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Restraint of Controversial Musical Expressions after Skywaler Records, Inc. v. Navarro and Barnes v. Glen Theatre, Inc.: Can the Band Play On?

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RESTRAINT OF CONTROVERSIAL MUSICAL EXPRESSION AFTER *SKYYWALKER RECORDS, INC. V. NAVARRO* AND *BARNES V. GLEN THEATRE, INC.*: CAN THE BAND PLAY ON?

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I. INTRODUCTION

There's music in the sighing of a reed;
There's music in the gushing of a rill;
There's music in all things, if men had ears;
Their earth is but an echo of the spheres.[1]

There has been considerable debate concerning the propriety of, and protection which should be afforded, allegedly sexually graphic, violent or profane forms of artistic expression.[2] Various forms of popular art, notably music and photography, received widespread publicity for shocking and highly explicit content.[3] In *Ward v. Rock Against Racism*,[4] the United States Supreme Court recognized that, "[m]usic is one of the oldest forms of human expression" which has historically been subject to censorship due to its appeal to the intellect and emotions.[5]

In the last several years, the lyrical content of popular music and art has received heightened scrutiny from both legislators and private citizens.[6] Perhaps the most noted incident in this explosive arena involves the well-known rap music group, *2 Live Crew* which gained

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1. LORD BYRON, LORD BYRON: DON JUAN 498, Canto XV, Stanza V.

2. *See infra* note 17 and accompanying text; *see also* Chuck Phillips, *'Rap Jam '91' Show Called Off in Ohio*, L.A. TIMES, Mar. 9, 1991, at F11 (reporting the cancellation of a rap concert that had been targeted for possible obscenity); *2 Live Crew Appeals*, NEWSDAY, Mar. 26, 1991, at 16 (reporting "2 Live Crew's" appeal of a federal ruling that their album is obscene).

3. Atlantic Beach Casino, Inc. v. Morenzoni, 749 F. Supp. 38, 39 (D.R.I. 1990) (enjoining the Town of Westerly from conducting a show cause hearing to review circumstances relevant to an establishment's entertainment license, prior to the performance of a 2 Live Crew concert); *see also* Isabel Wilkerson, *Cincinnati Gallery Indicted in Mapplethorpe Furor*, N.Y. TIMES, Apr. 8, 1990, at 1. More recently, the rap artist Ice-T has come under intense scrutiny as a result of the inclusion of the song, *Cop Killer* on his latest compact disk. Carla Hall & Richard Harrington, *Ice-T Drops 'Cop Killer'*, WASH. POST, July 29, 1992, at A1.

4. 491 U.S. 781 (1989).

5. *Id.* at 790.

6. *Atlantic Beach Casino*, 749 F. Supp. at 39 (focuses on the lyrical content of music).

considerable disrepute from the release and performance of material from its album entitled, *As Nasty as They Wanna Be*. Noted for its sexually explicit lyrics, *As Nasty as They Wanna Be* garnered sales well in excess of one million copies[7] and led to sell-out concerts. The group's highly publicized performance of this material led to the first federal court ruling regarding obscenity in popular music in the case of *Skyywalker Records, Inc. v. Navarro*.[8] In the words of United States District Court Judge Gonzalez:

> Justice Oliver Wendell Holmes, Jr. observed in *Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919), that the First Amendment is not absolute and that it does not permit one to yell "Fire" in a crowded theater. Today, this court decides whether the First Amendment absolutely permits one to yell another "F" word anywhere in the community when combined with graphic sexual descriptions.[9]

The plight of *2 Live Crew* is not an isolated situation. Other artists, including painters, sculptors, photographers and writers have been involved in this continuing controversy within the artistic community.[10] More recently, critics of rap artist, *Ice-T*'s song, *Cop Killer*, have lobbied publicly for the condemnation of the work and its exclusion from the artist's album.[11]

Within the legal community, discussion of controversial forms of expression has centered on the question of whether such expression merits Constitutional protection.[12] As in *Skyywalker*, cases have examined and evaluated the content of such works to determine if the art is obscene and, consequently, not protected by the Constitution.[13] As established by the United States Supreme Court in *Miller v. California*,[14] courts apply local standards of obscenity to determine whether artistic expression is obscene.[15] Although obscenity determinations are made

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7. *See* Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 582 (S.D. Fla. 1990), *rev'd*, Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992); David Gates & Peter Katel, *The Importance of Being Nasty*, NEWSWEEK, July 2, 1990, at 52.

8. 739 F. Supp. 578, 582 (S.D. Fla. 1990), *rev'd*, Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992).

9. *Id.* at 582.

10. In fact, the display of certain photographic art by Robert Mapplethorpe generated considerable controversy which led to the cancellation of showings and the limitation of funding provided galleries and institutions which displayed the art. Dennis Barrie, a museum curator in Cincinnati, Ohio, faced a jury trial on misdemeanor obscenity charges resulting from a showing of Mapplethorpe's work. Tom Mathews, *Fine Art or Foul?*, NEWSWEEK, July 2, 1990, at 46. A jury subsequently found Mr. Barrie innocent of these charges.

11. While there has been no judicial determination of the protected status of Ice-T's song, *Cop Killer*, various politicians, celebrities and members of police organizations have sharply criticized the song's lyrics as an incitement to violence. The artist maintains that the song merely expresses anger. Ultimately, the artist and Time-Warner, the record company which manufacturers and distributes Ice-T's recordings, have voluntarily agreed to delete *Cop Killer* from Ice-T's album. *See supra* note 3; Steve Marshall, *'Cop Killer' Cut Pulled from Album*, USA TODAY, July 29, 1992, at 1A.

12. *See infra* text accompanying notes 17 and 24.

13. *Skyywalker*, 739 F. Supp. at 587-96.

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

15. *Id.* at 24-25 (noting that two elements of the *Miller* test, the "average person" and the "contemporary community standards," apply local community standards to determine

by local authorities,[16] the ultimate determination remains both difficult and elusive.[17]

In the aftermath of *Skyywalker*, its ultimate reversal, and the more recent public outcry over Ice-T's song, *Cop Killer*, there remains a serious question regarding the extent of protection afforded artistic or musical expression in circumstances where the content may by suggestive, provocative or controversial.[18] The Supreme Court's decision in *Barnes v. Glen Theatre, Inc.*[19] indicates an apparent willingness to examine the content of controversial, expressive conduct.[20] This inquiry involves a precarious balance of the right to freely express ideas and opinions through song, particularly live performances, and the myriad of societal interests which justify the suppression of allegedly obscene, profane or inflammatory expression.[21]

Because of the Constitutional significance of the right to free expression, any government attempting to prevent the promotion or distribution of controversial art bears a significant burden to justify the prior restraint of such expression.[22] This burden notwithstanding, a critical question remains as to whether these restraints may inhibit or chill expression of artists such as 2 Live Crew or Ice-T.

A limitation on expression may not be enforced prior to a judicial determination of the protected nature of such expression.[23] Given the results in *Skyywalker* and *Barnes*, and despite the criticisms voiced by

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whether certain expression is obscene; a third element does not use local community standards, rather, it analyzes whether the work taken in its entirety has literary worth).

16. *Id.* at 24, 30.

17. Anne L. Clark, Note, *"As Nasty As They Wanna Be": Popular Music On Trial*, 65 N.Y.U. L. REV. 1481, 1514-20 (1990); *see also* Denise Z. Kabakov, Note, *Obscenity Decisions Based On Procedural Mechanisms Are Patently Offensive*, 10 LOY. ENT. L.J. 679 (1990)(noting that courts can escape defining obscenity through procedural mechanisms).

18. The group 2 Live Crew may provide courts with additional musical material for scrutiny with the anticipated release of a new album, *Sports Weekend*. *See* Edna Gundersen, *Pop's Profile Gets a Boost from Jackson, U2 Albums*, USA TODAY, Oct. 9, 1991, at 5D.

19. 111 S. Ct. 2456 (1991).

20. *Id.* at 2462-63. Although *Barnes* primarily involves the issue of Constitutional protection of expressive conduct, the Court's Constitutional law analysis could prospectively apply to artistic speech such as music. *See generally infra* text accompanying notes 241-50.

21. *See* Atlantic Beach Casino, Inc. v. Morenzoni, 749 F. Supp. 38, 42 (D.R.I. 1990) (balancing the harms and interests to each party to determine whether to grant or deny an injunction).

22. *Id.* at 41 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

23. *See* Skywalker Records, Inc. v. Navarro, 739 F. Supp. 578 (S.D. Fla. 1990) *rev'd on other grounds*, Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975), which reaffirmed that the minimum procedural safeguards necessary for a system of prior restraint to pass due process scrutiny must provide that:

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

Id. at 600-01; *see also* Vance v. Universal Amusement Co., 445 U.S. 308, 317 (1980) (noting that a "temporary" prior restraint relevant to adults only theaters bears a heavy presumption against its constitutionality, even if the prior restraint was issued by a state court judge); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559-60 (1975) (attacking the lack of procedural safeguards in the attempt to restrict the performance of "Hair");

some scholars in the legal community,[24] the prior restraint doctrine has become an important protection from the impermissible abridgement of free musical expression.

This article demonstrates the continued viability of the prior restraint doctrine in the protection of controversial musical expression through the examination of the *Skyywalker* and *Atlantic Beach* decisions. Through discussion of the Supreme Court's decision in *Barnes*, this article illustrates the growing willingness of the federal judiciary to examine and possibly restrict the content of artistic expression. Particular attention is given to the influence and effect of the prior restraint doctrine as applied to 2 Live Crew's musical expression.

In order to establish the foundation from which the prior restraint doctrine evolved, Section II of the article provides a basic background of the primary federal law applicable to First Amendment guarantees of free expression and the limitations which can be placed upon musical expression. Section II then delineates the specific components of the prior restraint doctrine and relates them to the attempted restriction of free musical expression.

Section III traces the factual predicate and judicial reasoning contained in the principal cases of *Skyywalker* and *Atlantic Beach*. An examination of these cases introduces the controversy surrounding 2 Live Crew. This section also examines the recent case of *Luke Records, Inc. v. Navarro*[25] which reversed the *Skyywalker* court's finding that *As Nasty As They Wanna Be* is obscene under *Miller* standards. The discussion then focuses on the controversy and ultimate holding in *Barnes* as it relates to the Supreme Court's willingness to examine, and possibly restrict, controversial musical expression.

Section IV of the article analyzes the respective decisions in *Skyywalker* and *Atlantic Beach* and the courts' analyses of the protected status of *As Nasty As They Wanna Be*. This section identifies the problems of the *Skyywalker* court's obscenity analysis, as well as *Atlantic Beach*'s brief acknowledgement of the protected status of 2 Live Crew's performance. The discussion includes the *Skyywalker*'s and *Atlantic Beach*'s confirmation of the significance of prior restraint procedural requirements. The section's analysis of the Supreme Court's decision in *Barnes* highlights the vulnerability of controversial expression. Such vulnerability underscores the importance of the prior restraint doctrine as a stalwart check on free speech abridgments.

Section IV ultimately recognizes the possible flaws in the prior restraint doctrine and the need for promptness in the imposition of proce-

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Freedman v. Maryland, 380 U.S. 51, 59-60 (1965) (challenging the constitutionality of the State of Maryland motion picture censorship statute).

24. *See* Marin Scordato, *Distinction Without A Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 8-9, 34 (1989) (criticizing the prior restraint doctrine for a lack of coherence and constitutional relevance). *See generally* Kabakow, *supra* note 17 which chides the "protection of speech" by use of procedural requirements which are inherent in the prior restraint doctrine.

25. 960 F.2d 134 (11th Cir. 1992).

dural safeguards. The Article concludes with comments delineating the importance of the prior restraint doctrine as a primary, if not solitary, mechanism which may prevent unwarranted restrictions on Constitutionally protected musical expression.

II. Background of Federal Law Applicable to Freedom of Expression.

A. *Constitutional Guarantee of Freedom of Expression.*

The Constitution of the United States provides, inter alia, "Congress shall make no law 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."[26] The freedom of speech or expression comprises the bulwark of individual rights granted under the Constitution.[27] Central to the freedoms protected by the Constitution, the freedom of speech is the "indispensable condition, of nearly every other form of freedom."[28]

As a basic canon of federal common law relevant to the First Amendment, speech generally enjoys significant protection from suppression.[29] Because of the importance of the right to free expression, even unpopular ideas and expressions are typically accorded Constitutional protection.[30] Music, including popular musical forms such as "rap," constitutes expression that is afforded First Amendment protection from unwarranted suppression.[31] Individuals do not, however, enjoy absolute rights to express any and all ideas in any context. In *Konigsberg v. State Bar of California*,[32] the Supreme Court noted that freedom of speech is *not* absolute and does not provide an "unlimited license to talk."[33] The Supreme Court further stated in *Konigsberg* that

26. U.S. Const. amend. I.

27. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (acknowledging that the freedom of speech represents an individual right which is superior to others); *see also* Jones v. Opelika, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting) (referring to the freedom of speech having a "preferred position"), *rev'd on other grounds*, 319 U.S. 103 (1943).

28. Palko v. Connecticut, 302 U.S. 319, 327 (1937) (Cardozo, J.) (characterizing the importance of free speech rights to other Constitutionally protected rights), *rev'd on other grounds*, Benton v. Maryland, 395 U.S. 784 (1969).

29. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (regarding an ordinance preventing pickets near schools); New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) (noting, inter alia, the "actual malice" requirement for defamation); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 500-01 (1952) (stating that the First and Fourteenth Amendments guarantee that no state shall abridge the freedom of speech by state action). *See generally* Clark, *supra* note 17, at 1505.

30. Texas v. Johnson, 491 U.S. 397, 414 (1989) (noting that the Government could not suppress an offensive idea or position); *Murdock*, 319 U.S. at 116 (prohibiting community suppression of unpopular views).

31. *See* Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 597 (S.D. Fla. 1990) (acknowledging that music is presumptively protected under the Constitution), *rev'd on other grounds*, Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992); *see also* Ward v. Rock Against Racism, 491 U.S. 781, 790 (stating that the First Amendment protects musical expression).

32. 366 U.S. 36 (1961).

33. *Id.* at 49-50.

regulations related to speech are not presumptively repugnant to the Constitution if such laws are substantiated by a sufficiently valid governmental interest.[34]

Because the right to free expression is not absolute, the Court recognizes that protected speech, i.e., speech which does not present a "clear and present danger,"[35] nor constitutes "fighting words" which incite lawless actions,[36] nor is obscene,[37] can be subject to reasonable time, place and manner restrictions within a public forum.[38] To prevent abusive intrusions upon free speech, governmental regulations must be content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels for communication.[39] Content-based restrictions on protected speech are generally unconstitutional.[40] Consequently, governmental authorities may only prescribe *narrowly* defined time, place and manner restrictions for such protected speech.[41]

B. *Unprotected Speech: "Clear and Present Danger" and "Fighting Words."*

Certain forms of expression are not afforded Constitutional protection. Legislators may prevent the expression of ideas that are "used in [certain circumstances] and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils . . . ."[42]

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34. *Id.* at 51. *See* Whitney v. California, 274 U.S. 357, 373, 376 (1927), (Brandeis and Holmes, J.J., concurring) (indicating that an individual's right to free speech was not absolute; in some contexts, governmental interests may be superior to an individual's right to speak freely), *rev'd on other grounds*, Brandenberg v. Ohio, 395 U.S. 444 (1969).

35. *See infra* notes 39-40.

36. *See infra* notes 41-43.

37. *See infra* notes 44-57.

38. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515-16 (1939) (noting the limited power of the Government to control speech on public property such as streets and parks).

39. United States v. Grace, 461 U.S. 171, 177 (1983) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

40. *See* Regan v. Time, Inc., 468 U.S. 641, 659 (1984) (striking down statutes which prohibit reproducing photographs of government currency); Carey v. Brown, 447 U.S. 455 (1980) (finding a statute which prohibited picketing of residences except for peaceful picketing of a place of employment involved in a labor dispute to be invalid, content-based restriction); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (invalidating a content-based ordinance prohibiting picketing within 150 feet of a school). *But see* Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 597 (S.D. Fla. 1990) (citing Near v. Minnesota, 283 U.S. 687, 715-16 (1931) (stating that obscene speech may be limited by the government), *rev'd on other grounds*, Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992).

41. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 544 (1980) (stating that the Public Service Commission's restriction on the utility company's actions to express its view regarding nuclear energy in customers' billing notices was unconstitutional since the restriction was not a valid time, place and manner limitation); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977) (invalidating a township's ordinance which prohibited the posting of "For Sale" signs in an effort to stem "white flight" from an integrated neighborhood); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) (a Virginia statute which forbade the advertising of prescription drug prices exceeded the bounds of constitutional time, place, and manner restrictions); Police Dept. of Chicago v. Mosley, 408 U.S. at 98 (1972) (striking down a city ordinance which prohibits most picketing within a 150 foot radius of a school).

42. Schenck v. United States, 249 U.S. 47, 52 (1919) (speech which thwarted the war

Such unprotected speech, including speech likely to incite or produce imminent dangers or lawless action, may be prohibited by the Government.[43] Other expressions which may not present a "clear and present danger" yet do not enjoy First Amendment protection include "fighting words" or speech "which by [its] very utterance inflict[s] injury or tend[s] to incite an immediate breach of the peace."[44] Such speech, the Court has ruled, is of little social value and the right to free expression was "outweighed by the interest of order and morality."[45] Nonetheless, in opinions subsequent to *Chaplinsky v. New Hampshire*, the Supreme Court has seemingly distanced itself from its original proscription against fighting words.[46]

C. *First Amendment Protection Does Not Extend To Obscenity.*

In *Chaplinsky*, the Supreme Court not only designated so-called "fighting words" as unprotected speech, but also noted in dicta that "lewd and obscene" speech fell within the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[47] This finding ultimately led the Court to its decision in *Roth v. United States*.[48]

In *Roth*, the Court quoted the *Chaplinsky* dicta and found that obscenity was not Constitutionally protected speech.[49] The Court defined obscenity as that which "deals with sex in a manner appealing to prurient interest."[50] To differentiate obscenity from sex depicted in art or literature, the Court emphasized that obscene speech is that which "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[51] This standard became the Court's guide to determine

effort did not constitute protected speech); *see* Abrams v. United States, 250 U.S. 616 (1919).

43. Courts have also categorized such unprotected speech or association as that which presents a "clear and present danger." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (Ku Klux Klan burning of crosses); *see also* Scales v. United States, 367 U.S. 203 (1961) (membership in an organization which advocates the overthrow of the government by force or violence); *Schenck*, 249 U.S. at 52 (presenting the renowned example of yelling "fire" in a crowded theater as speech which would likely produce or incite imminent danger), *subsequently overruled* by Burks v. United States, 437 U.S. 1 (1978). *See generally* Michael A. Coletti, Note, *First Amendment Implications Of Rock Lyric Censorship*, 14 PEPP. L. REV. 421, 439-43 (1967) (concerning the regulation or classification of rock music lyrics).

44. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

45. *Id.*

46. *See* Lewis v. City of New Orleans, 415 U.S. 130, 131 (1974) (overturning a conviction for uttering, "you goddamn motherfucking police"); Hess v. Indiana, 414 U.S. 105, 107 (1973) (holding that the statement, "[w]e'll take the fucking street later . . .," was protected speech); Gooding v. Wilson, 405 U.S. 518, 520 (1972) (overturning a conviction for saying, "[y]ou son of a bitch, I'll choke you to death."); Cohen v. California, 403 U.S. 15, 16 (1971) (overturning a conviction for breach of the peace for wearing a jacket which displayed the phrase, "Fuck the Draft").

47. *Chaplinsky*, 315 U.S. at 571-72; *see* Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (noting that obscene speech, like group libel, was not protected under the Constitution).

48. 354 U.S. 476 (1957), *overruled by* Miller v. California, 413 U.S. 15 (1973).

49. *Roth*, 354 U.S. at 485.

50. *Id.* at 487.

51. *Id.* at 489.

whether certain expression constituted obscene and, therefore, unprotected speech.[52]

Affirming the *Roth* finding that obscene speech is unprotected, the Supreme Court established the definitive test for obscenity in *Miller v. California*.[53] The test for obscene speech in *Miller* requires:

> (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.[54]

Subsequent to its decision in *Miller*, the Court clarified the components of the test. The first two components, which note that obscene speech must be "patently offensive" and "appeal to prurient interests," must be judged in terms of "contemporary community standards"[55] and not by national criteria.[56] Further, the Court has noted that only "patently offensive, 'hard core' sexual conduct specifically defined by the regulating state law" can be prohibited.[57] Obscenity does not include items which arouse normal sexual desires.[58]

Notwithstanding criticisms by justices in subsequent cases,[59] the *Miller* test continues to be the guideline used to determine whether certain forms of expression are obscene. Each component of the *Miller* test must be satisfied in order to classify a work as obscene.[60] Consequently, speech which is found to be obscene, in accordance with the *Miller* test, is not constitutionally protected.[61]

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52. *See* Ginzburg v. United States, 383 U.S. 463, 474-75 (1966) (certain publications were obscene since they commercially exploited erotica solely for the sake of prurient appeal).

53. 413 U.S. 15 (1973).

54. *Id.* at 24.

55. *Id.* The Court in *Miller* specifically noted that community standards, as determined by the jury, must be used to adjudge the offensiveness and prurient appeal of questioned expression, *id.* at 26, 30; *see* Smith v. United States, 431 U.S. 291, 301 (1977).

56. A "national standards" test had been adopted in a plurality opinion by the Court in Jacobellis v. Ohio, 378 U.S. 184, 195 (1964).

57. *Miller*, 413 U.S. at 27.

58. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985).

59. *See* Pope v. Illinois, 481 U.S. 497, 504-05 (1987) (Scalia, J., concurring); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 95, 100 (1973) (Brennan, J. dissenting) (noting the vagueness of the obscenity test and further stating "in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents.", *id.* at 113).

60. Luke Records, Inc. v. Navarro, 960 F.2d 134, 136 (11th Cir. 1992) (citing Penthouse Int'l., Ltd. v. McAuliffe, 610 F.2d 1353, 1363 (5th Cir. 1980)).

61. The Court has modified the *Miller* test for obscenity in cases involving the protection of minors; *see* Ginsberg v. New York, 390 U.S. 629 (1968) (upholding a statute that proscribed material which appealed to the prurient interests of minors); Butler v. Michigan, 352 U.S. 380 (1957) (invalidating a statute that makes it a criminal offense to make available materials which have a detrimental effect on minors).

D. *The Doctrine of Prior Restraint - Protection From Preemptive Suppression of Questionable Expression.*

Until speech or expression is ruled obscene, it must be accorded a degree of protection from censorship or limitation. This simple requirement represents a significant precept of the prior restraint doctrine.[62] Even speech, which on its face is offensive and lewd, falls within the protective sphere of the doctrine.[63] Governmental authorities, therefore, cannot summarily limit such questionable expression.

The case of *Freedman v. Maryland*[64] noted the government's obligation to secure a judicial determination of the unprotected status of allegedly obscene material. *Freedman* delineates the minimum procedural safeguards that prior restraints must provide in order to satisfy Constitutional scrutiny: (1) the governmental authority seeking to limit the speech or expression must initiate prompt judicial proceedings and prove that the expression is unprotected; (2) any limitations or restraints placed upon the expression prior to this judicial proceeding can be imposed for a brief period and only to maintain the "status quo;" and (3) the governmental authority must guarantee prompt and expedient judicial action.[65]

Prior restraints generally take the form of licensing or permit requirements, taxes, registrations, advanced publication or submission of materials or matters for dissemination and judicial injunctions.[66] The discretion of public officials who subject speech or expression to scrutiny has been held to produce "censoring effects" and often chills speech before the speech is uttered. Such prior restraint has been considered repugnant to the First Amendment right to free speech.[67]

62. Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 596 (S.D. Fla. 1990) (citing Freedman v. Maryland, 380 U.S. 51, 58 (1965) (reaffirming that minimal procedural safeguards must be followed in order for a prior restraint to be deemed permissible), *rev'd on other grounds*, Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992); *see* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559-60 (1975) (noting that the standard of obscenity "whatever it may have been, was not implemented by the board under a system with the appropriate and necessary procedural safeguards"); Vance v. Universal Amusement Co., 445 U.S. 308, 317 (1980).

63. *Skyywalker*, 739 F. Supp. at 598 (citing Roaden v. Kentucky, 413 U.S. 496, 504-05 (1973) (the "common thread" of the law is that where the state has removed from public distribution arguably protected speech, the state has imposed prior restraint), *rev'd on other grounds*, Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992); *cf.* Mishkin v. New York, 383 U.S. 502, 513 (1966).

64. 380 U.S. 51 (1965).

65. *Id.* at 59; *see Universal Amusement Co.*, 445 U.S. at 317; McKinney v. Alabama, 424 U.S. 669, 674 (1976); *Southeastern Promotions*, 420 U.S. at 559-60.

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

67. *Southeastern Promotions*, 420 U.S. at 552; *see also* Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969) (finding that a city ordinance which prohibits public demonstrations without a permit is unconstitutional censorship or prior restraint); Staub v. City of Baxley, 355 U.S. 313, 322 (1958) (stating that an ordinance which requires that individuals obtain a permit to solicit members for organizations which require the payment of dues is unconstitutional censorship or prior restraint); Kunz v. New York, 340 U.S. 290, 293-94 (1951) (stating that an ordinance which gives the government the discretion to control citizens' speech on religious matters is an invalid prior restraint); Lovell v. Griffin, 303 U.S. 444, 451-52 (1938) (finding that an ordinance which prohibits the distribution of literature without a permit is "invalid on its face"). In each of these cases, petitioners asked the

In addition to concerns relevant to censorship, prior restraints often involve licensing or regulatory schemes which have dubious, vague or unacceptable standards governing the suppression of speech.[68] The absence of such standards provides governmental officials with a significant degree of discretion in the decision of whether speech or expression will be permitted at all.[69] Indeed, the Supreme Court in *Southeastern Promotions, Ltd.* stated that the "Court has felt obliged to condemn systems in which the exercise of such authority was not bound by precise and clear standards . . . the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use."[70]

Another concern evolving from the concept of prior restraint is the delay caused by licensing or regulatory schemes. Courts have recognized that various forms of speech are valuable due to the urgency and immediacy of the idea expressed. Consequently, any delay in the presentation of these ideas can destroy the value, meaning and impact of this speech.[71] The delay or denial of such speech impairs the First Amendment rights of the speaker and the audience. Ultimately, the community as a whole loses.[72]

Given the problems related to unfettered discretion placed in public officials, the detriment attributable to delay and the other difficulties associated with censorship, issues of prior restraint generally include one or more of the following factors: (1) possible dissemination or distribution of speech or expression which may be controversial because of its content, form or manner of presentation;[73] (2) application to a public

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courts to provide requisite relief from "prior restraints" where public officials had forbidden the petitioners' use of public places to express their ideas. The officials had the power to deny the use of a forum in advance of the actual expression.

68. Atlantic Beach Casino, Inc. v. Morenzoni, 749 F. Supp. 38, 41 D.R.I. 1990); *see infra* notes 92, 94, 105, 118, and 122; *see also* Cox v. Louisiana, 379 U.S. 536, 557-58 (1965) (indicating that the unbridled discretion of Baton Rouge authorities to prohibit parades or street meetings is an invalid prior restraint); Irish Subcomm. v. R.I. Heritage Comm'n, 646 F. Supp. 347, 359 (D.R.I. 1986) (finding that a rule prohibiting political paraphernalia display is violative of the First Amendment). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-34, 1039 (2d ed. 1988); Scordato, *supra* note 24 at 8-9.

69. *Skyywalker*, 739 F. Supp. at 596; *Southeastern Promotions*, 420 U.S. at 553.

70. *Southeastern Promotions*, 420 U.S. at 553.

71. *Skyywalker*, 739 F. Supp. at 596 (citing *Southeastern Promotions*, 420 U.S. at 562).

72. *Skyywalker*, 739 F. Supp. at 596; *see* Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) (stating that appellants' continued defense of their Louisiana prosecution under laws which restrict "communist activities" would impair First Amendment freedoms due to delay); *see also* Quantity of Copies of Books v. Kansas, 378 U.S. 205, 210-11 (1964) (striking down a Kansas statute which permits the seizure and destruction of allegedly obscene material); Marcus v. Search Warrants of Property, 367 U.S. 717, 736-38 (1961) (finding the lack of safeguards and, therefore, adverse effects due to the unconstitutional Missouri procedures relevant to search and seizure of allegedly obscene materials).

73. *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989) (the expression in dispute was a rock concert); *Southeastern Promotions*, 420 U.S. at 546 (the controversial expression consisted of the proposed performance of the musical production *Hair*); Freedman v. Maryland, 380 U.S. 51 (1965) (the expression comprised motion pictures); Atlantic Beach Casino, Inc. v. Morenzoni, 749 F. Supp. 38 (D.R.I. 1990) (the expression consisted of a 2 Live Crew "rap" music concert); *Skyywalker*, 739 F. Supp. at 581 (the expression involved "2 Live Crew's" album, *As Nasty As They Wanna Be*).

official for use of a public forum to express ideas or for the sponsorship of expressive activity at an establishment;[74] (3) public officials' discretion to grant or withhold permission for the distribution of controversial expression via a license, permit or other such devise based upon the content of the expression;[75] (4) approval of the application before the expression is allowed;[76] (5) approval of the application is "ad hoc," with an appraisal of facts, exercise of judgment, and the formation of an opinion by the public official and without judicial intervention;[77] and (6) absent judicial determination of the protected status of the expression, judgment of the public official would prevent distribution or performance of the contemplated expression.[78] Generally, prompt judicial review would be required.[79] The presence of these elements, either singularly or collectively, triggers the applicability of the prior restraint doctrine. Under *Freedman*, the governmental official or "censor" generally bears the burden to prove the compelling need for such limitation. In the more recent case of *FW/PBS Inc. v. Dallas*,[80] Justices O'Connor, Stevens and Kennedy indicated in a concurring opinion that the government should not bear the burden of going to court to deny a license for a sexually oriented business.[81] This decision notwithstanding, the procedural requirements of the prior restraint doctrine set forth in *Freedman* remain compulsory.

III. Setting the Stage: Four Principal Cases Involving Controversial Expression.

The legal dilemma of the rap music group 2 Live Crew provides an excellent factual and legal reference for the discussion of the viability of the prior restraint doctrine. While some legal theorists have focused on whether 2 Live Crew's album, *As Nasty As They Wanna Be*, merited Constitutional protection,[82] the courts' decisions in *Skyywalker v. Navarro*[83], *Atlantic Beach v. Morenzoni*[84] and *Luke Records, Inc. v. Navarro*[85] present

74. *See Ward*, 491 U.S. at 781; *see also Southeastern Promotions*, 420 U.S. 546; *Freedman*, 380 U.S. 51; *Atlantic Beach*, 749 F. Supp. 38; *Skyywalker*, 739 F. Supp. 578; *infra* note 123.

75. *See infra* notes 94, 122, and 128.

76. *See infra* notes 94, 122, and 128.

77. *See infra* notes 122, 123, and 128.

78. *See Southeastern Promotions*, 420 U.S. at 554-55; *see also infra* note 122.

79. *Southeastern Promotions*, 420 U.S. at 560.

80. 493 U.S. 215 (1990).

81. *Id.* at 230. In *FW/PBS, Inc.*, the Court, in a divided decision, invalidated the city's licensing ordinance which required sexually oriented businesses to obtain approval from the health and fire departments and the building inspector *prior to* the issuance of a license. The ordinance also failed to provide for prompt judicial review.

82. *See generally* Clark, *supra* note 17.

83. 739 F. Supp. 578, 600-01 (S.D. Fla. 1990) (holding that an *ex parte* application to a state judge for an order of probable cause and an order finding that there was probable cause to believe *As Nasty As They Wanna Be* was obscene were insufficient procedures to meet the minimum due process requirements of prior restraint), *rev'd on other grounds*, Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. Fla. 1992).

84. 749 F. Supp. 38, 42-43 (D.R.I. 1990) (holding that a town ordinance allowing revocation of an entertainment license "for cause shown" was an unconstitutional use of prior restraint because the ordinance did not contain narrow, objective and definite standards to guide the licensing authority).

textbook illustrations of the importance of the doctrine in the conflict between freedom to express controversial ideas and governmental control of such expression. While the decision in *Barnes v. Glen Theatres, Inc.*[86] addresses nude dancing, the context of conduct and its potentially close association with the performance of musical expression underscores the ultimate importance of the prior restraint doctrine.

A. Skyywalker v. Navarro - *Issues of Protected Speech and Prior Restraint.*

In 1989, Skyywalker Records, Inc. released an album entitled, *As Nasty As They Wanna Be*, recorded by 2 Live Crew.[87] *As Nasty As They Wanna Be* (*Nasty*) allegedly contained sexually explicit lyrics, punctuated with crude and vulgar language.[88]

In early 1990, residents of South Florida registered complaints with the Broward County Sheriff's office regarding *Nasty*. Thereafter, the sheriff's office investigated the content and distribution of *Nasty*.[89] Deputy Sheriff Mark Wichner bought a cassette tape recording of *Nasty* from a retail music store in Broward County. Deputy Wichner obtained the tape from an open rack accessible to anyone.[90]

After listening to the recording of *Nasty*, Deputy Wichner prepared an affidavit that included a description of the facts relevant to the tape's retrieval. On February 28, 1990, Deputy Wichner submitted the affidavit, a transcription of six of the eighteen songs on *Nasty* and the actual tape of the album to the Broward County Circuit Court for a determination of whether *Nasty* was legally obscene.[91]

After consideration of the affidavit and other submissions, including information relevant to the accessibility of *Nasty* to the public, the circuit court judge found the recording obscene pursuant to section 847.011 of the Florida statutes and relevant case law.[92] The judge entered an order to this effect.[93]

The Broward County Sheriff's office then disseminated copies of

85. 960 F.2d 134 (11th Cir. 1992).

86. 111 S. Ct. 2456, 2461 (1991).

87. *Skyywalker*, 739 F. Supp. at 582. 2 Live Crew is a "rap" music group whose members include Luther Campbell, Mark Ross, David Hobbs, and Chris Wongwon. *Id.* Luther Campbell functions as president, secretary, sole director and shareholder of Skyywalker Records, Inc. which is a corporation based in Miami, Florida. *Id.*

88. *Nasty* contains such songs as: *Put Her in the Buck, D..K Almighty, Dirty Nursery Rhymes,* and *Bad A..B. . .H,* all of which contain explicit lyrics.

89. *Skyywalker*, 739 F. Supp. at 582-83.

90. *Id.* at 583.

91. *Id.*; FLA. STAT. ANN. §§ 847.07-.09 (West 1976) (generally concerned with the promotion of obscene materials); FLA. STAT. ANN. § 847.08 (Supp. 1992) (requires probable cause hearings when an indictment, information or affidavit is filed under §§ 847.07-.09; permits the State attorney to apply to the court for an order to the defendant, his agent, bailee, etc. to produce the materials for determination, and; allows a court to hold the material for further disposition after an appropriate hearing). In the case of *Skyywalker*, Deputy Wichner applied for a determination of obscenity from the court. The government however did not adhere to the statutorily mandated procedures for such a determination. *Skyywalker*, 739 F. Supp. at 596.

92. *Skyywalker*, 739 F. Supp. at 596; *see infra* text accompanying notes 100-01.

93. *Skyywalker*, 739 F. Supp. at 603.

the judge's order to retail businesses that might have sold the album. To avoid overaggression, the sheriff's office issued warnings in lieu of arrests to the stores regarding the distribution of *Nasty*. Subsequently, officials of the Sheriff's office visited twenty-three retail establishments including the store where Deputy Wichner bought a copy of the *Nasty* cassette. During these visits, the officials wore their uniforms and displayed their badges to the proprietors. The officials presented a copy of the order of the circuit court judge, his badge, and a warning that further sales of *Nasty* "would result in arrest and that if convicted, the penalty for selling to a minor was a felony, and a misdemeanor if sold to an adult."[94] Subsequently, all retail establishments in Broward County, regardless of their policy of labelling the recording or restricting sales to minors, discontinued sales of *Nasty*. The stores instituted this ban, notwithstanding the insert in *Nasty*'s packaging stating, "WARNING: EXPLICIT LANGUAGE CONTAINED."[95]

On March 16, 1990, Skyywalker Records (Skyywalker) filed suit in the United States District Court under section 1983, Title 42 of the United States Code.[96] Skyywalker also sought declaration of their rights and injunctive relief under the Federal Declaratory Judgment Act.[97] Thereafter, Sheriff Navarro filed an *in rem* action in the Broward County Circuit Court in an attempt to obtain a judicial determination that *Nasty* was obscene.[98]

Prior to a discussion of whether the sheriff's acts to discourage the sale of *Nasty* in local retail stores comprised an illegal prior restraint, the *Skyywalker* court performed an exhaustive determination of whether *Nasty* was Constitutionally protected speech. The court, without a jury, offered a detailed analysis of *Nasty* under the prevailing laws relevant to obscenity.[99] Acknowledging that this right is not absolute,[100] the court ultimately held that obscene material enjoys no Constitutional protection.[101] Focusing on provisions of the Florida statutes relevant to obscenity,[102] the court noted that the legislature's definition of obscenity closely parallels that of the Supreme Court in *Miller*.[103] Recognizing the

94. *Id.* at 583.

95. *Id.* 2 Live Crew released *As Clean As They Wanna Be* subsequent to *Nasty* which some establishments continued to sell. *As Clean As They Wanna Be* includes the identical instrumental music contained in *Nasty* but replaced the explicitly sexual lyrics with less graphic language. *Id.* at 582.

96. *Id.*; 42 U.S.C. § 1983 (1988) (provides federal, statutory relief for the wrongful deprivation by state officials of federal rights guaranteed by the Constitution of the United States and other federal laws).

97. 28 U.S.C. § 2201(a); *see Skyywalker*, 739 F. Supp. at 582.

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

99. *Id.* at 584-96.

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

101. *Id.* at 584 (citing Sable Communications of California, Inc. v. FCC, 492 U.S. 115; Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973); Miller v. California, 413 U.S. 15, 20 (1973); Roth v. United States, 354 U.S. 476, 483 (1957); *Chaplinsky*, 315 U.S. at 571-72 (1942)).

102. *Skyywalker*, 739 F. Supp. at 585.

103. FLA. STAT. ANN. § 847.001(7) (Supp. 1992) (defining obscenity in words which virtually mirror those in *Miller*:

criminal nature associated with obscene material, the court also observed the wide prohibitions against obscenity including sale, distribution and production.[104]

The *Skyywalker* court performed an exhaustive and comprehensive analysis of *Nasty* under the *Miller* guidelines for obscenity.[105] In its determination, the court found: (a) the "relevant community" whose standards would be used to evaluate *Nasty* would encompass Palm Beach, Broward and Dade Counties;[106] (b) the "average person," by whose standards *Nasty* would have to be judged, tends to be more tolerant of obscene speech than individuals in other parts of Florida, yet the "average person's" tolerance would not be unbridled;[107] (c) *Nasty*'s lyrics have the "tendency to excite lustful thoughts"[108] and, therefore, appeal to prurient interest;[109] (d) *Nasty*'s graphic and frequent portrayal of sexual conduct establishes the recording as "patently offensive," as evalu-

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

see also, *Miller*, 413 U.S. at 24 (delineating the basic "guidelines" for the trier of fact in the determination of obscenity).

104. *Skyywalker*, 739 F. Supp. at 585 (references portions of the Florida statutes which criminalize certain uses of obscene material: § 847.07 (transporting obscene material), § 847.011(1)(a) (making the distribution, sale, or production of obscene material a crime), § 847.011(2) (criminalizing the possession of obscene material), §§ 847.012, -.0125 (outlawing the distribution and display of obscene materials to minors), §§ 847.013, -.0133, -.0135 (prohibiting exposure to minors of obscene materials), and 847.0145 (prohibiting the buying or selling of minors)). *See* FLA. STAT. ANN. §§ 847.07, 847.011(1)(a), 847.012-.015 (West Supp. 1992).

105. *See generally Skyywalker*, 739 F. Supp. at 587-96.

106. *Id.* at 587-88 (citing *Miller*, 413 U.S. at 30). Before applying the "contemporary community standards" requirement, the court examined the geographic and socio-economic characteristics of Palm Beach, Broward and Dade Counties to conclude that those three areas comprised the "relevant community." *Id.* at 588. The court pointed to such factors as common geography, common transportation, shared access to radio and television stations and print media and similar composition of rural and urban areas. The opinion noted the area's racial, religious, gender and class diversity. The court emphasized that the determination of the relevant community remained a judicial rather than legislative function. *Id.* at 587 (citing Smith v. United States, 431 U.S. 291, 303 (1977)).

107. *Id.* at 588-89. The court admitted difficulty in the assessment of the "average person" standard. Nonetheless, the court recognized that this standard comprised a legal notion which must be taken from the "aggregation or average of everyone's attitudes in the area including persons with differing degrees of tolerance." *Id.* at 589 (citing Pinkus v. United States, 436 U.S. 293, 298-302 (1978)). The court commented specifically that the evaluation of *Nasty* constituted an "application of the law to the facts based upon the trier of fact's personal knowledge of community standards." *Id.* at 590. Consequently, the court concluded that its assessment of *Nasty* did not constitute the personal opinion of the judge, but a reflection of an average person of the relevant area.

108. *Id.* at 591 (citing Roth v. United States, 354 U.S. 476, 487 n.20 (1957), *overruled by* Miller v. California, 413 U.S. 15 (1973)).

109. *Id.* at 591-92. In reaching the conclusion that *Nasty* appeals to prurient interest, the court closely examined the lyrics of the album. The court noted that the frequent and graphic references to human genitalia and various bodily functions produced the prurient appeal and served only to evoke "dirty" thoughts. *Id.* at 591. The court also made specific reference to §§ 847.001(2) and 847.001(11) of the Florida statutes which depict the "sexual conduct" inherent in obscene materials. *Id.* While the court acknowledged "2 Live Crew's" commercial motive, it opined that this motive served to promote lustful thoughts. *Id.* at 592.

ated under "contemporary community standards;"[110] and (e) pursuant to an objective, reasonable person's standard, *Nasty* has no social value.[111] The court ultimately concluded that, by both a preponderance of the evidence and clear and convincing evidence, *Nasty* was "legally" obscene under Florida law.[112]

Subsequent to a determination that *Nasty* was obscene, the court addressed the issue of whether the sheriff's actions to discourage sales of *Nasty* constituted an illegal prior restraint.[113] Acknowledging that the "line between free speech and obscenity is so subtle, that the law imposes a presumption that all utterances are Constitutionally protected until there is a judicial decision to the contrary,"[114] the court recognized that any suppression of even obscene materials must comport with established procedures.[115] The court further noted that music constitutes a mode of expression within the context of free speech and is, therefore, entitled to protection as a liberty interest under the Fourteenth Amendment.[116]

Noting that proper procedures must be followed prior to the seizure of "arguably protected" material, the court recognized that the removal of any such material in contravention of procedure constitutes a prior restraint.[117] Applying the federal common law rules relevant to prior restraint to the actions of the sheriff, the court concluded that: (a) the state judge's "probable cause" order stating that *Nasty* was obscene did not comport with statutory or common law procedure and had "no legal effect;"[118] (b) the sheriff's actions constituted a seizure of presumptively protected material;[119] (c) the sheriff's ex parte application to the state judge for the probable cause order and the state court

110. *Id.* at 592 (citing *Miller*, 413 U.S. at 30; Cohen v. California, 403 U.S. 15, 22 (1971)). The court relied on sexual references and the frequency with which those references were given to conclude that *Nasty* was patently offensive. *Id.* at 592. The court specifically highlighted the use of "dirty words," and the music's intrusion on "unwilling" listeners. *Id.* at 593. Similar to the reasoning in its finding that *Nasty* appeals to prurient interest, the court noted that 2 Live Crew's commercial motive may have validity, but is not accorded great weight in determining if the work is patently offensive. *Id.* at 593. *C.f.* Ginzburg v. United States, 383 U.S. 463, 470 (1966) (noting that the court can consider the manner in which the material was distributed and promoted to determine if the work appeals to the prurient interest).

111. *Skyywalker*, 739 F. Supp. at 593-96 (citing Pope v. Illinois, 481 U.S. 497, 500-01 (1987)). Utilizing the *Miller* guidelines, the court concluded that *Nasty* lacked any literary, artistic, political or scientific value. *Id.* at 593-96. The court noted that *Nasty*'s primary thrust is its lyrics which have no socially valuable content. *Id.* at 595. The court rejected arguments that *Nasty* embodied cultural significance. *Id.* at 594. *Nasty* taken as a whole portrays graphic sexual references with no social value. *Id.* at 595-96.

112. *Id.* at 596.

113. *Id.* The *Skyywalker* court presents a classic discussion of the relevant law of prior restraint.

114. *Id.* at 597 (citing Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 63 (1989); Heller v. New York, 413 U.S. 483, 491 (1973)).

115. *Id.*

116. *Id.*

117. *Id.* at 598 (citing the rule as stated in Roaden v. Kentucky, 413 U.S. 496, 504-05 (1973); Mishkin v. New York, 383 U.S. 502, 513 (1966)).

118. *Id.* at 598, 600.

119. *Id.* at 598-99.

judge's issuance of the order were insufficient to guard against the dangers of unconstitutional prior restraint.[120]

Although ruling that *Nasty* was obscene, the court found that the sheriff's actions aimed to discourage the sale of *Nasty* constituted an illegal prior restraint which violated 2 Live Crew's First and Fourteenth Amendment rights.[121] The court specifically noted, however, that the sheriff could give advice to anyone suspected of violating the state's obscenity laws and could "vigorously" enforce these criminal laws.[122]

As an arguable consequence, significant legal actions ensued after the court's ruling in *Skyywalker*. Although a subsequent proceeding in the same court regarding legal costs and fees due the respective parties,[123] the authorities of Broward County unsuccessfully brought criminal charges against the members of 2 Live Crew for the performance and distribution of *Nasty*.[124] Moreover, the Broward County authorities successfully prosecuted a record store owner who sold copies of *Nasty* in his establishment.[125]

B. The Aftermath of Skyywalker v. Navarro: Atlantic Beach v. Morenzoni - *Governmental Prior Restraint.*

With its ruling that *Nasty* is obscene under Florida statutory law,[126] the United States District Court for the Southern District of Florida intensified the debate concerning freedom of controversial musical expression and governmental regulation of such expression. Undoubtedly this controversy haunted the band in engagements following the ruling in *Skyywalker*;[127] therefore, when a club owner in Misquamicut, Rhode Island, sought to sponsor a 2 Live Crew concert in the fall of 1990, it came as no surprise that the local government attempted to thwart the event.

Atlantic Beach v. Morenzoni[128] involved a privately owned and oper-

120. *Id.* at 600. The court relied heavily upon the Supreme Court's decision in Freedman v. Maryland, 380 U.S. 51, 58-59 (1965) (delineating that the governmental official must obtain judicial review prior to the suppression or seizure of an allegedly unprotected work; that the burden of proof regarding the unprotected nature of the material in question lies with the governmental official; that suppression before such review can be instituted for a brief period of time in order to preserve the status quo; that judicial review must be prompt).

121. *Skyywalker*, 739 F. Supp. at 603.

122. *Id.* at 604.

123. Skyywalker Records, Inc. v. Navarro, 742 F. Supp. 638 (S.D. Fla. 1990).

124. *See id.*; Clark, *supra* note 17, at 1504 n.203. It is significant to note that an important element of proof in the prosecution's case against 2 Live Crew in these criminal proceedings was an audio tape of the group's live performance of *Nasty*. Reports of the case indicate that the lyrics in performance were largely incomprehensible. A jury found the group not guilty of violating Florida's obscenity laws.

125. *See* Clark, *supra* note 17, at 1503; *Man Convicted in 2 Live Crew Sale Closes Up Store*, L.A. TIMES, Jan. 9, 1991, at 10 (record store owner forced to close his business due to financial difficulties).

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

127. *See* Clark, *supra* note 17, at 1503 n.202.

128. 749 F. Supp. 38 (D.R.I. 1990).

ated club in Misquamicut, Rhode Island, called the "Windjammer."[129] The Windjammer regularly booked concerts and dances for the adults of the general public.[130] Pursuant to its published ordinances, the local town council granted the club owners a liquor and entertainment license.[131] Following the Florida court's decision in *Skyywalker*,[132] the owners of the Windjammer contracted with 2 Live Crew for a concert engagement. The contract required the band to perform at the club on October 6, 1990.[133]

Due to 2 Live Crew's considerable publicity and ignominy for shocking and allegedly obscene lyrical content, the town council directed one of the club's owners, M.J. Murphy, to appear at a public hearing before the council to address the upcoming performance of 2 Live Crew.[134] During the public hearing, council members stated apprehension concerning the themes conveyed in 2 Live Crew's music. The council's apprehension focused on the basic moral sordidness of this music and its "contribution to 'America's slide into the sewer.' "[135]

Moreover, the members of the council expressed concern about public safety, given the possible large number of persons who would attend the concert and the boisterousness of the crowd.[136] The council concluded that the question regarding obscenity would be referred to the Rhode Island Attorney General. Additionally, the council noted that it would consider the revocation of the Windjammer's liquor and entertainment licenses. The owners and manager of the Windjammer thereafter requested written notice of the statutes, regulations and ordinances governing such action by the council.[137]

The council president wrote a letter to owners of the Windjammer and stated that a show cause hearing regarding the possible revocation of the club's liquor and entertainment license would take place on September 24, 1990. The letter also detailed the apprehensions and con-

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129. *Id.* at 39.

130. *Id.*

131. The Town of Westerly's ordinance governing the issuance of an entertainment license includes the following:

> § 17-84. Shows, motion pictures, performances, dances, balls - License required approval.
>
> No person shall maintain, operate or conduct any show, motion picture, theatrical performance, or other similar exhibition inside a building or structure designed, constructed and equipped for such purpose unless such person shall have a license issued by the Town Council, and approved by the Chief of Police, the Building Official, and Zoning Inspector; and no person shall maintain, operate or conduct any dance or ball unless such person shall have a license issued by the Town Clerk after approval of the Chief of Police.

Atlantic Beach, 749 F. Supp. at 40 n.3.

132. Note that the controversy involving the owners of the Windjammer occurred subsequent to the court's ruling on legal costs and fees in Skyywalker Records, Inc. v. Navarro, 742 F. Supp. 638 (S.D. Fla. 1990), *rev'd* Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992).

133. *Atlantic Beach*, 749 F. Supp. at 39.

134. *Id.*

135. *Id.* at 40.

136. *Id.*

137. *Id.*

cerns which the council had relevant to the upcoming concert. These "concerns" included the following: (1) the adequacy of parking facilities, special police and additional parking attendants to be provided at [the] facility on October 6, 1990, pursuant to Section 17-43(g) Westerly Code of Ordinances; (2) the adequacy of the club's ability to protect public places from the incursions of others as currently prohibited by Section 19-7(a)(2) Westerly Code of Ordinances and Section 17-43(g) Westerly Code of Ordinances; (3) expected public safety problems regarding the unprotected shore of the Atlantic Ocean on Atlantic Beach on October 6, 1990, Section 17-27, Westerly Code of Ordinances; (4) the club's ability to provide an adequate number of sanitary facilities outside of the establishment, on October 6, 1990, Section 17-43(e), Westerly Code of Ordinances; (5) the club's ability to afford adequate avenues for fire exit from the facility on October 6, 1990; (6) the club's ability to monitor and control the expected 1,500 patrons, both inside and outside of the establishment on October 6, 1990, Section 17-43(g) and Section 19-8k of the Westerly Code of Ordinances, and applicable Fire Codes; (7) the impact of the club's proposed entertainment of October 6, 1990 on the ability of the Westerly Police Department to maintain its normal operations, and simultaneously maintain adequate protection and manpower for the anticipated number of persons to attend this function.[138] As authority for a show cause hearing, the council president's letter also cited Rhode Island General Laws 5-22-2 and the Westerly Code of Ordinances Section 17-87. These laws governed actions required to grant or revoke licenses.[139]

On September 19, 1990, the owners of the Windjammer filed a motion with the United States District Court for the Southern District of Florida for a temporary restraining order to enjoin the town council from holding the show cause hearing relevant to the revocation of the

138. *Id.* at 40 n.1.

139. The laws cited in the Council President's letter included a Rhode Island statutory provision and a Westerly town ordinance. The state statute included the following language:

> City and Town Licenses for Exhibitions.
>
> Town and city councils may grant a license, for a term not exceeding one (1) year, under such restrictions and regulations as they shall think proper, to the owner of any house, room or hall in the town, for the purpose of permitting exhibitions, therein, which license shall be revocable *at the pleasure of the town or city council.*

Id. at 40 n.2 (citing R.I.G.L. 5-22-2) (emphasis added). The two Westerly town ordinances relevant to the issuance and revocation of an entertainment license stated the following:

§ 17-84. Shows, motion pictures, performances, dances, balls - License required approval.

> No person shall maintain, operate or conduct any show, motion picture, theatrical performance, or other similar exhibition inside a building or structure designed, constructed and equipped for such purpose unless such person shall have a license issued by the Town Council, and approved by the Chief of Police, the Building Official, and Zoning Inspector; and no person shall maintain, operate or conduct any dance or ball unless such person shall have a license issued by the Town Clerk after approval of the Chief of Police.

§ 17-87. Same - Revocation of License.

> Any license granted under Section 17-84 and 17-88 [outside entertainment] *may be revoked by the Town Council after public hearing for cause shown.*

Id. at 40 n.3 (emphasis added).

club's entertainment license.[140] Specifically, the club owners sought to restrain the council from accomplishing the following actions: (1) revocation of the club's entertainment license; (2) prohibition of the 2 Live Crew concert; and (3) imposition of any special requirements on the club's owners relevant to the forthcoming 2 Live Crew concert.[141]

In its decision, the district court found that the parties' controversy primarily involved a First Amendment "facial" challenge to Westerly's licensing ordinances.[142] After considering several preliminary issues,[143] the court delineated findings regarding the merits of the preliminary injunction. In consideration of the merits of the preliminary injunction, the court noted the requirements that the club owners must satisfy in order to prevail.[144] Within the context of the requirement that the club owners demonstrate a likelihood of success on the merits, the court noted the council's burden to overcome the mandates associated with prior restraint.

The court noted that the town council's decision to review the effects of the concert before the concert took place constituted prior restraint.[145] The court observed that any "system of prior restraints" bears a substantial presumption that such a system is Constitutionally invalid.[146] Any licensing scheme involving prior restraint must contain

140. *Id.* at 39.

141. *Id.*

142. *Id.* The parties to the action and the court agreed to treat the club owner's motion as an application for a preliminary injunction. *Id.* Accordingly, the Council's show cause hearing was continued pending the Court's ruling on the application for injunctive relief. *Id.*

143. *Id.* at 40-41. Preliminary issues included the question of the court's jurisdiction over the controversy. Citing Hague v. C.I.O., 307 U.S. 496, 519 (1939), the court noted that jurisdiction had been properly asserted pursuant to 28 U.S.C. § 1343, and that 28 U.S.C. secs. 2201, 2202, and 42 U.S.C. § 1883 provided the requisite jurisdiction for the court to grant declaratory and injunctive relief. *Id.* at 40-41.

The court also addressed the Town Council's assertion that the court lacked subject matter jurisdiction because there was no case or controversy. *Id.* at 41. Essentially, the Council opined that the case was not actionable since the club owners' license had not been reviewed and revoked. *Id.* The court, however, rejected this position since the club owners made a facial challenge to the town ordinance due to a lack of standards. *Id.*

The court noted that where a licensing statute vests "unbridled discretion in a government official over whether to permit or deny expressive activity," the individual affected by the law may challenge it facially without first applying for, and being denied, the license. *Id.* at 41 (citing Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 755-56 (1988); Venuti v. Riordan, 521 F. Supp. 1027, 1029-30 (D. Mass. 1981)). The court stated definitively that the 2 Live Crew concert was protected under the First Amendment. *Id.* at 41 (citing Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989)).

144. To prevail on a motion for a preliminary injunction, the court noted that the club owners must demonstrate four essential qualifications:

1. Likelihood of success on the merits; *Atlantic Beach*, 749 F. Supp. at 41-42.
2. Likelihood of immediate and irreparable harm if such relief is not granted; *Id.* at 42.
3. The injury to be sustained by the club owners outweighs any harm occasioned by the grant of injunctive relief; *Id.* and
4. The public interest will not be adversely affected by the grant of the injunction. *Id.* at 41 (citing LeBeau v. Spirito, 703 F.2d 639, 642 (1st Cir. 1983)).

145. *Id.* at 41 (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 554-55 (1975)). The court definitively asserted that the First Amendment of the Constitution protects "2 Live Crew's" performance. *Id.* (citing *Ward*, 491 U.S at 790).

146. *Id.* (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

"narrow, objective and definite standards to guide the licensing authority" in order to withstand Constitutional scrutiny.[147] In granting the preliminary injunction, the court ultimately concluded that the town of Westerly's administrative actions constituted an impermissible prior restraint.[148]

C. Skyywalker v. Navarro *on Appeal:* Luke Records, Inc. v. Navarro.

Ultimately, the members of 2 Live Crew appealed the *Skyywalker* court's decision that *Nasty* was obscene.[149] The court of appeals primarily examined the government's problem of proof in the establishment of a musical work as obscene.[150]

Subsequent to acknowledging the *Miller* test for obscenity,[151] the appellate court recognized two significant problems with the government's case. First, the Sheriff of Broward County failed to present any evidence in support of the obscenity charge other than a tape of *Nasty*. Conversely, the members of 2 Live Crew presented four expert witnesses who attested to *Nasty*'s artistic value or lack of prurient interest.[152] The sheriff's only proof was a cassette recording of a concert performance of *Nasty*. As a result, the court of appeals concluded that the sheriff failed to prove that *Nasty* lacked artistic value.[153]

Second, the presiding judge in *Skyywalker* relied on his own expertise to determine the community standards and to adjudge the artistic value of *Nasty*.[154] Acknowledging the difficulty of reviewing "value judgments on appeal,"[155] the court of appeals noted that the record failed to substantiate the judge's expertise in artistic or literary matters to satisfy the last component of the *Miller* test.[156] The appellate court further opined that the lower court judge could not determine *Nasty*'s artistic value by merely listening to the work.[157] Consequently, the appellate court concluded that the sheriff did not meet his burden of proof, even by a preponderance of the evidence.[158] Based on the finding regarding the lower court's obscenity ruling, the court of appeals did not comment upon the *Skyywalker* court's prior restraint analysis.[159]

147. *Id.* (quoting Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969)); *see supra* text accompanying notes 68, 73, and 74.

148. *Atlantic Beach*, 749 F. Supp. at 42-43.

149. *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 135 (1992) (noting that this case comprised the first instance where a federal court of appeals was asked to determine whether a musical work, containing both instrumental music and lyrics, is obscene under *Miller* standards).

150. *Id.*

151. *Id.* at 136.

152. *Id.* at 136-37.

153. *Id.* at 138.

154. *Id.* at 137.

155. *Id.*

156. *Id.* at 138.

157. *Id.* at 139. The court also noted that the government need not present expert testimony to determine whether *Nasty* was obscene. *Id.* at 137. (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973).

158. *Id.* at 136, 138-39.

159. See *Luke Records, Inc.*, 960 F.2d 134.

D. Barnes v. Glen Theatre, Inc.: *Limitations On Controversial Expression.*

An additional consideration regarding the efficacy of the prior restraint doctrine in the preservation of free musical expression is the impact of the Supreme Court's recent decision in *Barnes v. Glen Theatre, Inc.*[160] *Barnes* addressed two Indiana establishments that provide, inter alia, adult entertainment including nude dancing. An Indiana public indecency statute[161] requires that dancers wear "pasties" and a "G-string" during performances.[162]

The two establishments which host totally nude dancers sought an injunction in the United States District Court to prevent the enforcement of the Indiana statute.[163] The distict court originally granted the injunction stating that the statute was facially overbroad.[164] The court of appeals reversed and remanded the case, stating that previous litigation prevented a challenge of the statute based upon a claim that the law was overbroad.[165] Subsequently, the district court denied the injunction, opining that the nude dancing performed in the establishments did not constitute "expressive activity" protected by the Constitution.[166] On its second review of the case, the court of appeals overturned the district court's decision noting that the First Amendment does protect nude dancing as expressive conduct.[167]

In a plurality opinion written by Chief Justice Rehnquist, the Supreme Court overturned the decision of the court of appeals and asserted the Constitutionality of the Indiana statute which generally proscribes public nudity.[168] The Court further stated that the nude dancing "of the kind involved here" comprises expressive conduct which is deserving of "marginal[]" First Amendment protection.[169]

In determining the extent of Constitutional protection that should be afforded to nude dancing, the Supreme Court recognized that limitations on this type of expressive activity constituted a valid "time, place, or manner" restriction.[170] The Court then adopted the "time, place, or

160. 111 S. Ct. 2456 (1991).
161. IND. CODE § 35-45-4-1 (1988).
162. *Barnes*, 111 S. Ct. at 2458-59.
163. *Id.* at 2459.
164. *Id.*
165. *Id.* (citing Glen Theatre, Inc. v. Pearson, 802 F.2d 287, 288-90 (7th Cir. 1986)).
166. *Id.* (citing Glen Theatre, Inc. v. Civil City of South Bend, 695 F.Supp. 414, 419 (N.D.Ind. 1988)).
167. *Id.* (citing Miller v. Civil City of South Bend, 887 F.2d 826 (7th Cir. 1989)).
168. *Id.* at 2460.
169. *Id.* In reaching its conclusion that nude dancing merits only marginal constitutional protection, the Supreme Court relied substantially on its opinion in Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975) (stating that "customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression"); California v. LaRue, 409 U.S. 109, 118 (1972) (stating that nude dancing may be entitled to constitutional protection "under some circumstances"), and Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) (stating that nude dancing "is not without" constitutional protection from "official regulation").
170. *Id.* (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)). The Supreme Court also noted that valid "time, place, and manner" restrictions are evaluated for speech that takes place on public property which is found to be a "public forum"

manner" test set forth in *United States v. O'Brien*,[171] and noted that when "speech" and "nonspeech" are combined, a "sufficiently important" governmental interest would justify incidental intrusions on First Amendment protected activities such as "speech."[172]

Using the four-part test enunciated in *O'Brien*, the Supreme Court concluded that the Indiana public indecency statute, which serves to protect substantial governmental interests in preserving order and morality, is sustainable notwithstanding any incidental intrusions on some expressive activity.[173] Specifically, the Court noted that: (1) the State of Indiana has the constitutional power to regulate public indecency;[174] (2) Indiana's public indecency statute furthers an "important or substantial" governmental interest in preserving "societal order and morality;"[175] (3) the government's interest in protecting order and morality does not relate to the suppression of erotic messages conveyed by such activity;[176] and (4) the statute, which incidentally restricts otherwise free speech, is narrowly tailored to further the governmental interest.[177]

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as noted in Ward v. Rock Against Racism, 491 U.S. 781 (1991), and Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). *Id.*

171. 391 U.S. 367 (1968) (refusing to provide constitutional protection to an individual's "symbolic speech," which consisted of burning his draft card to protest the United States's conflict in Vietnam).

172. *Id.* (citing *Barnes*, 111 S. Ct. at 2461 (citing *O'Brien*, 391 U.S. at 376-77)).

173. *Barnes*, 111 S. Ct. at 2461.

174. *Id.*

175. *Id.* at 2462. The Court noted the historic origins of the proscriptions against public nudity and the proliferation of similar statutes throughout the United States. *Id.* The Court further observed that the protection of public health, safety and morals constitutes a traditional police power of the state. *Id.* at 2461-62.

176. *Id.* at 2462. The Court recognized that the nude dancing involved presents "speech" in the form of an erotic message. *Id.* at 2463. The court emphasized that the State of Indiana's requirement that the dancers wear "pasties" and a "G-string" does not prevent this message; it merely makes the message less graphic. *Id.*

177. *Id.* at 2463. Justice Scalia concurred in the plurality opinion, stating that laws proscribing conduct not directly related to expression should not be subjected to customary First Amendment scrutiny. *Id.* Consequently, such laws should be upheld because they have a rational basis related to moral opposition to public nudity. *Id.* at 2468. Justice Souter also concurred, further opining that the governmental interest is substantial and that the Indiana statute furthers that interest, irrespective of any proof of harmful effects resulting from such activity. *Id.* at 2469-71. Souter relied substantially upon the Court's decision in Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). *Barnes*, 111 S. Ct. at 2469-71.

Justice White, joined by Justices Marshall, Blackmun, and Stevens, dissented. White noted that the non-obscene, nude dancing in this case is protected by the First Amendment, and opined that the Indiana statute reaches a substantial amount of protected expressive activity in furthering "societal order and morality." *Id.* at 2473. He stated that the statute should be subject to "the most exacting scrutiny" given the impact on free expression. *Id.* at 2474 (citing Texas v. Johnson, 491 U.S. 397, 411-12 (1989) and Boos v. Barry, 485 U.S. 312, 321 (1980)). White further noted the requirement that content-based restrictions must be drawn narrowly to further a compelling state interest. *Id.* (citing United States v. Grace, 461 U.S. 171, 177 (1983); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989)). Notwithstanding any question concerning the level of the government's interest, he felt that the statute was not narrowly drawn. *Id.* at 2475. White concluded that the Indiana law basically criminalizes nude dancing. *Id.* at 2476.

IV. Analysis: The Substantiation of the Prior Restraint Doctrine as a Guard Against the Premature Restriction of Controversial Expression.

Although courts may exhibit a willingness to scrutinize controversial musical expression, the *Skyywalker* and *Atlantic Beach* decisions substantiate the power, and overall importance, of the procedural requirements of the prior restraint doctrine. As a result, these requirements comprise a powerful shield against the premature and potentially unlawful restriction of controversial expression.

The courts' opinions in *Skyywalker* and *Atlantic Beach* note that government authorities' actions to prevent the dissemination of controversial musical forms constitute impermissible prior restraints which violate both the First and Fourteenth Amendments.[178] Both cases contain significant similarities and dissimilarities in the manner in which the courts arrived at their decisions.[179] These distinctions demonstrate the significance of the prior restraint doctrine in any attempt to restrict musical expression. Although *Barnes* relates to expressive conduct, the relatively close nexus between dancing and controversial musical expression elevates the importance of the prior restraint doctrine as applied to musical expression in a "live" context.

A. Skyywalker *and Its Demise: Controversial Music as Unprotected Expression - A Difficult Finding Which Highlights The Significance of the Prior Restraint Doctrine.*

The court in *Skyywalker* presented an extensive explanation of its conclusion that *Nasty* is obscene pursuant to the Florida statute. Because obscene material enjoys no Constitutional protection, the *Skyywalker* court, prior to *Luke Records, Inc.*, theoretically paved the way for the unabashed regulation of 2 Live Crew's album. The Florida statutes governing obscenity provide ample legislative authority to prohibit the dissemination of material found to be obscene.[180]

As the court in *Luke Records, Inc.* documents, there remain significant factors which substantially minimize the impact of the court's ruling. First, there are notable arguments opposing the correctness and legitimacy of the court's obscenity analysis as applied to *Nasty*.[181] Courts more often apply the *Miller* standard in obscenity cases involving pictorial pornography as opposed to cases involving musical expression.[182] Given the inherent artistic nature of music, it is difficult to find any musi-

178. *Skyywalker*, 739 F. Supp. at 600; *Atlantic Beach*, 749 F. Supp. at 41-42.
179. *Id.*
180. *See supra* text accompanying notes 102-03.
181. *See* Clark, *supra* note 17, at 1514-21.
182. People v. Sclafani, 520 N.E.2d 409, 414 (Ill. App. Ct. 1988) ("[M]agazines contain pictures of . . . masturbation, fellatio, cunnilingus, intercourse, homosexuality or lesbianism. . . . [P]ictures focus almost exclusively on . . . genitals . . . and the sparse text describes the events taking place"); Van Sant v. State, 523 N.E.2d 229, 241 (Ind. Ct. App. 1988); State v. Von Wilds, 362 S.E.2d 605, 607 (N.C. Ct. App. 1987). These cases involve the display of various forms of sexual activity.

cal composition that is totally void of literary, artistic, political or social value.[183] In fact, the court of appeals in *Luke Records, Inc.* stated in dicta that: ". . . [W]e tend to agree with appellants' contention that because music possesses inherent artistic value, no work of music alone may be declared obscene . . . ."[184] Moreover, the court in *Skyywalker*, in emphasizing the proof problem in obscenity cases involving music, indicated that the court's decision in such matters "is not based upon the undersigned judge's personal opinion as to the obscenity of the work, but is an application of the law to the facts based upon the trier of fact's personal knowledge of community standards."[185] The government's burden to prove each prong of the *Miller* test presents a formidable obstacle in the determination of a musical work as obscene.

The *Skyywalker* court recognized the seriousness, and perhaps the complexity, of ruling that a musical composition is obscene. The court specifically stated that its finding of obscenity is limited to 2 Live Crew's album, *Nasty*, and not to the group and its performances. As the court observed, "it is again important to note what this case is *not* about. Neither the 'Rap' or 'Hip-Hop' musical genres are on trial. The narrow issue before this court is whether the recording entitled *As Nasty As They Wanna Be* is legally obscene."[186] This holding shows the court's desire to limit its decision to a specific finding on 2 Live Crew's musical expression.[187]

As illustrated in *Skyywalker*, courts tend to adopt a cautious approach to any prior limitations or restraints placed upon musical expression until a formal designation of its unprotected status has been issued by the courts. This caution appears to stem from a recognition of the importance of First Amendment freedoms. The *Skyywalker* court noted, "music is clearly a form of expression within the scope of the free speech guaranty and thereby entitled to the presumption of constitutionality as a form of 'liberty' protected under the Fourteenth Amendment."[188] As in the case of *Skyywalker*, courts recognize the fine distinction between obscenity and protected speech.[189] As a result, there should be no summary limitations placed upon speech to ensure the protected status of expression.

The concept of "arguably" or "conceivably" protected speech, as noted in *Skyywalker*, constitutes a significant concept in the area of con-

183. *See* Clark, *supra* note 17, at 1519 (citing *Miller*, 413 U.S. 15, 24 (1973) and noting the improbability that any music could fail to satisfy that part of the *Miller* obscenity test requiring that a work lack artistic value).

184. *Luke Records, Inc.* 960 F.2d at 135.

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

186. *Id.* at 594.

187. *Id.* The court specifically stated: "The narrow issue before this court is whether the recording entitled *As Nasty As They Wanna Be* is legally obscene. This is also not a case about whether the group 2 Live Crew or any of its other music is obscene." *Id.*

188. *Id.* at 597.

189. *Id. See also Southeastern Promotions, Ltd.*, 420 U.S. 546, 559 (1975) ("It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.").

troversial musical expression. It provides that works, even those with blatant references to sexual activity, cannot be summarily censored.[190] Authorities must obtain a formal, judicial ruling that the work is legally obscene.[191] In spite of the existence of obscenity statutes, courts must perform an extensive *Miller* analysis on such "arguable or conceivably" protected speech.[192] Thereafter, this analysis must demonstrate that the musical expression in question is obscene under the *Miller* standard.[193] Only after this detailed analysis is complete can the governmental authority suppress such musical expression prior to performance.[194]

In the abstract, the *Skyywalker* decision may serve to chill musical expression. This view notes the court's novel finding that a musical composition is obscene under *Miller* standards represents an encroachment upon the artistic freedoms preserved by the First Amendment.[195] Although *Skyywalker* was ultimately reversed, the court's willingness to probe the content and merit of musical expression may signal a new willingness in the judiciary to analyze controversial musical expression.[196]

Conversely, notwithstanding its reversal in *Luke Records, Inc.*, *Skyywalker* could be viewed as an affirmation of the importance of free speech and measures required to suppress even questionable expression. As noted above, *Skyywalker* affirms the requirement that musical expression, regardless of its controversial nature, must be ruled obscene or unprotected before its dissemination may be limited.[197] This requirement represents a strong affirmation of the procedural requirements under the prior restraint doctrine. Furthermore, the proof required to substantiate a *Miller* analysis also minimizes the possibility that a musical composition would be found obscene.[198] This burden of proof appears to be a significant obstacle in establishing a musical work as obscene. Consequently, *Skyywalker* should not constitute a "slippery slope" which will lead to further limitations on speech.[199]

B. Atlantic Beach *and Controversial Music as Protected Expression - A Clear Finding.*

Unlike *Skyywalker*, the court in *Atlantic Beach* assumed a much less controversial view of the question of protection. While the *Skyywalker* court explored the unprotected status of 2 Live Crew's album *Nasty*

190. *Skyywalker*, 739 F. Supp. at 597.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *See supra* note 17 at 1481-85 & 1523-31.
196. *See infra* text accompanying note 205.
197. *See supra* text accompanying note 190.
198. *See supra* text accompanying notes 150-59 & 187-88.
199. Subsequent to *Skyywalker*, there have been no additional cases that have found musical expression to be obscene and, thus, constitutionally unprotected.

under prevailing obscenity laws in Florida,[200] the court in *Atlantic Beach* provided a straightforward finding that 2 Live Crew's performance enjoys First Amendment protection.[201] The court relied completely upon the Supreme Court's decision in *Ward v. Rock Against Racism*,[202] holding that "[m]usic, as a form of expression and communication, is protected under the First Amendment."[203] Consequently, governmental authorities seeking to restrict dissemination of protected speech must conform to the requirements of the prior restraint doctrine which proscribes limitations on protected speech except under limited circumstances.[204]

Unlike *Skyywalker*, the court in *Atlantic Beach* utilized a different approach to the protected speech issue. The court in *Skyywalker* appeared willing to delve extensively into the content of the 2 Live Crew's musical expression pursuant to the *Miller* obscenity standards. The *Atlantic Beach* court, however, took a seemingly detached approach to the question. The court's summarial acceptance of the protected status of 2 Live Crew's performance may signal an unwillingness on the court's part to explore the content of the group's music. Such inaction may also serve to illustrate the federal courts' difficulty in deciding whether popular musical forms are legally obscene.[205]

Through their findings and discussion of the protected nature of the musical expression involved in the cases, both *Skyywalker* and *Atlantic Beach* illustrate the continued applicability and viability of the prior restraint doctrine. When speech is protected, as found by the court in *Atlantic Beach*, it cannot be subject to prior restraints except under narrowly defined circumstances. Unless musical expression is found constitutionally unprotected, such speech must be accorded provisional protection until its unprotected status is confirmed by the court. As the court's decision in *Skyywalker* establishes, judicial confirmation of the protected status of speech constitutes a significant element of the prior restraint doctrine.

C. *The Prior Restraint Doctrine and Its Relation to Controversial Expression.*

Subsequent to their respective discussions of the protected nature of 2 Live Crew's musical expressions, the courts in both *Skyywalker* and *Atlantic Beach* examined the applicability of the prior restraint doctrine.[206] In each case, the courts employed the federal common law applicable to the doctrine.

In the case of *Skyywalker*, the court's utilization of the prior restraint

200. *See supra* text accompanying notes 99-104.
201. *Atlantic Beach*, 749 F. Supp. 38, 41 (D.R.I. 1990). The court discusses the protected nature of 2 Live Crew's performance in the context of the issue involving the club owner's facial challenge to the town's ordinance. *Id. See supra* text accompanying note 142.
202. 491 U.S. 781 (1989).
203. *Id.* at 790. *See also Atlantic Beach*, 749 F. Supp. at 41.
204. *See supra* text accompanying notes 42-48 & 62-65.
205. *See* Clark, *supra* note 17, at 1515-20. *See also infra* text accompanying note 215.
206. *See supra* text accompanying notes 113-122.

doctrine focused on the lack of adherence to procedures that guarantee that protected speech has not been censored.[207] The court emphasized the requirement that the sheriff in Broward County adhere to the procedural due process requirements in the regulation of "arguably or conceivably" protected musical expression such as *Nasty*.[208]

In effect, the *Skyywalker* court used its previously defined concept of "arguably or conceivably" protected speech as a precursor to its prior restraint analysis. The court noted that *Nasty* could not be seized or censored unless the precise requirements of due process were followed.[209] In addition to recognizing the "fine line" between obscene and protected musical expression, the court also noted that "music is clearly a form of expression within the scope of the free speech guaranty and thereby entitled to the presumption of constitutionality as a form of 'liberty' protected under the Fourteenth Amendment."[210] Consequently, regardless of the overtly explicit nature of the musical expression, such "arguably or conceivably" protected speech cannot be suppressed or seized without the invocation of formal judicial processes.[211] This affirms the importance of the procedural safeguards inherent in the prior restraint doctrine.

The court definitively concluded that the prior restraint in *Skyywalker* was unconstitutional. Because of the sheriff's failure to institute formal judicial actions,[212] the prior restraint was neither imposed

207. *Skyywalker*, 739 F. Supp. at 597-98.

208. In effect, the *Skyywalker* court focused its discussion relevant to the prior restraint doctrine on factor number 6 noted *supra* note 78 and accompanying text. *See Skyywalker*, 739 F. Supp. at 600-01 (emphasizing that there must be a judicial finding that *Nasty* is obscene under Florida statutes *prior to* any seizure or limitation placed upon the distribution of such musical expression).

209. *Skyywalker*, 739 F. Supp. at 600-01.

210. *Id.* at 597 (citing *Southeastern Promotions*, 420 U.S. 546, 557-58 (1975) (noting that the musical "Hair" as theater is a form of speech); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (finding that the motion picture film is a form of speech)).

211. *See supra* text accompanying notes 63 & 117, and *infra* note 215. The court found that the Broward County Sheriff's dissemination of the probable cause order to retail stores, together with the warning that continued sales of *Nasty* may be criminally actionable, remained tantamount to a "seizure" of *Nasty*. *Skyywalker*, 739 F. Supp. at 598. The court recognized that "seizure" did not require an actual physical transfer of the album. *Id.* As in this case, the distribution of the probable cause order, together with the warning, constituted a "constructive" seizure and was, therefore, subject to due process requirements. *Id.* In reaching its conclusion, the court relied heavily upon the opinions expressed in Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (administrative commission's "blacklist" of publications sent with warnings of the commission's power to recommend prosecution deemed an impermissible prior restraint), Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353, 1362 (5th Cir. 1980), *cert. dismissed*, 447 U.S. 931 (1980) (Solicitor General's use of various media forms, visits to retail establishments and warrantless arrests to stop the sale of sexually explicit publications *without prior judicial proceedings* deemed an impermissible prior restraint), and Council for Periodical Distributors Association v. Evans, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part*, 827 F.2d 1483 (11th Cir. 1987) (district attorney warned specific retailer that continued sale of questionable material would warrant "institution" of criminal proceedings, and "strongly suggested" that other retailers refrain from selling such materials to avoid arrest). *Skyywalker*, 739 F. Supp. at 599.

212. The failure to institute formal judicial proceedings to determine the unprotected nature of *Nasty* remains enigmatic in light of the Florida statute's clear language regarding the need for probable cause hearings. Section 847.08 of the Florida code states:

for a brief period of time nor imposed to preserve the status quo. Thus, 2 Live Crew did not receive any guarantee or assurances that a prompt judicial hearing would occur.[213]

In contrast to the examination of the prior restraint in *Skyywalker*, the court's analysis of the Westerly Town Council's attempt at limiting or restraining the performance of 2 Live Crew in the *Atlantic Beach* case remains straightforward and more summary in scope.[214] Unlike *Skyywalker*, the *Atlantic Beach* court focused on the quality of the standards which govern the attempted prior restraint.[215] Since the *Atlantic Beach* court summarily concluded that 2 Live Crew's concert performance constituted protected speech,[216] the court would obviously be more predisposed to address the adequacy of standards applicable to

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> Whenever an indictment, information, or affidavit is filed under the provisions of §§ 847.07-847.09, the state attorney or his duly appointed assistant may apply to the court for the issuance of an order directing the defendant or his principal agent or bailee or other like person to produce the allegedly obscene materials at a time and place so designated by the court for the purpose of determining whether there is probable cause to believe said material is obscene. After hearing the parties on the issue, if court determines probable cause exists, it may order the material held by the clerk of the court pending further order of the court. This section shall not be construed to prohibit the seizure of obscene materials by any other lawful means.

Further, §§ 847.011, .012, .013 refer specifically to the need for judicial action in the institution of sanction under the Florida obscenity law.

213. *Skyywalker*, 739 F. Supp. at 601-03. The *Skyywalker* court also compared the sheriff's actions to those of the Postmaster General in Blount v. Rizzi, 400 U.S. 410 (1971), where a nonjudicial officer had total discretion to initiate judicial proceedings *after* the suppression of the "arguably" obscene materials. *Id.* at 601. In Blount the Postmaster could intercept suspected obscene mail and hold it for an indefinite time period without any mandatory requirement invoking judicial review. *Id.* The *Skyywalker* court stressed that the mere guarantee or assurance of a prompt judicial determination was not sufficient. *Id.* at 603. The court held that where the government intends to seize large quantites of presumptively protected materials, due process requires an adversarial hearing *before* any seizures are made. *Id.* (citing Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 109 S.Ct. at 929 (1989); *Quantity of Books*, 378 U.S. 205, 210-11 (1964); *Marcus*, 367 U.S. 717, 735-36 (1961); *Evans*, 642 F. Supp. 552 (M.D. Ala. 1986).

214. Note the brevity of the *Atlantic Beach* court's opinion regarding the constitutionality of the Town Council's prior restraint. *Atlantic Beach*, 749 F. Supp. at 41-43. Comparably, the *Skyywalker* court's analysis of the sheriff's prior restraint of *Nasty* contains a significantly greater degree of analysis and discussion. *Skyywalker*, 739 F. Supp. at 596-603. This distinction is compelling since *Atlantic Beach* focuses primarily on the attempted prior restraint by the town council, while *Skyywalker* centers predominately on the unprotected nature of the musical expression under prevailing obscenity laws. *Atlantic Beach*, 749 F. Supp. at 41-43; *Skyywalker*, 739 F. Supp. at 596-603.

215. *Atlantic Beach*, 749 F. Supp. at 41.

216. *Id.* In 1978 the State of Rhode Island codified detailed prohibitions against obscenity. 1978 R.I. PUB. LAWS 11-31-1 et seq. 11-31-1 ("Circulation of obscene publications and shows") proscribes the promotion of obscene material through criminal sanctions. The section adopts the *Miller* definition of obscenity. *Id.* Other sections of Chapter 31 include § 11-31-2 ("Forfeiture of obscene publications"), § 11-31-8 ("Entry of premises by sheriff or deputies"), § 11-31-10 ("Sale or exhibition to minors of indecent publications, pictures, or articles"), § 11-31-12 ("Penalty for making receipt of obscene publications a condition to delivery of other publications"), and § 11-31-13 ("Injunctive proceedings by attorney general"). However, in 1979, the Supreme Court of Rhode Island struck down the statutory provisions because the laws "fail[ed] to meet the *Miller* blueprint" and were "constitutionally overbroad." D & J Enterprises, Inc. v. Michaelson, 401 A.2d 440, 446 (R.I. 1979). Given the lack of a legal statutory predicate, the United States District Court in Rhode Island may not have found it prudent to evaluate the musical content of 2 Live Crew's repertoire to determine the music's protected status. This

the prior restraint involved.[217] The court essentially adopted the federal common law relevant to the attempted restraints placed upon protected speech.[218] Consequently, the town's prior restraint of 2 Live Crew's performance must be based upon laws which have "narrow, objective and definite standards to guide the licensing authority."[219]

The court in *Atlantic Beach* noted that the Town Council of Westerly had a legitimate interest in regulating establishments such as the Windjammer.[220] The court stated the federal common law rule that "time, place and manner restrictions on expressive activity are permissible, but even then the regulations must be 'narrowly and precisely tailored to their legitmate objectives'."[221] The court ultimately concluded that Westerly's ordinances were not sufficiently specific to constitute valid time, place and manner restrictions.[222] Although the *Atlantic Beach* court's discussion of the town's ordinances in terms of valid "time, place and manner" restrictions constitutes dicta, its holding remains quite summary in explanation.

The *Atlantic Beach* court failed to discuss the forum question in any substantive detail.[223] This omission on the court's part may have resulted from the assumption that the Windjammer did not fit the definition of a public forum.[224] The court's exclusion of the public forum discussion may also be attributed to the view that the classification of the forum involved remains less determinative than the contemplated restrictions on the speech in question.[225] While the court acknowledged the government's interest in regulating entertainment establishments such as the Windjammer, it completely rejected the town council's regulatory attempts. Without applying the analysis relevant to valid time, place and manner restrictions,[226] the court simply stated, "[t]he Westerly licensing ordinances do not even approach the necessary level of specificity constitutionally mandated."[227]

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lack of statutory guidelines may also explain the court's seeming unwillingness to evaluate the content of the band's material.

217. Because there remained no issue regarding the protected status of the musical expression involved, the *Atlantic Beach* court followed federal case precedent relevant to the constitutionality of prior restraints in light of the presence of definitive standards. *See supra* text accompanying note 65.

218. *Atlantic Beach*, 749 F. Supp. at 41-2.

219. *See supra* text accompanying notes 67-68.

220. *Id.* at 42.

221. *Id.* (citing Shuttlesworth v. Birmingham, 394 U.S. 147, 153 (1969); Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation, 417 F. Supp. 632, 638 (D.R.I. 1976)).

222. *Atlantic Beach*, 749 F. Supp. at 42.

223. *Id.*

224. The Windjammer Club in *Atlantic Beach* constitutes a private institution which operated as an entertainment facility. *Id.* at 39. Yet, the fact that the Windjammer Club constitutes a private establishment does not insulate it from possible restrictions. *See Barnes*, 111 S. Ct. at 2459 (Court notes that it has applied time, place, and manner restrictions on "non-public" fora).

225. LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 12-24 (2d ed. 1988).

226. *See supra* text accompanying notes 38, 41, 170, 171, & 222.

227. *Atlantic Beach*, 749 F. Supp. at 42. Given the fact that the contemplated 2 Live Crew performance at the Windjammer Club constituted protected speech, the restrictions

Ultimately, the *Atlantic Beach* court concluded its prior restraint analysis in a discussion of the "chilling effect" that the town's actions would have upon the free expression of others.[228] Unlike its discussion of time, place and manner restrictions, the court provided a more substantive explanation of the chilling effects of threatening to revoke the club owners' entertainment license. Basically, the court adopted the commonly held view that such actions effectively discourage individuals or establishments from engaging in similar protected expression.[229] In effect, the town council's actions would inflict "irreparable harm."[230]

The *Atlantic Beach* court's discussion of the potential chilling effects resulting from the town's threatened prosecution serves to solidify the court's prior restraint analysis. Central to the concept of a chilling effect is the desire to prevent the free flow of protected speech.[231] Given the fact that the court finds 2 Live Crew's performance protected,[232] any threat of adverse action takes on greater significance. The chance of a chilling effect resulting from governmental action would be more evident. This factor contrasts cases involving "unprotected speech such as obscenity, libel or expression presenting a 'clear and present danger'."[233] Such unprotected speech may be subjected to "threatened" governmental sanction due to the very nature of the speech and the potential harm of such expression.[234]

The attempted prior restraint in *Atlantic Beach* poses an interesting contrast to the prior restraint attempted in *Skyywalker*. The *Skyywalker* case involved detailed statutory prescriptions relevant to attempted prior restraints of obscene expression.[235] In *Atlantic Beach*, the court

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manifested in the Westerly Town's ordinances lacked the requisite specificity required of valid time, place, and manner restrictions. *Id. Cf.* Renton v. Playtime Theaters, 475 U.S. 41 (1986) (Washington, D.C., city ordinance limiting the proximity of adult movie theaters to certain zoned areas valid time, place, and manner restriction).

228. *Atlantic Beach*, 749 F. Supp. at 42.

229. *Id.* at 42 (citing Dombrowski v. Pfister, 380 U.S. 479, 486-89 (1965); NAACP v. Button, 371 U.S. 415, 433 (1963)). *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 277-79 (1964) (fear of prosecution for libel could have a chilling effect upon journalists who may refrain from publishing controversial material); Clark, *supra* note 17, 1523-25, n.370-86 (citing Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 N.Y. U. L. REV. 685, 693 (1978)).

230. *Atlantic Beach*, 749 F. Supp. at 42. The Court concluded its prior restraint analysis with a discussion entitled "Balancing the Harms and Interests." *Id.* As an element of the law relevant to preliminary injunctions, the court found that the club owners' first amendment right to free expression outweighed any assumed interest of the town to protect the public interest or to preserve the integrity of the licensing system. *Id.*

231. *Sullivan*, 376 U.S. 254, 277-79 (1964). *See also* Schauer, *supra* note 229, at 693.

232. *Atlantic Beach*, 749 F. Supp at 41 (court unequivocally states that 2 Live Crew's performance is protected by the first amendment).

233. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978) (plurality opinion) (no absolute constitutional protection for vulgar, offensive or shocking content); Miller v. California, 413 U.S. 15 (1973) (observing the unprotected status of obscene speech); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (discussing conduct directed to inciting imminent lawless action); *Sullivan*, 376 U.S. 254 (noting that defamatory speech is not protected by the Constitution); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (stating that "fighting words," by their utterance, inflict injury or tend to incite an immediate breach of the peace).

234. *See Chaplinsky*, 315 U.S. at 569.

235. *See supra* text accompanying notes 65 & 113.

noted that the Town of Westerly had few definitive and explicit standards which supported the imposition of a prior restraint on protected musical expression.[236] Further, the governmental authority in *Skyywalker* failed to follow legally sustainable standards regarding the regulation of the unprotected musical album.[237] The Town of Westerly, however, attempted to restrain 2 Live Crew's performance pursuant to ordinances that were woefully inadequate.[238]

In spite of their distinctions, both *Skyywalker* and *Atlantic Beach* serve to support the basic thesis that the prior restraint doctrine remains a formidable obstacle to the attempted limitations placed upon musical expression.[239] Both cases confirm that the prior restraint doctrine's adherence to basic due process tenets remains a significant legal tool to ensure freedom of musical expression.[240]

D. Barnes *Demonstrates the Importance of the Prior Restraint Doctrine.*

At first glance, the *Barnes* decision could be viewed as inapplicable to Constitutional issues involving musical expression. The Court focused its analysis on expressive activity involving nude dancing. Such activity can more likely be seen as conduct in lieu of speech which the Court appeared to provide greater protection.[241] Since musical expression more closely embodies "speech" instead of "nonspeech,"[242] *Barnes* may be inapplicable to such expression. Furthermore, the Court's finding that the government's interest in protecting order and morality justified incidental impacts on protected expression may be confined to nudity in public.[243]

The *Barnes* decision, however, could have a significant impact on the

236. *Atlantic Beach*, 749 F. Supp. at 41-42.

237. *See supra* text accompanying notes 212-13.

238. *Atlantic Beach*, 749 F. Supp. at 41-42.

239. *Skyywalker*, 739 F. Supp. at 596-603; *Atlantic Beach*, 749 F. Supp. at 41-42. *See also supra* text accompanying note 214.

240. *Skyywalker*, 739 F. Supp. at 596-603; *Atlantic Beach*, 749 F. Supp. at 41-42. *See also* Oklahoma Publishing. Co. v. District Ct., 430 U.S. 308 (1977) (per curiam) (pretrial order prohibiting news media from disseminating name or picture of boy, subject of a juvenile proceeding, unconstitutional); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (court order barring news media from publishing facts strongly implicating defendant in murder case unconstitutional prior restraint); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (striking down court order barring publication of "classified" government document for failure of government to rebut "heavy presumption" against validity of prior restraint); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (temporary injunction stopping individual from distributing leaflets concerning "panic peddling" of real estate agent an unconstitutional prior restraint). *See also* Scordato, *supra* note 24, at 5-6.

241. *Barnes*, 111 S. Ct. 2456, 2460 (1991). The court emphasized the lower protection afforded "nonspeech" or conduct. *Id.* Compare *id.* at 2463-67, where Justice Scalia emphasizes that conduct merits no First Amendment application. *See also supra* note 67 (delineating cases noting the heavy presumption against prior restraints of speech).

242. *Barnes*, 111 S. Ct. at 2466 (citing United States v. O'Brien, 391 U.S. 361, 376-77 (1968)).

243. The Court appears to place great weight on the history of public indecency statutes which "reflect the moral disapproval of people appearing in the nude among strangers in public places." *Id.* at 2461. The Court also notes that a large number of states have such statutes. *Id.*

permissible restrictions placed upon controversial musical expression. The Court appeared more willing to grant greater latitude and leniency to governmental authorities in implementing content-based regulations of expressive conduct where the governmental interest is "significant."[244] Notwithstanding the categorization of the governmental interest involved, *Barnes* demonstrates the Court's present tendency to evaluate the content of the expression.[245]

Irrespective of questions regarding the importance of terminology, it appears significant that the Court requires the government to have a "substantial" rather than "compelling" interest where the regulation is clearly content-based.[246] The Court's rationale could be particularly applicable to musical performances containing objectionable conduct as well as speech.[247]

Barnes indicates that a significant or "sufficient" governmental interest may excuse any tangential limitations placed upon protected speech.[248] Relying solely upon the Court's opinion in *United States v. O'Brien*,[249] the Court opined that governmental interests in regulating "nonspeech" such as expressive conduct would justify any incidental intrusions upon protected "speech."[250] The Court thus found that the State of Indiana's goal to eliminate public nudity excused any restrictions placed upon protected "speech" or messages conveyed in the dance.[251]

For controversial musical acts such as 2 Live Crew or even other less controversial artists, this substantiation by the Court poses an intriguing dilemma. While the Court's ruling may not infringe upon the musical compositions of these artists, it may limit the live communication of these works if they are performed in a manner which impinges upon "sufficiently important" governmental interests. Such interests may include performance of the musical composition in violation of state or local laws proscribing public nudity[252] or projection of sound

244. *Id.* at 2462-63.

245. *Id.* at 2460. The court notes specifically that the type of nude dancing performed in the plaintiffs' establishment is deserving of marginal constitutional protection. *Id.*

246. *See supra* text accompanying notes 174-76. *See also Barnes*, 111 S. Ct. at 2472 (dissent).

247. The factor could be illustrated in controversial musical performances such as "Hair" which include nudity. *See, e.g., Southeastern Promotions, Ltd.*, 420 U.S. 546 (1975); *see also supra* text accompanying notes 123 & 126-34. This problem concerning the combination of conduct, i.e., dance or movement, and musical expression may also surface with the staging of the long-running Broadway musical "Oh! Calcutta!," a risque musical that includes frontal nudity. *See also infra* note 261.

248. *Barnes*, 111 S. Ct. at 2461 (citing *O'Brien*, 391 U.S. at 376-77) ("symbolic speech" or "expressive conduct" not entitled to full constitutional protection). The Court quotes from *O'Brien*: "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.*

249. 391 U.S. 367 (1968).

250. *Id.*

251. *Id.* at 2463.

252. *Id.* at 2456.

volume.[253] The communication of these works could be effectively limited if the performance contravenes sufficient governmental interests.[254]

The Court's willingness to relegate conduct to a lesser threshold of Constitutional protection may, at the very least, subject the performance of controversial music forms to extreme scrutiny if not limitation. While limitations imposed by governmental interests must be "content-neutral,"[255] governmental entities may be able to limit the message of the music by sanctioning the "conduct" manifested in performance.

Barnes clearly established a lesser Constitutional standard for "nonspeech" or expressive conduct.[256] This holding of the Court may be considered significant, and perhaps somewhat contradictory, in light of the Court's precedent upholding First Amendment protection for various forms of symbolic or "nonspeech."[257] Nonetheless, this lower threshold for expressive conduct creates a compelling question for musical expression that is performed. As the Court recognized, an important governmental interest in limiting expressive conduct or "nonspeech" may justify incidental encroachments upon constitutionally protected speech.[258] While the *Barnes* holding noted its application

253. Ward v. Rock Against Racism, 491 U.S. 781, 800-01 (1989). In *Ward* the Court noted that the City of New York's requirement that sound for a group's live performance must be controlled by city personnel bespeaks the city's "substantial interest in protecting its citizens from unwelcome noise." *Id.* (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984): "[G]overnment 'ha[s] a substantial interrest in protecting its citizens from unwelcome noise.' "). It also found support in Frisby v. Schultz, 487 U.S. 474, 484 (1987) (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)): "This interest is perhaps at its greatest when government seeks to protect " 'the well-being, tranquility, and privacy of the home.' " "

254. *Barnes*, 111 S. Ct. at 2460-63. In past cases, the Supreme Court upheld content-based limitations on speech where a significant governmental interest was present. *See supra* note 233. *See also* Greer v. Spock, 424 U.S. 828, 838 (1976) (allowing the federal government to prohibit partisan political speeches on military installation); Lehman v. Shaker Heights, 418 U.S. 298, 302-03 (1974) (plurality opinion) (finding that city transit system that rents commercial advertising space on its vehicles did not have to accept partisan advertisements). *See also* Texas v. Johnson, 491 U.S. 397 (1989) (statutes proscribing flag burning unconstitutional if flag burning comprises part of political protest).

255. *Ward*, 491 U.S. at 798.

256. *Barnes*, 111 S. Ct. at 2460-63.

257. The Supreme Court has recognized that a number of forms of expressive conduct warrant First Amendment Protection. United States v. Eichman, 110 S. Ct. 2404 (1990) (allowing an individual to burn the American flag to protest various aspects of the United States's domestic and foreign policy); *Johnson*, 491 U.S. 397 (statutes proscribing flag burning unconstitutional where flag-burning comprises part of political protest); Spence v. Washington, 418 U.S. 405 (1974) (per curiam) (hanging of inverted American flag with peace symbols from window protected); Gregory v. City of Chicago, 394 U.S. 111 (1969) (peaceful demonstrations by African Americans for school desegregation protected); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (wearing of black arm bands by students protesting American involvement in the Vietnam conflict protected); Brown v. Louisiana, 383 U.S. 131 (1966) (upholding constitutional protection for silent sit-in by African Americans demonstrating against a racially-segregated library); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (permitting Jehovah Witness children to refuse to salute the American flag); Stromberg v. California, 283 U.S. 359 (1931) (displaying red flag as symbol of opposition to government constitutes protected expression). The court's protection of such "nonspeech" has also led to the protection of potential offensive or inflammatory conduct. *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

258. *Barnes*, 111 S. Ct. at 2460-61.

to expressive conduct, the Court's allowance for incidental abridgement of protected speech creates a compelling situation for the performance of controversial musical expression or other forms of speech that are performed.

The most telling observation in the Court's "incidental abridgement" rule is the effect on the performance of controversial speech. As noted, the Court has dealt with the performance of the controversial musical production of "Hair" in *Southeastern Promotions, Ltd. v. Conrad.*[259] *Southeastern Promotions, Ltd.* criticized the governmental authorities' failure to adhere to procedural safeguards preventing unwarranted prior restraint.[260] However, given the present holding in *Barnes* regarding "incidental abridgement," the Court may scrutinize and limit the expression of controversial performances such as "Hair." This issue may surface in the immediate future given the attempt to stage the controversial musical, "Oh! Calcutta!", in the very same Chattanooga, Tennessee theatre where "Hair" originally came under attack.[261] The Court's findings in *Barnes* may have significant ramifications upon the performance of controversial musical acts including certain musicals and groups such as 2 Live Crew.

More significant may be a signal of the Court's willingness to probe and interpret the content of expression to determine the degree of intrusion on expressive activity.[262] The Court seems willing to allow restrictions which not only sanction unprotected speech such as nudity, but also protected expression, i.e., nude dancing, which is "in the outer perimeters of the First Amendment."[263] If such latitude is justifiable, musical expression that includes controversial conduct may also be affected. Consequently, references to the government's interest to prevent an "evil" embodied in a limited extent in otherwise protected expression may be considered scanty reasoning substantiating restrictions which proscribe a "significant amount of protected expressive activity."[264]

If the post-*Barnes* era ushers in more detailed scrutiny of controversial musical expression, the basic tenor of the prior restraint doctrine

259. 420 U.S. 546 (1975).

260. *Id.* at 562 (citing Hamling v. United States, 418 U.S. 87 (1974); Jenkins v. Georgia, 418 U.S. 153 (1974); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Miller v. California, 413 U.S. 15 (1973); Gooding v. Wilson, 405 U.S. 518 (1972)).

261. "Oh! Calcutta!" is a long-running musical which includes scenes with frontal nudity. *Testimony Begins in "Oh! Calcutta!" Case*, WASH. TIMES, Nov. 14, 1991, A5. Despite strong criticism, a Chattanooga, Tennessee promoter has sought to present the risque musical at the Tivoli Theater, the very same venue where "Hair" created a controversy in *Southeastern Promotions, Ltd. Id. See also* Jack Broom & Anne Koch, *Applause from Foes of Nude Dancing Local Activists Cheer Supreme Court Ruling*, SEATTLE TIMES, June 22, 1991, A1.

262. Note the Court's observance that "the requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic" demonstrates the Court's willingness to interpret the impact of governmental restrictions on the message intended to be conveyed. *Barnes*, 111 S.Ct. at 2463.

263. *Id.* at 2460.

264. *Id.* at 2473 (White, J., dissenting)

will remain an obstacle to restrictions on protected speech. Judicial determination of the protected nature of the musical expression will still be required, with the courts exercising the detailed analysis required to establish that such expression is unprotected.[265] While the prior restraint doctrine may have problems relating to its definition and scope, it remains a necessary tool to ensure that protected musical activity is unrestricted.

E. *Prior Restraint Doctrine - A Guardian With Possible Flaws.*

Although *Skywalker* and *Atlantic Beach* affirm the importance of the prior restraint doctrine, challenges remain to the continued viability of the doctrine.[266] One criticism of the prior restraint doctrine focuses on the lack of a substantive distinction between true "prior restraints" and laws which impose sanctions on the speaker after making the speech.[267] Given the diverse instances where the Supreme Court has applied the doctrine, this criticism appears valid.[268] This criticism also observes that prior restraint laws present no more of a chilling effect than laws imposing sanctions after the expression was uttered.[269]

While the basic definition of prior restraint is significantly broad,[270] the doctrine remains an important and imposing impediment to the suppression or limitation of musical expression. There appears to be little ambiguity concerning attempts to prevent the sale of a controversial musical composition[271] or the discretionary limitations placed upon a proposed musical performance.[272]

While both prior restraint and subsequent sanction laws impose chilling effects, prior restraint laws have the greater potential for delaying expression. Delay of expression imposed by the prior restraint laws

265. *See supra* text accompanying notes 62-63.

266. Scordato, *supra* note 24, at 8-9, nn.37-42.

267. In his article, Professor Scordato specifically states:

> The fundamental problem with the contemporary doctrine of prior restraint is that the distinction upon which the doctrine rests—the distinction between prior restraints and subsequent sanctions—lacks sufficient substance to support a categorical legal rule. The distinction . . . fails to provide a means of identifying a category of potentially speech-suppressive government activities that is in any way meaningful for first amendment purposes. As a result, the prior restraint doctrine lacks the reliability and predictability of application necessary to support constitutionally protected speech. It is, in effect, a distinction without a difference.

Id. at 8.

268. For cases where courts have utilized the prior restraint doctrine in a variety of contexts see *Skyywalker*, 739 F. Supp. 578, *Navarro*, 742 F. Supp. 638, and *Atlantic Beach*, 749 F. Supp. 38. *See also* Scordato, *supra* note 24, at 6-7; *supra* text accompanying notes 25-34.

269. Scordato, *supra* note 24, at 16. *See also* Kabakow, *supra* note 17, at 681 (where the author criticizes the holding in *Gascoe, Ltd. v. Newtown Township*, 699 F.Supp. 1092 (E.D. Pa. 1988), since a lack of procedural safeguards was the sole basis for the court's invalidation of a town's obscenity ordinance).

270. Prior restraints are generally defined as governmental limitations placed upon expression before utterance. *Skyywalker*, 739 F. Supp. at 596 (citing Times Film Corp. v. City of Chicago, 365 U.S. 43, 55 n.2 (1961) (Warren, C.J., dissenting)).

271. *Skyywalker*, 739 F. Supp. at 597-600.

272. *Atlantic Beach*, 749 F. Supp. at 40.

constitutes a significant impact on the effect or meaning of the communication. This can be particularly true in cases involving popular music, where popularity of the musical compositions and the groups that perform the music may fluctuate dramatically over short periods. *Skyywalker* recognizes the critical impact of delay imposed by prior restraints:

> Many forms of speech are of value because of the urgency and immediacy of the idea expressed. Even if a censor ultimately allows publication, significant delay in the decision-making process can destroy the fleeting value of the speech . . . If speech is delayed or denied, the rights of both the speaker and his audience are impaired and society is the ultimate "loser."[273]

Consequently, the prior restraint doctrine remains a vital tool to protect against the imposition of arbitrary decisions in the attempted suppression of musical expression.[274]

F. *Effectiveness of Prior Restraint Safeguards: Emphasis on Promptness of Judicial Review.*

The controversy surrounding 2 Live Crew and the ultimate federal decisions discussed above accentuate the importance of time as a key element in the effectiveness of the prior restraint doctrine. It appears critical that the procedural requirements of the prior restraint doctrine attach at the first instance of governmental action regarding the musical expression. The promptness of the government in obtaining a judicial determination of the protected status of a musical work can be essential in minimizing the chilling effects of unlawful suppression.

As noted in Section II, D of this article, the value of expression often relates to the immediacy of the expression.[275] Any delay in the dissemination of such speech not only alters the effect of the message, but also discourages the speaker of the message.[276] Such delay is likely to have an adverse effect on musicians in the performance of musical works. As a result, the procedural requirements of the prior restraint doctrine must attach at the instant that governmental action is contemplated.[277] This notion of promptness in the adherence to procedural requirements constitutes perhaps the most important mechanism in the prevention of musical censorship.

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273. *Skyywalker*, 739 F. Supp. at 596 (citing *Southeastern Promotions*, 420 U.S. at 562; *Dombrowski*, 380 U.S. at 479, 486 (1965); Marcus v. Search Warrants of Property, 367 U.S. 717, 736 (1961); Quantity of Copies of Books, v. Kansas, 378 U.S. 205, 214 (1964)). *See also Atlantic Beach*, 749 F. Supp. 38.

274. In spite of the criticism concerning the prior restraint doctrine, Professor Scordato also acknowledges the benefits of the prior restraint doctrine in invalidating laws whose restrictions are overbroad and impinge upon protected speech. *See* Scordato, *supra* note 24, at 16.

275. *See supra* text accompanying note 71.

276. *See supra* text accompanying notes 71 & 72.

277. *See Freedman*, 380 U.S. 51, 58 (1965). This concept of promptness also relates to the judicial decision regarding the protected status of the expression in question. *Skyywalker*, 739 F. Supp. at 603 (citing Teitel Films Corp. v. Cusack, 390 U.S. 139 (1968); Fort Wayne Books Inc. v. Indiana, 489 U.S. 46 (1963); *Quantity of Books*, 378 U.S. 205, 210-11 (1964); *Marcus*, 367 U.S. 717, 735-36 (1961); *Evans*, 642 F. Supp. 552 (M.D. Ala. 1986).

A criticism of the prior restraint doctrine as delineated by case law to date must be the lack of a definitive explanation as to when a judicial determination must be sought on the protected status of speech. The mere statement that the governmental entity seek "prompt" judicial action does not effectively provide for an immediate determination. In order to prevent the unwarranted suppression of musical expression, the procedural requirements of the prior restraint doctrine must attach at the first instance of governmental action.

In *Skyywalker*, Deputy Wichner's initial preview of *Nasty* and his submission of an affidavit to the lower court should have triggered the formal procedures for review.[278] Such governmental scrutiny regarding *Nasty* merits immediate judicial review to prevent unlawful suppression. While the court in *Skyywalker* noted this concept of promptness,[279] it failed to emphasize the importance of the prompt institution of judicial action.[280] Moreover, the Florida statutes that codify the procedural requirements inherent in the prior restraint doctrine must be amended to ensure that these procedures are invoked at the first instance of governmental action.[281] Regardless of possible debates concerning what constitutes "governmental action," the requirement that judicial review occur promptly remains essential to the effectiveness of the prior restraint doctrine in the prevention of unlawful censorship of musical expression.[282]

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278. *See supra* text accompanying notes 90-91.

279. *Skyywalker* 739 F. Supp. at 603.

280. *Id.* at 600 (where the court noted only that the sheriff's actions were "insufficient," failing to comment on the importance of securing prompt judicial review.).

281. Consequently, Florida Code § 847.08, which prescribes the requirement of judicial review for questionable expression, can be amended as follows (changes in brackets [ ]):

> [As soon as] an indictment, information, or affidavit is filed [by any state or local governmental official] under the provisions of §§ 847.07-847.09, the state attorney or his duly appointed assistant [shall promptly] apply to the court for the issuance of an order directing the defendant or his principal agent or bailee or other like person to produce the allegedly obscene materials at a time and place so designated by the court for the purpose of determining whether there is probable cause to believe said material is obscene. After hearing the parties on the issue, if the court determines probable cause exists, it may[, subject to a prompt and speedy proceeding,] order the material held by the clerk of the court pending further order of the court.

See supra note 211 for the complete original text of § 847.08 of the Florida Code.

282. The question of "governmental action" comprises a compelling question as a trigger for the invocation of procedural safeguards. The controversy surrounding the rap artist, Ice-T, and his song, *Cop Killer*, presents an absorbing question as to whether "official governmental action" has occurred. *See supra* text accompanying notes 3 & 11. Advocates for the artist could argue that the public comments, particularly those by Fraternal Order of Police members who indicate that the song incites violence against police, effectively "seizes" *Cop Killer* without a judicial determination as to its protected status. The record company's withdrawal of the song from the artist's album underscores the argument that the work has been seized. This argument also begs the question as to whether the statements by those individuals constitute official governmental actions, particularly if such statements are made in their capacities as private citizens. It is interesting to note that Eric Clapton's 1974 hit song, *I Shot the Sheriff*, which contains lyrics describing violence against a law enforcement official, did not garner the criticism leveled against Ice-T's song, *Cop Killer*.

V. CONCLUSION

The prior restraint doctrine remains a viable and formidable medium in the preservation of unrestricted musical expression. Under the doctrine, governmental authorities that seek to limit controversial forms of musical expression must comport with the doctrine's stringent requirements, including the judicial determination of the protected nature of expression. These requirements also mandate the existence of narrow, objective and precise standards for limitations on such expression.

Skyywalker and *Barnes* bespeak a new proclivity of the judiciary to engage in a more probative review of the content of expressive activity. Moreover, courts have indicated a willingness to lessen the degree of governmental interest required to substantiate content-based restrictions on certain types of expressive activities. These factors do not, however, diminish the importance, relevance or impact of the prior restraint doctrine. Regardless of the perceived objectionable nature of the work, the doctrine mandates a threshold review and finding of a musical expression's lack of constitutional protection prior to the imposition of any restrictions. Notwithstanding its flexible definition, the prior restraint doctrine remains a primary legal tool that prevents the unfettered, and perhaps unwarranted, censorship of musical expression.