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## Explicit Lyrics: The First Amendment Free Speech Rulings That Have Protected Against Music Censorship In The United States

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# EXPLICIT LYRICS: THE FIRST AMENDMENT FREE SPEECH RULINGS THAT HAVE PROTECTED AGAINST MUSIC CENSORSHIP IN THE UNITED STATES

*Eric T. Kasper\**

As noted by the U.S. Supreme Court in *Ward v. Rock Against Racism* (1989), calls for music censorship are at least as old as Plato's *Republic*. Attempts to punish artists for their music continue across the globe to the present day. In the United States, these attempts have been thwarted by key Court precedents on incitement (*Brandenburg v. Ohio*, 1969), true threats (*Watts v. United States*, 1969), profanity (*Cohen v. California*, 1971), and obscenity (*Miller v. California*, 1973). None of these precedents dealt with music, but after *Southeastern Promotions, Ltd. v. Conrad* (1975), courts have applied the tests in those rulings to find substantial First Amendment protection for musical artists, including in cases involving Ozzy Osbourne, Judas Priest, 2 Live Crew, and Tupac Shakur. In cases against musicians for alleged threats, profanity, incitement, and obscenity, the Court's tests have collectively been a positive development for the thriving of musical expression in the United States. State power over musical expression restricts the creative autonomy of, and political critiques by, musical artists and it deprives listeners of the intellectual and emotional experiences that songs provide. Maintaining the application of the Court's standards to music, and expanding their protections, should remain First Amendment imperatives, as doing otherwise would embolden those in power to censor music that is critical of them or that is by artists from minority communities and viewpoints.

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## I. INTRODUCTION: “WE’VE ONLY JUST BEGUN”

Music is one of the oldest forms of human expression. From Plato’s discourse in the *Republic* to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions and have censored musical compositions to serve the needs of the state. The Constitution prohibits any like attempts in our own legal order.<sup>1</sup>

In *Ward v. Rock Against Racism* (1989), a case holding that New York City could impose content neutral sound amplification requirements at a Central Park bandshell,<sup>2</sup> the Court explained that the censorship of music has ancient roots.<sup>3</sup> Indeed, both in the United States and across the globe, history is replete with examples of governments trying to hinder musical expression, with restrictions coming at the performance, recording, and distribution stages. Nevertheless, music in the United States today enjoys substantial legal protection from government censorship.<sup>4</sup> This is due, in large part, to Court rulings in cases involving music, including *Southeastern Promotions, Ltd. v. Conrad* (1975)<sup>5</sup> and *Ward*, but these and other cases applied decisions unrelated to music to reach their holdings.<sup>6</sup> By directly placing music within the scheme of First Amendment protection, the Court opened the door for its precedents in other areas to be applied to musical expression.<sup>7</sup> In the nearly half-century since *Southeastern Promotions*, this has led to key First Amendment precedents that had nothing to do with music being applied to music-

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1. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (internal citations omitted).

2. *Id.* at 803.

3. *Id.* at 790.

4. *See, e.g., id.* (“Music, as a form of expression and communication, is protected under the First Amendment”); *Davidson v. Time Warner, Inc.*, Civ. A. V-94-006, 1997 WL 405907, at \*12 (S.D. Tex. Mar. 31, 1997) (“music...receives full First Amendment protection”).

5. *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 546 (1975) (holding that city officials imposed a prior restraint and violated the First Amendment when they denied a company the use of a city-leased auditorium to present the musical *Hair*).

6. *Id.* at 555–58 (citing various cases not involving music, such as *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Adderley v. Florida*, 385 U.S. 39 (1966); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

7. *See, e.g., Ward*, 491 U.S. at 790–91 (after finding that music is protected by the First Amendment, the Court applied forum analysis jurisprudence adopted in cases like *Perry Education Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37 (1983)).

related cases, protecting a wide variety of expression and artists. Still, attempts to punish musicians for what they advocate in their songs continue to the present day, even in the United States.

This article will proceed as follows: Part II will explore the various ways that music has been censored by governments historically, both generally and in the United States specifically. Part III will discuss in detail the relevant Supreme Court precedents that would eventually be used to protect musical expression, including *Brandenburg v. Ohio* (1969),<sup>8</sup> *Watts v. United States* (1969),<sup>9</sup> *Cohen v. California* (1971),<sup>10</sup> and *Miller v. California* (1973),<sup>11</sup> and their progeny. As explored in Part IV, these precedents ensured that the same high degree of protection that exists for the spoken and printed word exists for musical expression, particularly outside of broadcast media. This is exemplified in lower court cases involving the controversial music of various artists, including Ozzy Osbourne,<sup>12</sup> Judas Priest,<sup>13</sup> 2 Live Crew,<sup>14</sup> and Tupac Shakur.<sup>15</sup> Part V will conclude by defending the application of *Brandenburg*, *Watts*, *Cohen*, and *Miller* to music, as the Court's tests in these areas have collectively been a positive development for the thriving of musical expression in the United States. State power over musical expression not only restricts the creative autonomy and political critiques of artists, it also deprives listeners of the intellectual and emotional experiences that songs provide. The Court must maintain its current jurisprudence and continue to apply it to music, as doing otherwise would embolden those in power to silence music that is critical of them, censor music by artists from minority communities, or ban music that they dislike for other reasons. In fact, not

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8. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

9. *Watts v. United States*, 394 U.S. 705 (1969).

10. *Cohen v. California*, 403 U.S. 15 (1971).

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

12. *Waller v. Osbourne*, 763 F. Supp. 1144 (M.D. Ga. 1991), aff'd 958 F.2d 1084 (11th Cir. 1992).

13. *Judas Priest v. Second Jud. Dist. Ct. of State of Nev.*, 760 P.2d 137 (Nev. 1988).

14. *Luke Rees, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992).

15. *Davidson v. Time Warner, Inc.*, Civ. A. V-94-006, 1997 WL 405907 (S.D. Tex. Mar. 31, 1997).

only should this protection be preserved, including for explicit lyrics, but that protection should also be expanded, including in broadcast media.

## II. “WE DIDN’T START THE FIRE”: A BRIEF HISTORY OF MUSIC CENSORSHIP

In *Ward*, the Court’s contention that music censorship dates back to “Plato’s discourse”<sup>16</sup> is evident if one reads the *Republic*. There, Plato explains how music can have a powerful hold on human beings: “rhythm and harmony most of all insinuate themselves into the inmost part of the soul and most vigorously lay hold of it in bringing grace with them; and they make a man graceful if he is correctly reared, if not, the opposite.”<sup>17</sup> Plato opined that the person “properly reared on rhythm and harmony would have the sharpest sense for what’s been left out and what isn’t a fine product of craft or what isn’t a fine product of nature.”<sup>18</sup> Furthermore, Plato stated that the right kind of music “engenders moderation.”<sup>19</sup> With proper training in music, Plato imagined that one “would certainly be most useful to himself and the city.”<sup>20</sup> Given the powerful impact Plato believed music can have on one’s development, judgment, and “soul,” Plato argued to his readers that the government must have a strong hand in educating young people in music.<sup>21</sup>

What, then, of those who would challenge the government’s ideas of what is proper training in music? For Plato, “the overseers of the city must cleave to this, not letting it be corrupted unawares, but guarding it against all comers: there must be no innovation in...music contrary to the established order.”<sup>22</sup> The city’s overseers, according to Plato, “must beware of change to a strange form of music, taking it to be a danger to the whole.”<sup>23</sup> Plato’s

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16. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

17. PLATO, *THE REPUBLIC OF PLATO* 80 (Allan Bloom trans., 2d ed. 1991).

18. *Id.*

19. *Id.* at 88.

20. *Id.* at 93.

21. *Id.* at 82.

22. *Id.* at 101.

23. *Id.* at 102.

position on the matter was as follows: “So it’s surely here in music, as it seems...that the guardians must build the guardhouse.”<sup>24</sup> Specifically, Plato argued that the city must “supervise...the poets and compel them to impress the image of the good disposition on their poems.”<sup>25</sup>

To the Court’s point in *Ward*, what began in Plato’s *Republic* has extended throughout recorded history “to the totalitarian state in our own times,”<sup>26</sup> as “rulers have known [music’s] capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state.”<sup>27</sup> Indeed, governments have long used music to further state goals, especially through the adoption of national anthems. For instance, the song “Het Wilhelmus,” originally written in the late sixteenth century to glorify William of Orange and the struggle for independence, experienced rapid popularity and soon became the unofficial national anthem of the Netherlands, later being officially adopted as the country’s national anthem in 1932.<sup>28</sup> Governments have also attempted to use music to support military ends, such as through the establishment of the U.S. Marine Corps Band in 1798,<sup>29</sup> and most notably through legendary director John Philip Sousa’s marches.<sup>30</sup> Additionally, Adolf Hitler supposedly remarked that “[w]hoever wants to understand National Socialist Germany must know

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24. *Id.*

25. *Id.* at 80; *id.* at 102 (Plato makes clear that when he speaks of “poets” he is referring to persons who write music); *id.* at 54 (similarly, Plato confirms that he “include[s] speeches in music”).

26. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

27. *Id.*

28. JAMES MINAHAN, *THE COMPLETE GUIDE TO NATIONAL SYMBOLS AND EMBLEMS* 478 (2010); BENJAMIN S. SCHOENING & ERIC T. KASPER, *DON’T STOP THINKING ABOUT THE MUSIC: THE POLITICS OF SONGS AND MUSICIANS IN PRESIDENTIAL CAMPAIGNS* 12 (2012) (Likewise, the United Kingdom’s “God Save the King (or Queen),” which became popular in the 1740s, has been recognized as that country’s unofficial national anthem for approximately two centuries); SAMUEL HIDEO YAMASHITA, *LEAVES FROM AN AUTUMN OF EMERGENCIES: SELECTIONS FROM THE WARTIME DIARIES OF ORDINARY JAPANESE* 275 n. 28 (2005) (Other examples include Japan’s national anthem, “Kimigayo,” the lyrics of which originated from a tenth century poem, with the anthem’s title appealing to “Our Majesty’s Reign.”)

29. ROBERT A. SIMONSEN, *MARINES DODGING DEATH: SIXTY-TWO ACCOUNTS OF CLOSE CALLS IN WORLD WAR II, KOREA, VIETNAM, LEBANON, IRAQ AND AFGHANISTAN* 19 (2009).

30. *Id.*

Wagner,”<sup>31</sup> and the Nazis regime’s racist and anti-Semitic propaganda was often accompanied in newsreels and films by Richard Wagner’s compositions.<sup>32</sup>

Like Plato, governments have long understood the power of music and have long tried to censor and punish persons who have used music against the wishes of the state. In 789, to promote “peace, concord and unanimity” in the holy Roman Empire, Emperor Charlemagne issued an edict that emphasized the scribing of texts, including those reciting liturgical chants, had to reflect religious orthodoxy.<sup>33</sup> In medieval Europe, the Catholic Church placed a ban on the playing of the tritone interval (an augmented fourth or diminished fifth on the musical scale) because the dissonant sound, labeled at the time as the “Devil’s Interval,” purportedly elicited evil.<sup>34</sup> In fifteenth century England, King Henry V issued a decree, probably under similar concerns about the corruption of youth that motivated Plato, that “no ditties shall be made or sung by minstrels or others.”<sup>35</sup> Such motivations were also behind a 1543 English ban on ballad song sheet printing, as they were deemed dangerous for their ability to “subtilly [*sic*] and craftily instruct the king’s people and especially the youth of the realm.”<sup>36</sup> That English ban remained in place until lifted by Elizabeth I.<sup>37</sup> Vienna instituted a theatre censorship office in 1770, restricting operas that could be publicly performed, including those that were considered immoral for their portrayal of sex.<sup>38</sup> In nineteenth

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31. PETER CADDICK-ADAMS, *SNOW AND STEEL: THE BATTLE OF THE BULGE 1944-45* 125 (2015).

32. *Id.*

33. LUISA NARDINI, *In the Quest of Gallican Remnants in Gregorian Manuscripts: Archaisms in the Masses for the Holy Cross in Aquitanian Chant Books*, in *THE OXFORD HANDBOOK OF MUSIC CENSORSHIP* 7, 11 (Patricia Hall ed., 2018).

34. MARK V. TUSHNET ET AL., *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* 27 (2017).

35. PETER BLECHA, *TABOO TUNES: A HISTORY OF BANNED BANDS AND CENSORED SONGS* 3 (2004).

36. *Id.*

37. MARTIN CLOONAN, *BANNED!: CENSORSHIP OF POPULAR MUSIC IN BRITAIN: 1967-92* 11 (1996).

38. MARTIN NEDBAL, *SEX, POLITICS, AND CENSORSHIP IN MOZART’S DON GIOVANNI /DON JUAN, 175–77* (2015).



century pre-unification Italy, censors had the power to restrict what appeared in operas for political or religious reasons.<sup>39</sup>

As for “the totalitarian state in our own times,”<sup>40</sup> examples abound of music censorship in the last century. In the Soviet Union, the old national anthem, “God Save the Czar,” was banned in 1922.<sup>41</sup> In 1929, the Soviet Union’s central arts administration undertook efforts to “ban the sale of religious musical literature” and “to exclude any operas saturated with religion.”<sup>42</sup> That same year, the Union of Soviet Composers (which was essentially controlled by the Soviet government) was formed, with composers expected to bring their works to the union for “approval” before being performed publicly.<sup>43</sup> During the same time, jazz music was banned for a few years.<sup>44</sup> Beginning in 1936, the Soviet Chief Directorate for the Inspection of Spectacles and Repertoire banned more than half of newly composed plays for being too formalistic or for not portraying socialism sufficiently positively.<sup>45</sup> In 1948, the Central Committee of the Communist Party issued a decree denouncing classical formalistic orchestral music and modern music.<sup>46</sup> This led to the censorship of composers whose music was declared anti-democratic or reactionary.<sup>47</sup> Some loosening of Soviet government

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39. FRANCESCO IZZO, “YEARS IN PRISON”: GIUSEPPE VERDI AND CENSORSHIP IN PRE-UNIFICATION ITALY 237, 239-40 (2015).

40. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

41. Barbara Makanowitzky, *Music to Serve the State*, 24 THE RUSSIAN REV. 266, 267 (1965).

42. PAULINE FAIRCLOUGH, “*We Should Not Sing of Heaven and Angels*”: Performing Western Sacred Music in Soviet Russia, 1917-1964, in THE OXFORD HANDBOOK OF MUSIC CENSORSHIP 109, 114-15 (Patricia Hall ed., 2015).

43. GEORGE G. WEICKHARDT, *Dictatorship and Music: How Russian Music Survived the Soviet Regime*, 31 RUSSIAN HIST. 121, 125 (2004).

44. Makanowitzky, *supra* note 41, at 266, 268–69.

45. THE SOVIET THEATER: A DOCUMENTARY HISTORY 251 (Laurence Senelick & Sergei Ostrovsky eds., 2014).

46. Makanowitzky, *supra* note 41, at 271–73.

47. *Id.* at 273.

power over music occurred after Joseph Stalin's death in 1953,<sup>48</sup> but the Communist Party continued exercising control over music, particularly rock music, which was banned from both being composed in recording studios and publicly performed.<sup>49</sup> These legal prohibitions were only lifted as part of Mikhail Gorbachev's glasnost reforms in 1986 shortly before the dissolution of the Soviet Union.<sup>50</sup>

Nazi Germany was notorious for music censorship, despite being much more short-lived than the Soviet Union. When Nazi Wilhelm Frick was appointed interior minister toward the end of the Weimar republic in 1930, his decree, "Against Negro culture, for German racial heritage," revoked performance licenses for businesses that sponsored what was deemed "Negro" music, theatre, or dance.<sup>51</sup> Once the Nazis came to full power in 1933, they put various prohibitions on Jewish musicians from being able to legally teach and publicly perform music.<sup>52</sup> Nazi authorities banned jazz music from being broadcast in the 1930s<sup>53</sup> In particular, Hitler issued a ban on jazz music being broadcast by the Berlin Broadcasting Station in 1933, and he clarified the racist intent behind the order, as he specified that the prohibition applied

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48. *Id.* at 274.

49. Julie S. Berkowitz, *A Look into Glasnost's Impact on the Soviet Art World*, 11 LOY. L.A. ENT. L. REV. 453, 459–60 (1991).

50. *Id.* at 454 n.13, 460.

51. ERIC BERKOWITZ, DANGEROUS IDEAS: A BRIEF HISTORY OF CENSORSHIP IN THE WEST, FROM THE ANCIENTS TO FAKE NEWS 186 (2021). Frick also banned the compositions of Igor Stravinsky. *Id.*

52. DeLora J. Neuschwander, *Music in the Third Reich*, 3 MUSICAL OFFERINGS 93, 101-02 (2012); David Pimentel, *The Blues and the Rule of Law: Musical Expressions of the Failure of Justice*, 67 LOY. L. REV. 191, 217 (2020) (More generally, music deemed "degenerate" was banned in Nazi Germany).

53. ERIK LEVI, MUSIC IN THE THIRD REICH 84 (1996).

to “especially that brand produced by Negro orchestras and singers.”<sup>54</sup> During World War II, the Reich Music Examination Office possessed the power to review and ban any music in the country.<sup>55</sup>

The Nazis and the Soviets are far from the only foreign governments in the last century that have censored music because it challenged prevailing orthodoxy. During the Cold War, Eastern bloc nations followed the lead of the Soviets and banned dissent through any medium, which included music.<sup>56</sup> Similarly, after the Chinese revolution, in the 1950s domestic artists whose music was deemed too bourgeoisie were forced to publicly renounce their past works, or they were punished in other ways, including by being sent to labor camps.<sup>57</sup> The People’s Republic of China continues to censor ideas critical of its government, such as through selectively restricting foreign musical performers from being able to hold concerts in the country,<sup>58</sup> blocking access to websites containing music that has not been reviewed by the Ministry of Culture,<sup>59</sup> and imprisoning Tibetan musicians who are critical of China’s treatment of that minority group.<sup>60</sup> In 1957, Egypt put in place a prohibition on rock ‘n’ roll music,<sup>61</sup> and in 1997 the country banned heavy metal music due to its perceived representation of “Western degeneracy.”<sup>62</sup> For a further example, Indonesian President Sukarno banned the Beatles’

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54. ROBERT CORN-REVERE, *THE MIND OF THE CENSOR AND THE EYE OF THE BEHOLDER: THE FIRST AMENDMENT AND THE CENSOR’S DILEMMA* 147 (2021). These Nazi bans and others proved difficult to enforce, though, in Germany due to the continued popularity of jazz music; SCHOENING & KASPER, *supra* note 28, at 17.

55. ALAN E. STEINWEIS, *ART, IDEOLOGY, AND ECONOMICS IN NAZI GERMANY: THE REICH CHAMBERS OF MUSIC, THEATER, AND THE VISUAL ARTS* 141 (1993).

56. Pimentel, *supra* note 52, at 217.

57. HON-LUN YANG, *Curb that Enticing Tone: Music Censorship in the PRC*, in *THE OXFORD HANDBOOK OF MUSIC CENSORSHIP* 455–56 (Patricia Hall ed., 2015).

58. *Id.* at 461.

59. *Id.* at 467.

60. Pimentel, *supra* note 52, at 217.

61. BLECHA, *supra* note 35, at 5.

62. FARHAD KHOSROKHAVAR, *NEW ARAB REVOLUTIONS THAT SHOOK THE WORLD* 237 (2016).

music in his country in the 1960s.<sup>63</sup> More comprehensively, since 1967 North Korea has banned all foreign music, and domestic music is state-produced, done at the command of the supreme leader.<sup>64</sup>

Additionally, after Augusto Pinochet became dictator of Chile during a coup in 1973, musicians on the political left were tortured and killed, with disapproved songs banned from being broadcast on the radio.<sup>65</sup> South Africa under apartheid in 1974 banned music deemed blasphemous, contemptuous, or that was “harmful to the relationship between any groups in South Africa.”<sup>66</sup> Among other works, Peter Gabriel’s anti-apartheid song, “Biko,” was banned in South Africa because it was deemed to be music that could “contribute to a condition that will be harmful to the security of the state.”<sup>67</sup> When the Khmer Rouge took power in Cambodia in 1975, it banned all popular music activities, and it has been estimated that approximately 90 percent of musicians were executed or starved to death.<sup>68</sup> After Ayatollah Khomeini was appointed the supreme ruler of Iran in 1979, all music concerts were banned, including foreign television and radio broadcasts of classical and popular music.<sup>69</sup> From that point until the 1980s, only songs promoting the revolution and Islamic ideology were permitted to be performed in Iran.<sup>70</sup> When the Taliban took power in Afghanistan in 1996, they banned all forms

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63. KRISNA SEN & DAVID T. HILL, GLOBAL INDUSTRY, NATIONAL POLITICS: POPULAR MUSIC IN “NEW ORDER” INDONESIA, IN *REFASHIONING POP MUSIC IN ASIA: COSMOPOLITAN FLOWS, POLITICAL TEMPOS, AND AESTHETIC INDUSTRIES* 76 (Allen Chun, et. al. eds., 2004).

64. Jemayel Khawaja, *North Korea’s Secret Weapon Is Terrible Synth Pop*, VICE (July 10, 2017), <https://www.vice.com/en/article/7x9x8d/north-koreas-secret-weapon-is-terrible-synth-pop> [https://perma.cc/QEM9-AF8D].

65. Paula Thorrington Cronovich, *Out of the Blackout and into the Light: How the Arts Survived Pinochet’s Dictatorship*, 13 *IBEROAMERICANA*, 119, 120, 125 (2013).

66. MICHAEL DREWETT, *Exploring Transitions in Popular Music: Censorship from Apartheid to Post-Apartheid South Africa*, in *THE OXFORD HANDBOOK OF MUSIC CENSORSHIP* 593, 595 (Patricia Hall ed., 2018).

67. STEPHEN MAMULA, *Starting from Nowhere?: Popular Music in Cambodia after the Khmer Rouge*, 39 *Asian Music* 26, 595 (2008), *reprinted in* *NON-WESTERN POPULAR MUSIC*, 19 (Tony Langlois ed. 2011).

68. *Id.* at 30-31.

69. Amenah Youssefzadeh, *Veiled Voices: Music and Censorship in Post-Revolutionary Iran*, in *THE OXFORD HANDBOOK OF MUSIC CENSORSHIP* 660–61 (Patricia Hall ed., 2018).

70. *Id.* at 661.

of music, including performances at weddings and funerals.<sup>71</sup> In 2012, ongoing music censorship in Russia received international attention as three members of the band Pussy Riot were convicted of hooliganism for performing a song that was critical of President Vladimir Putin and the Russian Orthodox Church.<sup>72</sup> In more recent years, Russian authorities have intervened to stop dozens of live musical performances by rap, punk, and electronic musicians, under the guise that the performances promote suicide, drug use, or run afoul of a national ban on “gay propaganda.”<sup>73</sup> In 2022, the military junta ruling Myanmar executed Phyo Zeya Thaw, a hip-hop star whose lyrics promoted democracy in the country.<sup>74</sup>

That brings us to the United States. Although the Court opined in *Ward* how the “Constitution prohibits any like attempts at musical censorship in our own legal order,”<sup>75</sup> there have been various efforts by different levels of governments to censor music in the United States. This was particularly true before the Supreme Court cases below signaled a change in direction as to how the First Amendment would be interpreted. Those attempts at censorship under the U.S. Constitution never systematically rose to the level or scale of prohibitions and punishments that have been rampant in some of the countries cited above. Nevertheless, these historical American examples—as isolated as some of them may have been—remain troubling. Often, the purported justification for restricting musical expression was that songs or artists were engaging in some form of obscenity, indecency, profanity, lewdness, threats, or advocating/inciting some other sort of illegality.<sup>76</sup> The intervention of American courts, including the U.S. Supreme Court, to stop music censorship was much more recent.

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71. John Street, *‘Fight the Power’: The Politics of Music and the Music of Politics*, 38 *GOV’T & OPP’N* 113, 117–20 (2003).

72. Dustin Koenig, Note, *Pussy Riot and the First Amendment: Consequences for the Rule of Law in Russia*, 89 *N.Y.U. L. REV.*, 666, 667–78 (2014).

73. *Russia: Censorship of Younger Generation’s Music*, HUMAN RIGHTS WATCH (Feb. 29, 2019) <https://www.hrw.org/news/2019/02/28/russia-censorship-younger-generations-music#> [<https://perma.cc/Q2FL-SVFH>].

74. Hannah Beech, *Phyo Zeya Thaw, Burmese Pro-democracy Rapper, 41, Is Executed*, *N.Y. TIMES* (July 28, 2022), <https://www.nytimes.com/2022/07/27/world/asia/27phyo-zeya-thaw-dead.html?referringSource=articleShare> [<https://perma.cc/NB2F-Q6CY>].

75. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

76. See, e.g., BLECHA, *supra* note 35, at 33, 35, 102–04, 121.

Before our current constitutional order was formally established, some colonial governments had highly restrictive bans on music. By 1712, the Massachusetts Bay Colony criminalized the publication of “any filthy, obscene, or profane song...’ in imitation or mimicking of religious services.”<sup>77</sup> In a famous case in the New York Colony, John Peter Zenger was prosecuted for seditious libel in 1735 for statements critical of colonial Governor William Cosby,<sup>78</sup> including for reprinting lyrics from ballads that were disparaging of Governor Cosby and other British officials.<sup>79</sup> Although he was eventually freed, Zenger spent nine months in jail before he was acquitted.<sup>80</sup> Before independence, music continued to have sporadic censorship by colonial governments, such as in 1745, when a New Yorker was tried for “singing in praise of the Pretender.”<sup>81</sup>

During the nineteenth century, singing among enslaved persons in the American South was commonplace, but most states had bans on enslaved persons using loud instruments, such as drums, on the rationale that those instruments could be used to communicate over long distances during a possible slave revolt.<sup>82</sup> Conversely, the Union Army prohibited Southerners during Reconstruction from publicly performing popular Confederate songs, such as “Bonnie Blue Flag” and “I’m a Good Ol’ Rebel.”<sup>83</sup> When lobbying Congress to expand the ban on what could be sent through the mail to include

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77. *Roth v. United States*, 354 U.S. 476, 483 (1957)

78. CHRISTOPHER B. DALY, *COVERING AMERICA: A NARRATIVE HISTORY OF A NATION’S JOURNALISM* 26 (2012).

79. PATRICIA L. DOOLEY, *FREEDOM OF SPEECH: REFLECTIONS IN ART AND POPULAR CULTURE* 54 (2017); LIVINGSTON RUTHERFURD, *JOHN PETER ZENGER: HIS PRESS, HIS TRIAL, AND A BIBLIOGRAPHY OF ZENGER IMPRINTS* 40 (1904).

80. DALY, *supra* note 78, at 26.

81. LEONARD W. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 19–20 (1963).

82. PORTIA K. MAULTSBY, *The Translated African Cultural and Musical Past*, in *AFRICAN AMERICAN MUSIC: AN INTRODUCTION* 3, 6 (Mellonee V. Burnim & Portia K. Maultsby eds., 2nd ed., 2015).

83. DOOLEY, *supra* note 79, at 54.

all “obscene, lewd, or lascivious” materials in 1873, Anthony Comstock explained how under existing law he had seized, among other things, “sheet music for impure songs.”<sup>84</sup>

More evidence of American government restrictions on music exists in the early to mid-twentieth century. In the 1920s there was a backlash against jazz music in the United States.<sup>85</sup> For instance, the city of Cleveland imposed a ban on “vulgar, noisy, jazz music” in dance halls.<sup>86</sup> This was just one of many significant restrictions that state and local governments placed on dance hall activities as jazz music was rising in popularity, with other laws imposing racist limits on the public, including enforcing racial segregation of patrons.<sup>87</sup> Morality-based restrictions during the Jazz Age included banning Sunday dancing and placing a minimum age on unmarried persons who could be admitted to dance halls.<sup>88</sup>

Race was at the center of the Federal Bureau of Investigation (FBI) placing singer Billie Holiday on their Security Index and surveilling her after she started singing the anti-racist and anti-lynching song “Strange Fruit” and the pacifist song “The Yanks Are Not Coming” in 1939.<sup>89</sup> Singer Paul Robeson’s critique of racism in the United States led to several government-imposed restrictions on his performances.<sup>90</sup> The mayor of Peoria, Illinois prevented Robeson from performing at city hall in 1947.<sup>91</sup> Furthermore, that same year, the Los Angeles city council banned him from singing at a scheduled show in the city.<sup>92</sup> After continued efforts at calling attention to racism

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84. Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—from Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 747–48 (1992).

85. See, e.g., RALPH G. GIORDANO, SATAN IN THE DANCE HALL: REV. JOHN ROACH STRATON, SOCIAL DANCING, AND MORALITY IN 1920S NEW YORK CITY 79–80 (2008).

86. *Id.* at 80.

87. *Id.* at 79.

88. *Id.* at 79–80.

89. BLECHA, *supra* note 35, at 143–44.

90. *Id.* at 145–48.

91. *Id.* at 145–46.

92. *Id.* at 146.

in the United States and imperialist exploitation of Africa, in 1950 the U.S. State Department revoked Robeson's passport on the grounds that his traveling overseas was "contrary to the best interests of the United States."<sup>93</sup> The State Department's action, which was upheld in federal court,<sup>94</sup> prevented Robeson from performing music abroad.<sup>95</sup>

One of the most notable music-based law enforcement raids in the United States occurred in Memphis, Tennessee in February 1948, when police seized and physically destroyed records deemed to be obscene.<sup>96</sup> In South Carolina in 1953, several counties passed ordinances restricting the hours during which jukeboxes could be operated and banned the playing of popular music on jukeboxes on Sundays or if it could be heard from a church.<sup>97</sup> The following year in New Jersey, the state Division of Alcohol Control and Order demanded that multiple bars remove objectionable songs from their jukeboxes, lest they lose their liquor licenses.<sup>98</sup> In 1955, the Houston Juvenile Delinquency and Crime Commission banned more than 30 songs it considered to be obscene, stopping all nine radio stations in the area from playing them.<sup>99</sup>

Throughout the 1950s, Congress held investigations into rock 'n' roll and introduced legislation that would have imposed significant restrictions on the music industry.<sup>100</sup> Often, these interventions by Congress were based on fears that rock music was obscene, that it would incite young people to

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93. BLECHA, *supra* note 35, at 147–48; DARLENE CLARK HINE, *Paul Robeson's Impact on History*, in PAUL ROBESON: THE GREAT FORERUNNER 142, 147 (Freedomways ed., 1998).

94. HINE, *supra* note 93, at 147.

95. BLECHA, *supra* note 35, at 147.

96. ERIC NUZUM, PARENTAL ADVISORY: MUSIC CENSORSHIP IN AMERICA 212 (2001).

97. *Id.* at 214.

98. *Id.* at 216 (the songs at issue were "Hawaiian Tale" and "Joe's Joint.")

99. AMY ABSHER, THE BLACK MUSICIAN AND THE WHITE CITY: RACE AND MUSIC IN CHICAGO, 1900-1967 101 (2018); CHRISTOPHER GAIR, THE AMERICAN COUNTERCULTURE 32 (2007); NUZUM, *supra* note 96, at 104.

100. BERNIE HAYES, THE DEATH OF BLACK RADIO: THE STORY OF AMERICA'S BLACK RADIO PERSONALITIES 41 (2005); NUZUM, *supra* note 96, at 221.



commit crime, or that it would turn them into communists.<sup>101</sup> In 1954, Congressmember Ruth Thompson of Michigan introduced a bill that would have banned the mailing of “pornographic” records through the USPS.<sup>102</sup> Furthermore, that same year, the U.S. Senate’s Juvenile Delinquency Subcommittee issued a report on potential links between youth crime and popular music.<sup>103</sup> In 1957, legislation that would have required song lyrics to be reviewed and possibly modified by a review committee before they could be sold or publicly broadcast was introduced in Congress.<sup>104</sup> Moreover, the following year, the Senate Committee on Interstate and Foreign Commerce held hearings on possible connections between popular music and juvenile crime.<sup>105</sup> Although none of these efforts resulted in successful legislation to restrict musical artists, the House Un-American Activities (HUAC) Committee called Pete Seeger to testify in 1955 about possible communist infiltration in the music industry.<sup>106</sup> Seeger refused to testify on First Amendment grounds, resulting in him being cited in 1956 for 10 counts of contempt of Congress.<sup>107</sup> Seeger’s conviction was eventually overturned by a U.S. Court of Appeals, but the ruling was based on a faulty indictment, not on First Amendment grounds.<sup>108</sup>

Additionally, in the 1950s more musical artists found themselves threatened with criminal prosecution for their performances. In 1955, Elvis Presley was told by authorities in both Florida and in California that they would arrest him on charges of obscenity if he danced on stage during his performances.<sup>109</sup> Gene Vincent was forcibly removed from the stage of a

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101. HAYES, *supra* note 100, at 41; NUZUM, *supra* note 96, at 221; Minna Bromberg & Gary Alan Fine, *Resurrecting the Red: Pete Seeger and the Purification of Difficult Reputations*, 80 SOC. FORCES 1135, 1140 (2002).

102. HAYES, *supra* note 100, at 41.

103. NUZUM, *supra* note 96, at 214.

104. *Id.* at 221.

105. *Id.* at 222.

106. Bromberg & Fine, *supra* note 101, at 1140.

107. *Id.* at 1140–41.

108. *Id.* at 1141.

109. GAIR, *supra* note 99, at 32.

live performance and jailed in Arizona, and in 1956 was convicted of violating lewdness and obscenity laws in Virginia.<sup>110</sup> What was most relevant for authorities' focus on Vincent was his performance of the romantically-themed song, "Lotta Lovin."<sup>111</sup>

Government investigations, surveillance, and other actions directed toward musical artists in the United States reached a fever pitch in the 1960s, based largely on the content of artists' songs or performances. Starting in 1963, the FBI kept an extensive Security Index file on Phil Ochs because of his anti-Vietnam War songs like "Draft Dodger Rag" and "I Ain't Marching Anymore."<sup>112</sup> The FBI investigated Bob Dylan for similar reasons.<sup>113</sup> In January 1964, Indiana Governor Matthew Welsh publicly stated his belief that the (largely indiscernible) lyrics of the Kingsmen's song "Louie Louie" were obscene.<sup>114</sup> Governor Welsh's concerns helped initiate investigations into the song's lyrics by the Federal Communications Commission (FCC), the USPS, and the FBI, with federal authorities investigating the matter until November 1965.<sup>115</sup> According to an FCC spokesperson, after review it was found that the song's mostly incomprehensible lyrics were "unintelligible at any speed."<sup>116</sup> In 1965, Cleveland, Ohio Mayor Ralph Locher imposed a ban on rock concerts after a performance by the Rolling Stones.<sup>117</sup> In 1966, a James Brown concert in Kansas City, Missouri was halted because police believed his dancing onstage to be lewd and obscene.<sup>118</sup>

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110. BLECHA, *supra* note 35, at 96.

111. *Id.*

112. *Id.* at 154.

113. *Id.* at 151.

114. Will Higgins, *That Time Indiana Teens Ratted Out Dirty 'Louie Louie' Lyrics, and the FBI Got Involved*, INDIANAPOLIS STAR (Jan. 2, 2019), <https://www.indystar.com/story/entertainment/2019/01/02/kingsmen-louie-louie-richard-berry-song-lyrics-dirty-version-fbi-investigation-indiana-teens/2240339002/> [<https://perma.cc/VQ8K-FEFV>]; Marion County, Indiana chief trial deputy prosecutor contemplated (although ultimately not file) charges for obscenity against the Kingsmen. *Id.*

115. *Id.*

116. *Id.*

117. NUZUM, *supra* note 96, at 224.

118. *Id.* at 154.

In the late 1960s and early 1970s, law enforcement arrested and criminally prosecuted several popular musicians. At a show in New Haven, Connecticut in December 1967, the Doors' Jim Morrison's mid-show "obscenity-filled" criticism of police brutality resulted in him being forcibly removed from the stage and arrested.<sup>119</sup> A charge of resisting arrest was later dismissed, although Morrison did pay a small fine for disturbing the peace.<sup>120</sup> At a March 1969 Miami concert, Morrison was charged with various crimes and eventually convicted at trial in 1970 for indecent exposure and profanity.<sup>121</sup> Furthermore, the FBI surveilled the Doors during the 1960s,<sup>122</sup> due in part to Morrison's stage antics but also potentially because of the perceived inciteful lyrics of some of the band's music.<sup>123</sup> This included the song, "Five to One," which contained the lines, "They got the guns, we got the numbers. We are gonna win, yeah, we are taking over!"<sup>124</sup>

FBI surveillance in the late 1960s extended to a number of other musicians who spoke out against the Vietnam War, including John Lennon, Jimi Hendrix, and even the Monkees.<sup>125</sup> In 1970, Country Joe McDonald received a \$500 fine for being a "lewd, lascivious and wanton person in speech and behavior" at a 1969 concert in Worcester, Massachusetts.<sup>126</sup> Authorities did not like his anti-Vietnam War song, "I Feel Like I'm Fixin' to Die Rag," where McDonald led the audience in a profane chant: "Gimme an F, Gimme

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119. *Rocker Jim Morrison Arrested this Day in New Haven*, NEW HAVEN REG. (Dec. 9, 2019), <https://www.nhregister.com/news/article/Rocker-Jim-Morrison-arrested-this-day-in-New-Haven-14892565.php> [<https://perma.cc/XK49-DRD>].

120. *Id.*

121. Dave Itzkoff, *Jim Morrison Is Candidate for Pardon in '69 Arrest*, N.Y. TIMES (Nov. 16, 2010), <https://www.nytimes.com/2010/11/17/us/17Crist.html> [<https://perma.cc/JUS7-54X6>].

122. BLECHA, *supra* note 35, at 157.

123. *Id.* at 157–58.

124. *Id.*

125. Julian Mark, *The Monkees' Last-Living Member Sues FBI for Secret Files on the Band*, N.Y. TIMES (Aug. 31, 2022), <https://www.washingtonpost.com/nation/2022/08/31/monkees-lawsuit-fbi/> [<https://perma.cc/9BSW-EZ4R>].

126. Patrick Sauer, *Country Joe's Obscene Truths*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/opinion/country-joe-vietnam-woodstock.html> [<https://perma.cc/AR4P-XSEY>]; BLECHA, *supra* note 35, at 157.

a U, Gimme a C, Gimme a K, What's that spell?"<sup>127</sup> Similarly, in November 1969, Janis Joplin was arrested in Tampa, Florida on (and later convicted of) charges of "vulgar and indecent language."<sup>128</sup> The incident arose after she observed police shouting at her fans during a concert, leading Joplin to say in the microphone mid-song, "Don't fuck with those people."<sup>129</sup> After the May 1970 Kent State shootings, Neil Young wrote the song "Ohio," which blamed President Nixon for the tragedy.<sup>130</sup> Ohio Governor James Rhodes ordered radio stations in the state not to play the song, but the order appeared to have largely been ignored.<sup>131</sup>

At the federal level at this time, a major concern dealt with musical artists who were thought to promote drug usage. In 1970, President Nixon called a meeting of governors over concerns he had with music lyrics.<sup>132</sup> Nixon even requested that broadcasters refuse to play songs referring to drugs.<sup>133</sup> In 1971, the FCC issued a memorandum opinion and order to radio broadcasters, detailing how it had received a number of complaints "concerning the lyrics of records played on broadcasting stations relat[ing] to a subject of current and pressing concern: the use of language tending to promote or glorify the use of illegal drugs as marijuana, LSD, 'speed', etc."<sup>134</sup> The FCC went on to threaten stations with license renewal, insinuating that playing such music was not in the public interest.<sup>135</sup> The FCC soon thereafter issued clarification of that order,<sup>136</sup> providing a list of example songs that

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127. SCHOENING & KASPER, *supra* note 28, at 18; BLECHA, *supra* note 35, at 157.

128. Gabrielle Calise, *How Janis Joplin was arrested in Tampa 50 Years ago*, TAMPA BAY TIMES (Nov. 14, 2019), <https://www.tampabay.com/news/tampa/2019/11/14/how-janis-joplin-was-arrested-in-tampa-50-years-ago/> [<https://perma.cc/D8E2-82YP>].

129. *Id.*

130. BLECHA, *supra* note 35, at 158.

131. *Id.*

132. NUZUM, *supra* note 96, at 141–42.

133. *Id.* at 142.

134. *In re License Resp. to Rev. Recs. Before Their Broad.*, 28 F.C.C.2d 409, 409 (1971).

135. *Id.*

136. *In re Licensee Resp. to Rev. Recs. Before Their Broad.*, 31 F.C.C.2d 377 (1971).

would qualify as promoting illegal drug use, including the Beatles' "Lucy in the Sky with Diamonds" and "With a Little Help from My Friends," as well as Peter, Paul, and Mary's "Puff, the Magic Dragon."<sup>137</sup> A college radio station challenged the FCC's order on First Amendment grounds, with the U.S. Court of Appeals upholding the constitutionality of the FCC's order,<sup>138</sup> and the U.S. Supreme Court declining to review it in *Yale Broadcasting Co. v. FCC* (1973).<sup>139</sup> In 1973, Senator James Buckley released a report, and held a hearing, on the connection between rock music and drug use, but this did not draw much attention, as hearings over Watergate began to dominate Congress's attention soon thereafter.<sup>140</sup> All told, until the early 1970s there was a clear pattern of government overreach in censoring music deemed dangerous or undesirable by public officials.

### III. "FIGHT THE POWER": SUPREME COURT FIRST AMENDMENT PRECEDENT AND MUSIC

As examined at length above, there have been various attempts at music censorship in United States history. Although government attempts to restrict musical expression continued through the latter years of the twentieth century into the twenty-first century, these censorship attempts have become much less frequent and have almost universally failed in the courts. To this point, it was approximately 50 years ago that American courts started to consistently expand First Amendment protections.<sup>141</sup> Chief among these cases

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137. CORN-REVERE, *supra* note 54, at 133.

138. *Yale Broad. Co. v. F.C.C.*, 478 F.2d 594, 595 (D.C. Cir. 1973).

139. *Yale Broad. Co. v. F.C.C.*, 414 U.S. 914 (1973).

140. NUZUM, *supra* note 96, at 145–47.

141. See Eric T. Kasper & Troy A. Kozma, *Absolute Freedom of Opinion and Sentiment on All Subjects: John Stuart Mill's Enduring (and Ever-Growing) Influence on the Supreme Court's First Amendment Free Speech Jurisprudence*, 15 MASS. L. REV. 1, 26–28 (2020).

are *Brandenburg v. Ohio* (1969),<sup>142</sup> *Watts v. United States* (1969),<sup>143</sup> *Cohen v. California* (1971),<sup>144</sup> *Miller v. California* (1973),<sup>145</sup> and their progeny.

*Brandenburg* provided the contemporary definition outlining circumstances when incitement to violence and other forms of lawlessness fall outside First Amendment protection.<sup>146</sup> The case involved Ku Klux Klan (KKK) leader Clarence Brandenburg's appeal of a conviction for violating a state syndicalism statute that prohibited advocating violence to accomplish industrial or political reform.<sup>147</sup> Brandenburg was convicted for a speech he gave at a KKK rally where a large wooden cross was burned and multiple participants possessed firearms.<sup>148</sup> At one point, Brandenburg spoke the following words about what he characterized as hundreds of KKK members in Ohio: "We're not a revengent [*sic*] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [*sic*] taken."<sup>149</sup> Brandenburg then alluded to plans for the KKK to "march[] on Congress."<sup>150</sup> In a second film recorded by the television station, Brandenburg stated racist and anti-Semitic rhetoric.<sup>151</sup> Brandenburg was then convicted of violating Ohio's syndicalism statute.<sup>152</sup>

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142. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

143. *Watts v. United States*, 394 U.S. 705 (1969).

144. *Cohen v. California*, 403 U.S. 15 (1971).

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

146. Emerson J. Sykes, *In Defense of Brandenburg: The ACLU and Incitement Doctrine in 1919, 1969, and 2019*, 85 *BROOK. L. REV.* 15, 16 (2019).

147. *Brandenburg*, 395 U.S. at 444–45.

148. *Id.* at 445.

149. *Id.* at 446.

150. *Id.*

151. *Id.* at 447 (specifying that Brandenburg stated the following: "Personally, I believe the n\*\*\*\*r should be returned to Africa, the Jew returned to Israel.").

152. *Id.* at 444–45.

The U.S. Supreme Court overturned Brandenburg's conviction.<sup>153</sup> According to the Court, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>154</sup> As explained in *Brandenburg's per curiam* opinion, "the mere abstract teaching...of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steering it to such action."<sup>155</sup>

The three-part Imminent Lawless Action Test devised by the Court in *Brandenburg* is very protective of expression. For speech to be outside the purview of First Amendment protection, the speaker must intend to, and be likely to, incite imminent lawless action.<sup>156</sup> All three elements of this test must be present for expression to be prosecutable under the First Amendment, making it a very protective standard.<sup>157</sup> For instance, in *Hess v. Indiana* (1973), the Court overturned the conviction of a Vietnam War protestor who, while law enforcement cleared demonstrators from the street, stated, "We'll take the fucking street later," or "We'll take the fucking street again."<sup>158</sup> As explained by the Court, even if Hess intentionally advocated for others to break the law, his statements did not indicate that any advocacy of lawlessness was imminent. The Court opined that "[a]t best...the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess' speech."<sup>159</sup> Similarly, in *NAACP v. Claiborne Hardware Co.* (1982), at issue were speeches given by Charles Evers to rally local residents to boycott stores as a way to pressure the local government to desegregate, including stating in

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153. *Id.* at 449.

154. *Id.* at 447.

155. *Id.* at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961)).

156. Sykes, *supra* note 146, at 24–27.

157. Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 547 (2000).

158. *Hess v. Indiana*, 414 U.S. 105, 106–07, 109 (1973).

159. *Id.* at 108.

one 1966 speech that anyone “who broke the boycott would ‘have their necks broken’ by their own people,”<sup>160</sup> and in a 1969 speech when he warned people that “the Sheriff could not sleep with boycott violators at night.”<sup>161</sup> According to the Court, though, these speeches did not rise to incitement of imminent lawless action because the words were unlikely to produce imminent lawlessness based on the history of the case:

The emotionally charged rhetoric of Charles Evers’ speeches did not transcend the bounds of protected speech set forth in *Brandenburg*....In the course of [his] pleas, strong language was used. If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case, however...the acts of violence identified...occurred weeks or months after [his] speech. Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech.<sup>162</sup>

Thus, the Court has found that the *Brandenburg* Test protects advocacy of illegality and violence, unless the speaker *intends*, and is *likely*, to incite *imminent* lawlessness.<sup>163</sup> As will be expounded in Part IV below, this has great importance for music, particularly recorded music.

*Watts v. United States* (1969) was the Court’s first case finding a true threat exception to the First Amendment.<sup>164</sup> Robert Watts was convicted of violating a federal law that banned one from “knowingly and willfully...[making] any threat to take the life of or to inflict bodily harm upon

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160. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 900 n.28 (1982).

161. *Id.* at 902.

162. *Id.* at 928.

163. Gey, *supra* note 157, at 547.

164. Zachary Stoner, *What You Rhyme Could Be Used Against You: A Call for Review of the True Threat Standard*, 44 NOVA L. REV. 225, 229 (2020).



the President of the United States.”<sup>165</sup> The conviction stemmed from Watts’s speech at a Washington, D.C. rally to protest police brutality.<sup>166</sup> Most people at the rally were in their teens or early twenties.<sup>167</sup> Watts, who was 18 years of age, responded in the following way to a critic who claimed that young people needed to obtain more education before voicing their opinions:

I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.<sup>168</sup>

The Court overturned Watts’s conviction.<sup>169</sup> In doing so, the Court began its analysis by conceding that “[t]he Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence.”<sup>170</sup> Nevertheless, in Watts’s case, the Court found that his speech was nothing more than “political hyperbole.”<sup>171</sup> The Court reasoned that “[t]he language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact.”<sup>172</sup> Therefore, the Court concluded that Watts’s “only offense here was ‘a kind of very crude offensive method of stating a political opposition to the President.’ Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.”<sup>173</sup>

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165. *Watts v. United States*, 394 U.S. 705 (1969).

166. *Id.* at 705–06.

167. *Id.* at 706.

168. *Id.*

169. *Id.* at 708.

170. *Id.* at 707.

171. *Id.* at 708.

172. *Id.* (internal citation omitted).

173. *Id.* (internal quotation omitted).

Although *Watts* did not construct a specific test for measuring true threats<sup>174</sup> (like *Brandenburg* did for incitement), the Court's opinion in *Watts* implied that what constitutes a true threat should be understood narrowly, thus protecting abrasive and vulgar discourse about political matters.<sup>175</sup> Years later, the Court explained in *R.A.V. v. St. Paul* (1992) that, as a general matter, true threats are outside of First Amendment protection because they "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."<sup>176</sup> Still, in *R.A.V.*, the Court made clear that when banning true threats the government may not criminalize threats expressing certain political viewpoints but not others.<sup>177</sup> For a more comprehensive definition, the Court explained what a true threat is in *Virginia v. Black* (2003): "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."<sup>178</sup> As elaborated further by the Court in *Black*:

The speaker need not actually intend to carry out the threat... Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.<sup>179</sup>

Like the case with incitement, *Black*'s narrow construction of what constitutes a true threat is quite protective of expression.<sup>180</sup> This has important implications for the safeguarding of musical expression.

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174. Stoner, *supra* note 164, at 232.

175. *Id.*

176. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

177. *Id.* ("[T]he Federal Government can criminalize only those threats of violence that are directed against the President... But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities.").

178. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

179. *Id.* at 359–60.

180. Roger C. Hartley, *Cross Burning – Hate Speech as Free Speech: A Comment on Virginia v. Black*, 54 CATH. U. L. REV. 1, 4 (2004).

*Cohen v. California* (1971) provided protection for profane and offensive speech in public forums.<sup>181</sup> The case arose due to Paul Cohen wearing a jacket bearing the plainly visible words, “Fuck the Draft,” throughout the corridors of the Los Angeles County Courthouse.<sup>182</sup> Cohen’s purpose in wearing the jacket was to “inform[] the public of the depth of his feelings against the Vietnam War and the draft.”<sup>183</sup> Other persons, including children, were present in the courthouse corridor.<sup>184</sup> Cohen was convicted of a state statute that prohibited “maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person...by...offensive conduct” and sentenced to 30 days in jail.<sup>185</sup>

Finding that Cohen’s speech did not fall into any discernible category of unprotected speech,<sup>186</sup> the Court explained how “the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense,”<sup>187</sup> because “we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.”<sup>188</sup> The Court emphasized the need to protect the freedom of expression as a way to ensure individual autonomy, democratic self-government, and the search for truth:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry

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181. Clay Calvert, *Iancu v. Brunetti’s Impact on First Amendment Law: Viewpoint Discrimination, Modes of Offensive Expression, Proportionality and Profanity*, 43 COLUM. J. L. & ARTS 37, 53, 77 (2019).

182. *Cohen v. California*, 403 U.S. 15, 16 (1971).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 19–20.

187. *Id.* at 21.

188. *Id.* (internal quotations omitted).

and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.189

The Court reasoned that the use of the particular word at issue, even though it was highly offensive to some, did not empower the government to ban it, as “the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.”<sup>190</sup> Instead, as pithily explained by the Court in terms that certainly can apply to musical expression, “one man’s vulgarity is another’s lyric.”<sup>191</sup> Furthermore, requiring Cohen to express himself through another, less emotionally-charged word was not constitutionally permissible, as “words are often chosen as much for their emotive as their cognitive force.”<sup>192</sup> Indeed, if Cohen had to use another word to express himself—such as “*Against the Draft*” or even “*Screw the Draft*”—it may not be received in the same way by the reader. To this point, the Court recognized that targeting particular language could be a quick way to eliminate censoring ideas: “we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”<sup>193</sup>

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189. *Id.* at 24.

190. *Id.* at 25.

191. *Id.*

192. *Id.* at 26.

193. *Id.*

*Cohen* provides strong protection for the use of profanity in contemporary public forums,<sup>194</sup> including for speakers as diverse as high school students on social media<sup>195</sup> and businesses seeking trademark protection.<sup>196</sup> In extending *Cohen*'s protection of offensive speech to military funeral protestors carrying homophobic and anti-Catholic signs in *Snyder v. Phelps* (2011),<sup>197</sup> the Court concluded as follows:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.<sup>198</sup>

The Court has extended the First Amendment's protection of offensive speech to symbolic speech, including burning the American flag, in *Texas v. Johnson* (1989),<sup>199</sup> where the Court reasoned as follows: "If there is a bed-rock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>200</sup> The protection of profane and otherwise offensive speech, stemming from *Cohen*, has major implications when applied to music.

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194. Calvert, *supra* note 181, at 53.

195. *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2043 (2021) (noting that a public high school violated the First Amendment for suspending a student from the cheer team after the student posted on Snapchat a photo with a caption reading, "Fuck school fuck softball fuck cheer fuck everything.").

196. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019) (noting that the Patent and Trademark Office violated the First Amendment by refusing to register a trademark for a clothing line named "FUCTION").

197. *Snyder v. Phelps*, 562 U.S. 443, 448 (2011) (noting that the signs used in the case included the following: "'God Hates the USA,' 'Thank God for 9/11,' 'America is Doomed,' 'Don't Pray for the USA,' 'Thank God for IEDs,' 'Thank God for Dead Soldiers,' 'Pope in Hell,' 'Priests Rape Boys,' 'God Hates Fags,' 'You're Going to Hell,' and 'God Hates You.'").

198. *Id.* at 460–61.

199. *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

200. *Id.* at 414.

A few years after *Cohen*, the Court decided a case setting forth the contemporary standard for obscenity, *Miller v. California* (1973). Marvin Miller was convicted of violating a state law that prohibited “knowingly distributing obscene matter.”<sup>201</sup> The case arose because Miller promoted his various types of “adult” illustrated books by mailing unsolicited samples in brochures.<sup>202</sup> A group of brochures was sent in an envelope to a restaurant manager, which he opened in the presence of his mother, resulting in a complaint to the police.<sup>203</sup> Miller’s advertisements were for several books (titled *Intercourse*, *Man-Woman*, *Sex Orgies Illustrated*, and *An Illustrated History of Pornography*), and one film (titled *Marital Intercourse*).<sup>204</sup> As described by the Court, “[w]hile the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.”<sup>205</sup>

In *Miller*,<sup>206</sup> the Court explained that the justices were “called on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment. . . .”<sup>207</sup> The Court ruled that the test for obscenity should be understood as follows:

The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>208</sup>

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201. *Miller v. California*, 413 U.S. 15, 16 (1973).

202. *Id.* at 17–18.

203. *Id.* at 18.

204. *Id.*

205. *Id.*

206. *Id.* at 37.

207. *Id.* at 19–20.

208. *Id.* at 24 (internal citations and quotations omitted).

The Court has explained that “prurient” means “having a tendency to excite lustful thoughts” or “a shameful or morbid interest in nudity, sex, or excretion.”<sup>209</sup> As described by Chief Justice Burger, what states could prohibit in part (b) of the *Miller* test includes “[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated,”<sup>210</sup> or “[p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”<sup>211</sup> Perhaps even more to the point, the Court reasoned how this standard would protect a significant amount of sexually-themed expression: “Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct specifically defined by the regulating state law, as written or construed.”<sup>212</sup>

Although *Miller* was something of a drawback of First Amendment protection from existing obscenity case law,<sup>213</sup> it nevertheless provided a high bar of protection for sexually-themed expression, allowing for prosecution only of “‘hard core’ sexual conduct.”<sup>214</sup> In fact, the Court clarified how broad this protection was just one year after *Miller* in *Jenkins v. Georgia* (1974), ruling that the film *Carnal Knowledge* was not obscene.<sup>215</sup> In doing so, the *Jenkins* Court reasoned that “[t]here are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards.”<sup>216</sup> Later Court decisions would explain that the *Miller* Test for obscenity applies to communication in newer media, including cable

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209. Roth v. United States, 354 U.S. 476, 487 n.20 (1957).

210. *Miller*, 413 U.S. at 25.

211. *Id.*

212. *Id.* at 27.

213. See Jason Kipness, *Revisiting Miller After the Striking of the Communications Decency Act: A Proposed Set of Internet Specific Regulations for Pornography on the Information Superhighway*, 14 SANTA CLARA COMPUT. & HIGH TECH. L.J. 391, 405 (1998).

214. John C. Stewart, *Pope v. Illinois: A Reasonable Person Approach to Finding Value*, 20 U. TOL. L. REV. 231, 238 (1988).

215. *Jenkins v. Georgia*, 418 U.S. 153, 155 (1974).

216. *Id.* at 161.

television<sup>217</sup> and the internet.<sup>218</sup> Furthermore, the Court illuminated in *Pope v. Illinois* (1987) that when determining if a work has any serious literary, artistic, political, or scientific value, what matters is not the finding of a person in a given community, but rather “whether a reasonable person would find such value in the material, taken as a whole.”<sup>219</sup> This clarification by the Court meant that the determination of this value reflected a national standard, not a local one.<sup>220</sup> Decisions like *Pope* that have expanded First Amendment protections under *Miller* have greatly decreased obscenity prosecutions in recent decades.<sup>221</sup> The fact that materials having serious literary, artistic, or political value are, by definition, not obscene has implications for various types of musical expression.

How do we know that these key precedents—*Brandenburg*, *Watts*, *Cohen*, and *Miller*—and their progeny apply to musical expression? The answer to that question begins with *Southeastern Promotions, Ltd. v. Conrad* (1975), a case involving a prior restraint against a company promoting the musical *Hair*.<sup>222</sup> Although it was not the Court’s first free speech case involving questions about the constitutional protection of expression through song,<sup>223</sup> the Court’s decision in *Southeastern Promotions* dealt directly with questions about the censorship of musical theater. *Southeastern Promotions* made an application to use a privately-owned theater that was under a long-term lease with the city of Chattanooga, Tennessee.<sup>224</sup> When the application

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217. See *Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 751–52 (1996).

218. See *Reno v. ACLU*, 521 U.S. 844, 872 (1997).

219. *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987).

220. Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1579–80 (1988).

221. See Brian L. Frye, *The Dialectic of Obscenity*, 35 HAMLINE L. REV. 229, 235 (2012).

222. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547 (1975).

223. See *e.g.*, *Edwards v. South Carolina*, 372 U.S. 229, 238 (1963) (where the Court overturned breach of the peace convictions for a group of black civil rights protestors whose protest at the state capital included singing); *id.* at 233–34.

224. *Se. Promotions Ltd.*, 420 U.S. at 547.



was reviewed by the Board of Directors for the Chattanooga Memorial Auditorium, all of whom were mayoral appointees, they rejected it.<sup>225</sup> The rejection was *not* due to a scheduling conflict at the theater.<sup>226</sup> Rather, the application was denied because the board concluded that putting on the musical was not “in the best interest of the community” due to concerns about nudity and obscenity.<sup>227</sup> Southeastern Promotions sought a preliminary injunction in federal court against the board, but this application was denied.<sup>228</sup> After a hearing, the court denied a permanent injunction, concluding that the production of *Hair*, since it included simulated sex and group nudity, violated city ordinances prohibiting obscenity and public nudity and was not entitled to First Amendment protection.<sup>229</sup> The Sixth Circuit Court of Appeals affirmed the decision.<sup>230</sup> None of the judges at the district court or court of appeals had seen a performance of the musical before rendering their decisions.<sup>231</sup>

The U.S. Supreme Court reversed the decision in *Southeastern Promotions*,<sup>232</sup> holding that the board’s actions constituted a prior restraint in violation of the First Amendment.<sup>233</sup> Put simply, “[t]he board’s judgment effectively kept the musical off stage.”<sup>234</sup> According to the Court, “[o]ur distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law.”<sup>235</sup> In a case where what was most directly at issue

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225. *Id.* at 548 & n.2.

226. *Id.* at 548.

227. *Id.*

228. *Id.* at 548–49.

229. *Id.* at 550–52.

230. *Id.* 552.

231. *Id.*

232. *Id.* at 562.

233. *Id.* at 559–62.

234. *Id.* at 555.

235. *Id.* at 553.

was nudity, the Court did not explicitly hold that musical expression is protected by the First Amendment, but the implication was clear, within the context of a theatrical musical:

Only if we were to conclude that live drama is unprotected by the First Amendment—or subject to a totally different standard from that applied to other forms of expression—could we possibly find no prior restraint here. Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems. By its nature, theater usually is the acting out—or singing out—of the written word, and frequently mixes speech with live action or conduct. But that is no reason to hold theater subject to a drastically different standard.<sup>236</sup>

Thus, the Court clarified that the same general standards of First Amendment protection that apply to publications and speeches in public forums would also apply to theatrical performances.<sup>237</sup> Since *Hair* was a musical, the *Southeastern Promotions* Court assumed that music was protected by the First Amendment without specifically addressing music as a form of expression in its opinion.<sup>238</sup> The same assumption that music is generally protected by the First Amendment was made by the Court in *Schad v. Borough of Mount Ephraim* (1981), where the Court concluded the following when striking down<sup>239</sup> a complete ban on all live entertainment: “Entertainment...is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as *musical* and dramatic works fall within the First Amendment guarantee.”<sup>240</sup>

If there was any doubt about musical expression having the same level of First Amendment protection as print publications or speeches in public forums, it was erased in *Ward v. Rock Against Racism* (1989). At issue was

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236. *Id.* at 557–58 (internal citations omitted) (emphasis added).

237. Anthony Ventry III., *Application of the First Amendment to Violent and Nonviolent Video Games*, 20 GA. ST. U. L. REV. 1129, 1132 (2004).

238. Alan K. Chen, *Instrumental Music and the First Amendment*, 66 HASTINGS L.J. 381, 392 (2015).

239. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

240. *Id.* (emphasis added).

a New York City policy requiring the use of sound-amplification equipment and a sound technician provided by the city by performers at the Naumburg Acoustic Bandshell in Central Park.<sup>241</sup> These regulations were meant to help control the volume of amplified music at the bandshell, due to the proximity of residences and people engaging in recreation, after numerous excessive noise complaints.<sup>242</sup> Although the U.S. Supreme Court ultimately upheld New York City's regulations,<sup>243</sup> the Court also explicitly held that musical expression has constitutional protection: "Music, as a form of expression and communication, is protected under the First Amendment."<sup>244</sup> More to the point, the Court explained how "the case has been presented as one in which the constitutional challenge is to the city's regulation of the musical aspects of the concert; and, based on the principle we have stated, the city's guideline must meet the demands of the First Amendment."<sup>245</sup> Accordingly, the Court in *Ward* applied the same type of test to time, place, and manner restrictions on musical expression as it would for those types of restrictions on pure speech:<sup>246</sup> such restrictions are constitutional, "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"<sup>247</sup>

In a case indirectly involving music through parades—*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995)—the Court made some direct statements about music and the First Amendment. In *Hurley*, the Court found that the First Amendment was violated by a state requir-

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241. *Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989).

242. *Id.* at 784–85.

243. *Id.* at 790.

244. *Id.*

245. *Id.*

246. *Id.* at 790–91 ("[W]e decide the case as one in which the bandshell is a public forum for performances in which the government's right to regulate expression is subject to the protections of the First Amendment.").

247. *Id.* at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

ing private citizens who organized a parade to include a group with a message the organizers found disagreeable.<sup>248</sup> Like in *Southeastern Promotions* and *Ward*, the Court in *Hurley* found music to have First Amendment protection: “The protected expression that inheres in a parade is not limited to its banners and *songs*...for the Constitution looks beyond written or spoken words as mediums of expression.”<sup>249</sup> The extent of that protection included music without lyrics and music without a clear message: “a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded...music of Arnold Schönberg.”<sup>250</sup> More recently, the Court has assumed that music communicates messages protected by the First Amendment when striking down<sup>251</sup> a ban on selling violent video games to minors in *Brown v. Entertainment Merchants Association* (2011):

Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and *music*) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection.<sup>252</sup>

*Ward*, along with *Southeastern Promotions* and later cases, opened the door for the other key precedents above—*Brandenburg*, *Watts*, *Cohen*, and *Miller*—to also apply to musical expression in the modern era.

#### IV. “BREAKING THE LAW”: MODERN ATTEMPTS TO CENSOR MUSIC THWARTED IN THE LOWER COURTS

Even before the U.S. Supreme Court more explicitly found music protected by the First Amendment in *Ward*, lower courts were receiving the

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248. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 558–59 (1995).

249. *Id.* at 569. (emphasis added).

250. *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 411 (1974) (per curiam)).

251. *Brown v. Ent. Merch. Ass’n*, 564 U.S. 786, 805 (2011).

252. *Id.* at 790 (emphasis added).

Court's signal in *Southeastern Promotions* and began applying First Amendment standards for pure speech to music. Two early relevant lawsuits involved Ozzy Osbourne. The first of these lawsuits began with the tragic suicide of John Daniel McCollum, who shot and killed himself with a .22 caliber handgun while listening to recordings of Osbourne's songs on October 26, 1984.<sup>253</sup> Specifically, that night McCollum was listening to albums titled *Blizzard of Ozz* and *Diary of a Madman*, including one song titled, "Suicide Solution."<sup>254</sup> On October 25, 1985, McCollum's parents filed a lawsuit against Osbourne and CBS Records, Inc., claiming that the music was the proximate cause of McCollum's death.<sup>255</sup> As explained in court records, some of the lyrics of the song are, "Get the gun and try it, Shoot, shoot, shoot."<sup>256</sup> A Los Angeles Superior Court dismissed the lawsuit on December 19, 1986,<sup>257</sup> with Judge John L. Cole stating at the time that "[w]e have to look very closely at the First Amendment and the chilling effect that would be had if these words were held to be accountable."<sup>258</sup> The case was appealed to the California Court of Appeals, which found that the plaintiffs' lawsuit was barred by the First Amendment in *McCollum v. CBS, Inc.* (1988).<sup>259</sup>

The California Court of Appeals in *McCollum* began its analysis by proclaiming that "artistic expressions such as the music and lyrics here involved"<sup>260</sup> are "generally to be accorded protection under the First Amendment."<sup>261</sup> The court also cited *Cohen* among other cases for the proposition that "the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its

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253. *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 189 (Ct. App. 1988).

254. *Id.* at 189–90.

255. *Id.* at 189.

256. *Id.* at 191.

257. *Id.* at 189.

258. Kim Murphy, *Suit Claiming Ozzy Osbourne Song Led to Suicide Dismissed*, L.A. TIMES (Dec. 20, 1986), <https://www.latimes.com/archives/la-xpm-1986-12-20-mn-4460-story.html> [<https://perma.cc/U4GM-YFS5>].

259. *McCollum*, 249 Cal. Rptr. at 188.

260. *Id.* at 191.

261. *Id.* at 191–92.

content.”<sup>262</sup> After citing *Schad* and more explicitly proclaiming that the “First Amendment guarantees of freedom of speech and expression extend to all artistic and literary expression, whether in music, concerts, plays, pictures or books,”<sup>263</sup> the court explained how there are categories of unprotected speech, including obscenity under *Miller* and incitement to imminent lawless action under *Brandenburg*.<sup>264</sup> The exception at issue in *McCollum* was incitement. After recounting the elements of the *Brandenburg* Test,<sup>265</sup> the court reasoned that to find unprotected incitement, “we must conclude... (1) that Osbourne’s music was directed and intended toward the goal of bringing about the imminent suicide of listeners and (2) that it was likely to produce such a result.”<sup>266</sup> Toward this end, the court reasoned that it “is not enough that John’s suicide may have been the result of an unreasonable reaction to the music; it must have been a specifically intended consequence.”<sup>267</sup>

Applied to the facts of the case, the court in *McCollum* held that Osbourne’s music was protected by the First Amendment because he did not engage in unprotected incitement:

Apart from the “unintelligible” lyrics quoted above from “Suicide Solution,” to which John admittedly was not even listening at the time of his death, there is nothing in any of Osbourne’s songs which could be characterized as a command to an immediate suicidal act. None of the lyrics relied upon by plaintiffs, even accepting their literal interpretation of the words, purport to order or command anyone to any concrete action at any specific time, much less immediately. Moreover, as defendants point out, the lyrics of the song on which plaintiffs focus their primary objection can as easily be viewed as a poetic device, such as a play on

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262. *Id.* at 192 (quoting *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)).

263. *Id.* at 192.

264. *Id.* at 192–93.

265. *Id.* at 193.

266. *Id.*

267. *Id.*

words, to convey meanings entirely contrary to those asserted by plaintiffs.<sup>268</sup>

Thus, following the *Brandenburg* precedent, there was no evidence shown of Osbourne's intent to cause McCollum to end his life, it is unlikely that someone listening to the song would be led to die by suicide, and even if those two elements were present, there was no imminence shown. As explained by the court, Osbourne's advocacy here could be interpreted instead as expressing "a philosophical view that suicide is an acceptable alternative to a life that has become unendurable—an idea which, however unorthodox, has a long intellectual tradition."<sup>269</sup> The *McCollum* court explained that this is constitutionally protected advocacy, even if it might have a "tendency to lead to suicide or other violence,"<sup>270</sup> as punishing such speech was rejected by the U.S. Supreme Court in *Hess*.<sup>271</sup> Giving a nod to artistic expression, the *McCollum* court stated the following: "No rational person would or could believe otherwise nor would they mistake musical lyrics and poetry for literal commands or directives to immediate action. To do so would indulge a fiction which neither common sense nor the First Amendment will permit."<sup>272</sup>

Finally, the California Court of Appeals explained why First Amendment precedents like *Brandenburg*, *Cohen*, and *Miller*—all of which were criminal cases—applied to a civil suit like *McCollum*:

Musical composers and performers, as well as record producers and distributors, would become significantly more inhibited in the selection of controversial materials if liability for civil damages were a risk to be endured for publication of protected speech. The deterrent effect of subjecting the music and recording industry to such liability because of their programming choices would lead

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268. *Id.*

269. *Id.* at 194.

270. *Id.*

271. *Id.*

272. *Id.*

to a self-censorship which would dampen the vigor and limit the variety of artistic expression.<sup>273</sup>

The U.S. Supreme Court has long adopted this understanding of the First Amendment to civil suits as well.<sup>274</sup>

Ozzy Osbourne's second lawsuit raising First Amendment questions was a U.S. district court case, *Waller v. Osbourne* (1991). This case, like *McCullum*, unfortunately arose because of a teenage suicide. Michael Jeffrey Waller's death was caused by a self-inflicted gunshot wound to the head on May 3, 1986.<sup>275</sup> In a wrongful death lawsuit filed on April 28, 1988, Waller's parents claimed that their son repeatedly listened to the "audible and perceptible lyrics" from Osbourne's "Suicide Solution" on a cassette tape of the album *Blizzard of Ozz*.<sup>276</sup> When Osbourne and his co-defendant CBS Records moved to dismiss the lawsuit, the Wallers amended their complaint to allege that it was subliminal messages in "Suicide Solution" that caused their son to take his life.<sup>277</sup> As discovery progressed in the case, a plaintiffs' expert, upon examination of the master tapes of "Suicide Solution," concluded that instead of subliminal messages, which are "not audible,"<sup>278</sup> the song contained "preconscious suggestions"<sup>279</sup> which "can be heard though not necessarily understood."<sup>280</sup> Another plaintiffs' expert identified some unin-

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273. *Id.* at 195.

274. *See, e.g.,* *New York Times Co. v. Sullivan*, 376 U.S. 254, 227 (1964) ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."); *Snyder v. Phelps*, 562 U.S. 443, 451 (2011) ("The Free Speech Clause of the First Amendment—"Congress shall make no law . . . abridging the freedom of speech"—can serve as a defense in state tort suits.").

275. *Waller v. Osbourne*, 763 F. Supp. 1144, 1145–46 (M.D. Ga. 1991) *aff'd*, 958 F.2d 1084 (11th Cir. 1992).

276. *Id.*

277. *Id.* at 1146.

278. *Id.* at 1147.

279. *Id.*

280. *Id.*



telligible words on “Suicide Solution” that she “labeled” as subliminal messages,<sup>281</sup> but the court explained that this expert defined “subliminal” to include indecipherable words, which was not a standard definition of the term.<sup>282</sup>

After finding that the plaintiffs had failed to establish that there were any subliminal messages on the song,<sup>283</sup> U.S. District Judge Duross Fitzpatrick explored the relevant constitutional protections, citing *Schad* and stating the following: “music in the form of entertainment represents a type of speech that is generally afforded first amendment constitutional protection.”<sup>284</sup> Emphasizing the need for content and viewpoint neutrality, Judge Fitzpatrick opined how the Constitution “shields all who write, perform, or disseminate the music irrespective of whether it constitutes aberrant, unpopular, and even revolutionary music.”<sup>285</sup> Nevertheless, citing *Miller*, *Brandenburg*, and other cases, Judge Fitzpatrick concluded that certain categories of expression are not protected by the First Amendment.<sup>286</sup> Like in *McCullum*, the relevant category at issue in *Waller* was incitement to imminent lawless action.<sup>287</sup> After recounting the *Brandenburg* Test,<sup>288</sup> Judge Fitzpatrick cited *Hess* and specifically highlighted temporal considerations: “Supreme Court decisions have further indicated that in making such a finding the primary focus of the court should be on the imminence of the threat.”<sup>289</sup>

Furthermore, applying these considerations to “Suicide Solutions” led Judge Fitzpatrick in *Waller* to draw conclusions remarkably similar to the

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281. *Id.*

282. *Id.* at 1148.

283. *Id.* at 1150.

284. *Id.* at 1150, n.10.

285. *Id.* at 1150.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

*McCollum* court, with a finding that “the defendants did not engage in culpable incitement”<sup>290</sup> because there was “no indication whatsoever that defendants’ music was directed toward any particular person or group of persons. Moreover, there is no evidence that defendants’ music was intended to produce acts of suicide, and likely to cause *imminent* acts of suicide; nor could one rationally infer such a meaning from the lyrics.”<sup>291</sup> Like in *McCollum*, Judge Fitzpatrick in *Waller* concluded that the song “can be perceived as asserting in a philosophical sense that suicide may be a viable option one should consider in certain circumstances.”<sup>292</sup> Although Judge Fitzpatrick characterized this advocacy by Osbourne as “irresponsible and callous,”<sup>293</sup> he held that mere general advocacy of such ideas remains protected by the First Amendment, stating that “an abstract discussion of the moral propriety or even moral necessity for a resort to suicide, is not the same as indicating to someone that he should commit suicide and encouraging him to take such action.”<sup>294</sup> Judge Fitzpatrick granted summary judgment in favor of the Defendant, finding Osbourne’s music to be protected speech.<sup>295</sup> The decision was summarily affirmed by the Court of Appeals for the Eleventh Circuit in 1992,<sup>296</sup> and the U.S. Supreme Court denied *certiorari* the same year.<sup>297</sup>

Whether or not subliminal messages were contained in music was at issue in a 1990 trial in Nevada involving the band Judas Priest. *Vance v. Judas Priest* (1990) arose out of another tragedy. On the evening of Decem-

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290. *Id.* at 1151.

291. *Id.* (emphasis in original).

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at 1152–53.

296. *Waller v. Osbourne*, 958 F.2d 1084 (11th Cir. 1992).

297. *Waller v. Osbourne*, 506 U.S. 916 (1992).

ber 23, 1985, Raymond Belknap and James Vance entered an empty churchyard with a sawed-off shotgun.<sup>298</sup> Belknap shot himself, dying instantly.<sup>299</sup> Vance shot himself that night as well, suffering serious injuries, which ultimately played a large role in his death three years later.<sup>300</sup> The parents of both boys filed a lawsuit against Judas Priest, claiming that a song, “Better by You, Better Than Me” on the band’s 1978 *Stained Class* album contained a subliminal phrase “Do It” that triggered a suicidal impulse in the boys.<sup>301</sup> Although the band denied placing subliminal messages in the song, the case went to trial, and several experts testified on the issue of subliminal messages.<sup>302</sup> The trial judge, Jerry Carr Whitehead, concluded that the words “Do It” were present several times in the song, and that they were subliminal,<sup>303</sup> meaning they were “so faint as to be below the level of conscious awareness.”<sup>304</sup> However, Judge Whitehead also concluded in *Vance* that the words were *not* intentionally formed, as they were instead “the result of a chance combination of sounds.”<sup>305</sup> Even though he found that Vance and Belknap perceived subliminal stimuli from listening to the song,<sup>306</sup> Judge Whitehead also ruled that there was not enough evidence presented to establish that these subliminal stimuli could affect the conduct at issue in the case.<sup>307</sup> Thus, Judas Priest prevailed.<sup>308</sup>

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298. *Judas Priest v. Second Jud. Dist. Ct. of State of Nev.*, 760 P.2d 137, 138 (Nev. 1988).

299. *Id.*; Timothy E. Moore, Scientific Consensus and Expert Testimony: Lessons from the Judas Priest Trial, *Skeptical Inquirer*, Nov./Dec. 1996, at 32, 33.

300. *Judas Priest*, 760 P.2d at 138; Moore, *supra* note 299, at 33.

301. Moore, *supra* note 299, at 33.

302. *Id.* at 33–35.

303. *Vance v. Judas Priest*, No. 86-3939, 1990 WL 130920, at \*8–9 (Nev. Dist. Ct. Aug. 24, 1990).

304. *Id.* at \*9.

305. *Id.*

306. *Id.* at 13.

307. *Id.* at 14.

308. *Id.* at 21.

Judge Whitehead also made some pronouncements about the First Amendment in *Vance*. Most notably, he agreed that the protection of lyrics should be evaluated according to *Brandenburg*: “if the only issue before us were whether the lyrics of the song were protected speech, the Court would follow the incitement standard in *Brandenburg* and hold that the lyrics were protected speech.”<sup>309</sup> Nevertheless, Judge Whitehead thought that subliminal messages had to be evaluated differently because “the constitutional issues raised by the use of subliminal communication are so entirely different than those raised by the use of supraliminal music lyrics...”<sup>310</sup> Judge Whitehead concluded that subliminal messages in musical recordings are *not* entitled to First Amendment protection, because they do not advance any theories supporting the freedom of speech, they subject listeners to unwanted speech, and they are outweighed by the listener’s right of privacy.<sup>311</sup>

Putting aside what one defense witness later characterized as a trial involving “a classic example of junk science” as it relates to subliminal messages,<sup>312</sup> even the trial judge in *Vance* made clear that supraliminal musical lyrics should be evaluated according to the existing First Amendment precedents of the U.S. Supreme Court, including *Brandenburg*. Although the case was part of the 1980s anxiety over allegations of Satanic subliminal messages in heavy metal records,<sup>313</sup> Judge Whitehead disregarded this, instead applying relevant Court precedent, which resulted in the band winning the case.

The courts were protecting free expression in music during this period, but censorship was on the minds of multiple politicians in the legislative and executive branches at the federal and state levels. Some of this was directed at the highly questionable notion of brainwashing through subliminal lyrics.<sup>314</sup> During the 1980s, legislation was introduced in the California Assembly which would have banned subliminal messages from being inserted in musical recordings, and one bill introduced in Congress would have created

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309. *Id.* at 22.

310. *Id.*

311. *Id.* at 23.

312. Moore, *supra* note 299, at 33–35.

313. JAMES KENNAWAY, *BAD VIBRATIONS: THE HISTORY OF THE IDEA OF MUSIC AS A CAUSE OF DISEASE* 21 (2016).

314. *See id.* at 139–143.

a warning label for recordings with subliminal messages.<sup>315</sup> It was during this same era that the infamous Parents Music Resource Center (PMRC) hearing took place in the U.S. Senate's Committee on Commerce, Science, and Transportation to review what had been dubbed "porn rock," that was alleged to glorify through its lyrics sex, drugs, profanity, violence, and Satanism to young people.<sup>316</sup> The PMRC—led by, among others, Tipper Gore, then-wife of then-Senator Al Gore—was opposed to the sale and broadcast of music they deemed unsuitable for children, and they proposed warning labels and a rating system for albums.<sup>317</sup> Although the Senate hearing was held without proposed legislation, the threat of legislation was insinuated if the industry failed to act.<sup>318</sup> The PMRC's proposed rating system for music included "X" for music with lyrics that were sexually explicit or profane, "O" for references to the Occult, "D/A" for content with drugs or alcohol, and "V" for music that dealt with violent themes.<sup>319</sup> If it had been imposed by the government, such a ratings system would be a content-based regulation facing serious First Amendment questions<sup>320</sup> (eventually, the private Recording Industry Association of America, Inc., acting in response to the PMRC and the Senate hearing, provided participating companies with the option to affix to albums a warning label reading, "Explicit Lyrics—Parental

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315. BLECHA, *supra* note 35, at 51–52.

316. NUZUM, *supra* note 96, at 251–252; CORN-REVERE, *supra* note 54, at 128; Kory Grow, *PMRC's 'Filthy 15': Where Are They Now?*, ROLLING STONE (Sept. 17, 2015), <https://www.rollingstone.com/music/music-lists/pmrcs-filthy-15-where-are-they-now-60601/> [https://perma.cc/7RDR-76CL].

317. Wendy B. Kaufmann, *Song Lyric Advisories: The Sound of Censorship*, 5 CARDOZO ARTS & ENT. L. J. 225, 229–231, n.21 (1986).

318. NUZUM, *supra* note 96, at 251–52.

319. Grow, *supra* note 316.

320. See Mathieu Deflem, *Popular Culture and Social Control: The Moral Panic on Music Labeling*, 45 AM. J. CRIM. JUST. 2, 13 (2019) ("Legal scholars...argued that the labeling of records poses serious First Amendment issues because of the chilling effect the system might have as a *de facto* form of censorship, which might eventually lead to legislation regulating certain kinds of music. Legal commentaries following the 1985 Senate Hearing that considered the possibility of music being criminalized through legislation argued that such laws could never be upheld in a court of law." (internal citations omitted)).

Advisory”<sup>321</sup>). Even President Ronald Reagan launched an attack on the music industry in October 1985, lumping it in with pornographers and publishers in their “glorification of drugs, violence and perversity,”<sup>322</sup> questioning their First Amendment protection: “I don’t believe that our Founding Fathers ever intended to create a nation where the rights of pornographers would take precedence over the rights of parents, and the violent and malevolent would be given free rein to prey upon our children.”<sup>323</sup>

Beyond presidential statements and legislative hearings, there were more concrete threats to musical expression during this time from local governments and law enforcement; the courts were the only institution blocking overzealous censors from attacking the First Amendment rights of musical artists. In 1986, criminal charges were filed against Jello Biafra of the Dead Kennedys for the distribution of harmful material to minors.<sup>324</sup> What initiated the controversy was one of the band’s albums, *Frankenchrist*, which included a poster of a painting, titled *Landscape #20, Where Are We Coming From?*, by acclaimed Swiss artist H.R. Giger.<sup>325</sup> The painting has been colorfully described by pop culture writer Eric Nuzum as featuring “about a dozen sets of interlocked male and female genitalia...it is difficult to tell where one set of genitalia ends and another begins.”<sup>326</sup> The album also contained a warning sticker that read as follows: “Warning: The inside fold-out to this record is a work of art by H.R. Giger that some people may find shocking, repulsive, and offensive. Life can be that way sometimes.”<sup>327</sup> The warning was not sufficient for the prosecutor, who took the case to trial.<sup>328</sup> The trial judge had the jury consider not just the artwork, but also the content of

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321. Kaufmann, *supra* note 317 at 225–26, 233–34.

322. Bernard Weinraub, *Rock Lyrics Irk Reagan*, N.Y. TIMES (Oct. 10, 1985), <https://www.nytimes.com/1985/10/10/arts/rock-lyrics-irk-reagan.html> [<https://perma.cc/48CF-BGUK>].

323. *Id.*

324. DEENA WEINSTEIN, *ROCK’N AMERICA: A SOCIAL AND CULTURAL HISTORY* 231 (2015).

325. NUZUM, *supra* note 96, at 255–56.

326. *Id.*

327. WEINSTEIN, *supra* note 324, at 231.

328. *Id.*

the album, including the lyrics.<sup>329</sup> At issue was whether the material on the album was prurient (according to *Miller*) or if it was hard-core sexual material being distributed to children.<sup>330</sup> However, the prosecution could not convince a sufficient number of jurors that the album artwork was criminal, and the case resulted in a mistrial in 1987.<sup>331</sup> The political motivations behind the prosecution were revealed years later when the prosecutor apologized to Biafra and admitted that he was trying to appeal to voters in anticipation of an upcoming election.<sup>332</sup> The U.S. Supreme Court's obscenity precedents were enough to stop the prosecution in the jury room, although the financial and time pressures on the Dead Kennedys ultimately caused the band to break up during the trial.<sup>333</sup>

After a rather controversial Beastie Boys concert in February 1987,<sup>334</sup> Jacksonville, Florida passed an ordinance requiring "adult" performances to print on the ticket a warning stating, "for mature audiences only."<sup>335</sup> However, the real target of the ordinance appeared to be the Beastie Boys, as the tickets for the group's concert in August 1987 were the only tickets that the city required to bear such a warning.<sup>336</sup> The band sued the city and won the case, with the city agreeing to pay \$1,000 plus legal fees.<sup>337</sup> In agreeing to a

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329. Gil Kaufman, *Belated Apology From Attorney Who Prosecuted Dead Kennedys*, MTV (Jul. 7, 1997), <https://www.mtv.com/news/613/belated-apology-from-attorney-who-prosecuted-dead-kennedys/> [https://perma.cc/39QL-4MA3].

330. *Id.*

331. WEINSTEIN, *supra* note 324, at 231; Paul Feldman, *Pornography Charges Against Singer Biafra Dropped After Deadlock*, L.A. TIMES (Aug. 28, 1987), <https://www.latimes.com/archives/la-xpm-1987-08-28-me-2961-story.html> [https://perma.cc/39QL-4MA3].

332. WEINSTEIN, *supra* note 324, at 231.

333. *Id.*

334. According to reports, at the February 1987 concert, "the rap group had displayed a 21-foot-long phallus, one member of the band exposed his buttocks to the audience and the group's members urged women to expose their breasts." *City To Pay Beastie Boys \$1,000 Over Ticket Warning*, ASSOCIATED PRESS (June 14, 1988), <https://apnews.com/article/ec7f792da6cc974e8e9ccc3bfc136ad8> [https://perma.cc/WUQ9-TM7W].

335. *Id.*

336. *Id.*

337. *Id.*

permanent injunction against enforcement of the ordinance, the city conceded that the ordinance violated the First Amendment and Fourteenth Amendment protections for freedom of speech and due process.<sup>338</sup> Such stipulations were possible because of the Supreme Court's evolving protections for the freedom of expression.

Other artists in the late 1980s and early 1990s were mistreated by law enforcement, and this was particularly the case with black rappers. N.W.A. released the album *Straight Outta Compton* in 1989, which contained the song "Fuck tha Police."<sup>339</sup> FBI agent Milt Ahlerich sent a letter to N.W.A.'s record distributor, alleging that the album "encourages violence against and disrespect for the law-enforcement officer."<sup>340</sup> The letter carried with it the implication that this was an official pronouncement of the FBI, as Ahlerich wrote, "I wanted you to be aware of the FBI's position relative to this song and its message."<sup>341</sup> When N.W.A. started to perform "Fuck tha Police" in Detroit in August 1989, police rushed the stage and ended the show, although no arrests were made.<sup>342</sup>

Members of the heavy metal band GWAR were arrested in North Carolina in 1990 for simulating anal intercourse during a concert; they received a fine and a ban from performing in the state for one year.<sup>343</sup> In other cases, though, First Amendment rights were respected by law enforcement. When Ice-T's band Body Count released the song "Cop Killer" in 1992, elected officials and police organizations criticized the lyrics, even arguing that the song incited violence,<sup>344</sup> but no charges or lawsuits were filed. Unlike Agent Ahlerich writing a letter implying that he was speaking for the FBI, public

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338. *Id.*

339. BRYAN J. MCCANN, *THE MARK OF CRIMINALITY: RHETORIC, RACE, AND GANGSTA RAP IN THE WAR-ON-CRIME ERA* 54 (2017).

340. Deflem, *supra* note 320, at 16.

341. Peter Hart, *Straight Outta Compton's Censorship Lesson*, NAT'L COAL. AGAINST CENSORSHIP (Aug. 25, 2015), <https://ncac.org/news/blog/straight-outta-comptons-censorship-lesson> [<https://perma.cc/K3B8-NQ76>].

342. MCCANN, *supra* note 339, at 54; JERRY HEALER WITH GIL REAVILL, *RUTHLESS: A MEMOIR* 154–57 (2006).

343. Deflem, *supra* note 320, at 16.

344. *Id.* at 16–17.



officials or law enforcement officers who personally criticize artistic expression do not violate the First Amendment.<sup>345</sup> Indeed, law enforcement and other public employees have a First Amendment right to speak as citizens on matters of public concern, as long as it does not interfere with their public employers' ability to operate efficiently and effectively.<sup>346</sup> This free speech right for law enforcement and other public employees also applies in a collective capacity if such entities form non-profit groups to express their messages.<sup>347</sup>

A more serious situation developed in the 1990s involving both criminal prosecutions and civil suits over the songs composed by the hip hop group 2 Live Crew. Although there were some legal difficulties encountered by retailers selling some of the group's earlier albums,<sup>348</sup> the most controversial attempts to ban 2 Live Crew's work centered on their 1989 album *As Nasty As They Wanna Be*. According to one count, the album's song lyrics contained 226 uses of the word "fuck," 163 uses of "bitch" or "whore" when referring to women, 87 references to oral sex, and one discussion of incest.<sup>349</sup> The most notable case trying to restrict dissemination of the album arose in Broward County, Florida, where the sheriff's department began investigating *As Nasty As They Wanna Be* in February 1990.<sup>350</sup> Deputy Sheriff Mark Wichner purchased a cassette of the album in a local music store, transcribed it, and prepared an affidavit requesting that a Broward County Circuit Court find probable cause that it was obscene.<sup>351</sup> Circuit Court Judge Mel Grossman, after reviewing the entirety of the album, found probable cause that it

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345. See Hart, *supra* note 341.

346. *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

347. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342–43 (2010).

348. NUZUM, *supra* note 96, at 260 (a record store clerk was arrested in Callaway, Florida in 1987 for selling 2 Live Crew's album *2 Live Is What We Are* to a minor); Brian O'Gallagher & David P. Gaertner, *2 Live Crew and Judge Gonzalez Too – 2 Live Crew and the Miller Obscenity Test*, 18 J. LEGIS. 105, 105–06 (1991) (a record store owner was arrested in Alexandria, Alabama in 1988 for selling 2 Live Crew's albums *2 Live Is What We Are* and *Move Somethin'* to an undercover police officer; after being convicted of obscenity charges in municipal court, that record store owner appealed the case to have a jury trial in circuit court, where the case was overturned).

349. NUZUM, *supra* note 96, at 186.

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

351. *Id.* at 583.

was obscene on March 9, 1990.<sup>352</sup> Thereafter, sheriff's deputies visited approximately 15-20 stores in the county, warning employees that continued sale of the album could result in arrest, that selling obscenity to a minor is a felony, and that selling obscenity to an adult is a misdemeanor.<sup>353</sup> Local radio and television stations reported on the actions of the sheriff's office<sup>354</sup> (making it known to the public that censorship efforts were being undertaken), and the sheriff's office received no further evidence that stores in the county continued to sell the original version of the album containing explicit lyrics.<sup>355</sup>

On March 16, 1990, members of 2 Live Crew filed a federal lawsuit against Broward County Sheriff Nicholas Navarro.<sup>356</sup> After a trial, on June 6, 1990, U.S. District Judge Jose Gonzalez ruled that the album was obscene in *Skywalker Records, Inc. v. Navarro* (1990).<sup>357</sup> Judge Gonzalez used the three-part *Miller* Test in *Skywalker Records*, applying factors from that test to the facts of the case, including determining what the relevant "community" was and who the "average person" was.<sup>358</sup>

Regarding the first prong of the *Miller* Test, Judge Gonzalez found the album appealed to the prurient interest because "its lyrics and the titles of its songs are replete with references to female and male genitalia, human sexual excretion, oral-anal contact, fellatio, group sex, specific sexual positions, sado-masochism, the turgid state of the male sexual organ, masturbation, cunnilingus, sexual intercourse, and the sounds of moaning."<sup>359</sup> Even though both lay and expert witnesses testified that listening to *As Nasty As They*

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352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.* at 582–83.

356. *Id.* at 583.

357. *Id.* at 578, 582, 603.

358. *Id.* at 587–91.

359. *Id.* at 591.

*Wanna Be* did not physically excite them sexually,<sup>360</sup> Judge Gonzalez found the album to appeal “to a shameful and morbid interest in sex.”<sup>361</sup>

Regarding the second prong of *Miller*, Judge Gonzalez found the album to be patently offensive because of its “graphic detail.”<sup>362</sup> “The specificity of the descriptions makes the audio message analogous to a camera with a zoom lens, focusing on the sights and sounds of various ultimate sex acts...With the exception of part B on Side 1, the entire Nasty recording is replete with explicit sexual lyrics.”<sup>363</sup> Judge Gonzalez stated that this “is not a case of subtle references or innuendo, nor is it just ‘one particular scurrilous epithet’ as in *Cohen v. California*.”<sup>364</sup> Judge Gonzalez seemed to indicate that music should receive less protection than other forms of expression because “music...can certainly be more intrusive to the unwilling listener than other forms of communication.”<sup>365</sup> Judge Gonzalez explained his finding in this way:

A person can sit in public and look at an obscene magazine without unduly intruding upon another’s privacy; but...music is made to be played and listened to. A person laying on a public beach, sitting in a public park, walking down the street, or sitting in his automobile waiting for the light to change is, in a sense, a captive audience.<sup>366</sup>

As for the third prong of *Miller*, Judge Gonzalez examined it from the perspective of a reasonable person according to *Pope*.<sup>367</sup> Denying the plaintiffs’ expert witness testimony, which explained how the album contained serious political value from the African American community and serious

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360. *Id.* at 592.

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.* (quoting *Cohen v. California*, 403 U.S. 15, 22 (1971)).

365. *Id.* at 593.

366. *Id.*

367. *Id.* at 593–94.

sociological value due to cultural devices at work in the lyrics,<sup>368</sup> Judge Gonzalez concluded that “2 Live Crew has ‘borrowed’ components called ‘riffs’ from other artists...the several riffs do not lift *Nasty* to the level of a serious artistic work. Once the riffs are removed, all that remains is the rhythm and the explicit sexual lyrics which are utterly without any redeeming social value.”<sup>369</sup>

Even though the Judge Gonzalez found the album obscene, he also permanently enjoined the sheriff from threatening employees and owners of music stores because the judge found such action to be unconstitutional prior restraint.<sup>370</sup> Here, Judge Gonzalez relied on *Southeastern Promotions* to declare that “[p]rior restraints are repugnant to the right of free speech.”<sup>371</sup> As Judge Gonzalez explained, “the courts and not nonjudicial officials...must decide whether a specific work is obscene,”<sup>372</sup> because “the line between free speech and obscenity is so subtle.”<sup>373</sup> Therefore, Judge Gonzalez emphasized the need to follow strict procedural guidelines in cases where such works were being seized.<sup>374</sup> In this case, the only procedural safeguards put in place were an *ex parte* application to a circuit court judge and the circuit court judge’s order itself.<sup>375</sup> Again citing *Southeastern Promotions*, Judge Gonzalez explained how “[t]he final decision of whether *As Nasty As They Wanna Be* would be published was left in the nonjudicial hands of the Broward County Sheriff’s office.”<sup>376</sup> Accordingly, this was an unconstitu-

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368. *Id.* at 594.

369. *Id.* at 595–96.

370. *Id.* at 603.

371. *Id.* at 596.

372. *Id.* at 597.

373. *Id.*

374. *Id.*

375. *Id.* at 600.

376. *Id.* at 598.

tional prior restraint which meant “the plaintiffs’ rights to publish presumptively protected speech were left twisting in the chilling wind of censorship.”<sup>377</sup>

In sum, the U.S. district court ruling held that Sheriff Navarro’s actions, up to that point, were unconstitutional. However, like Judge Grossman, Judge Gonzalez also declared that a musical album was obscene and outside of First Amendment protection, thus keeping open the door to possible criminal prosecution.<sup>378</sup> Two days after Judge Gonzalez’s ruling, on June 8, 1990, the owner of E-C Records in Ft. Lauderdale, Florida was arrested for selling *As Nasty As They Wanna Be*.<sup>379</sup> On June 10, 1990, the Broward County Sheriff’s Office arrested 2 Live Crew members Luther Campbell and Chris Wongwon on obscenity charges for performing at an adults-only club in Hollywood, Florida.<sup>380</sup> The owner of E-C Records was convicted of selling obscenity on October 3, 1990, fined \$1,000, and ultimately had to close the store due to financial problems.<sup>381</sup> On October 20, 1990, a different jury acquitted Campbell and Wongwon of obscenity charges.<sup>382</sup> Elsewhere in the country, the Westerly, Rhode Island town council revoked the band’s entertainment license to perform a live show on October 6, 1990, but the band successfully sought an injunction against the town in U.S. district court;<sup>383</sup> a state judge in Bexar County, Texas dismissed criminal charges of promoting pornography against a record store owner in San Antonio on December 10, 1990.<sup>384</sup>

With all of this criminal and civil court activity, it is no surprise that 2 Live Crew appealed Judge Gonzalez’s obscenity finding to the U.S. Court of

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377. *Id.* at 600.

378. O’Gallagher & Gaertner, *supra* note 348, at 107–08.

379. *Id.* at 108.

380. *Id.*

381. *Id.* at 109.

382. *Id.*

383. *Id.*

384. *Id.*

Appeals for the Eleventh Circuit. The court of appeals reversed Judge Gonzalez's obscenity ruling in *Luke Records, Inc. v. Navarro* (1992).<sup>385</sup> In a *per curiam* opinion, the Eleventh Circuit began by noting how "[t]his case is apparently the first time that a court of appeals has been asked to apply the *Miller* test to a musical composition, which contains both instrumental music and lyrics."<sup>386</sup> The court indicated that it "tend[ed] to agree with appellants' contention that because music possesses inherent artistic value, no work of music alone may be declared obscene,"<sup>387</sup> although the court did not issue a ruling that music could *never* be obscene because it was not specifically presented by the parties in the case.<sup>388</sup> As to the facts of *Luke Records*, the court found that Judge Gonzalez lacked the evidence to find the album obscene. Sheriff Navarro's sole evidence was the album, as he called no expert witnesses.<sup>389</sup> On the other hand, 2 Live Crew called several witnesses.<sup>390</sup> A staff writer for a weekly arts and news publication testified that the group engaged in musical innovations with serious musical value.<sup>391</sup> A pop music critic for *Newsday* testified to the artistic value of rap generally and 2 Live Crew specifically.<sup>392</sup> A Rhodes scholar with a political science Ph.D. testified to the "political significance" and "numerous literary conventions, such as alliteration, allusion, metaphor, rhyme, and personification" contained in *As Nasty As They Wanna Be*.<sup>393</sup> Particularly since Judge Gonzalez decided the case without a jury, under *Pope* there was insufficient record for the judge to determine that according to contemporary community standards the album

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385. *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 135 (11th Cir. 1992).

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at 136.

390. *Id.* at 136–37.

391. *Id.* at 136.

392. *Id.*

393. *Id.* at 137.

lacked serious artistic value “simply by listening to this musical work.”<sup>394</sup> The U.S. Supreme Court denied *certiorari* in December 1992.<sup>395</sup>

Thus, the craze associated with *As Nasty As They Wanna Be* and 2 Live Crew came to a close. There were isolated actions trying to restrict musical expression as the 1990s progressed, but with favorable court decisions in *McCullum* and *Waller* applying the *Brandenburg* Test to music, and the *Luke Records* decision applying the *Miller* Test to songs, the courts were sending a strong signal that music would, in fact, receive the same First Amendment protection as pure speech and printed publication. But the signal was not always received by law enforcement and legislators. In 1992, the Washington State Legislature added “sound recordings” to the list of materials deemed “harmful to minors,” but the law was struck down in Washington state court the same year,<sup>396</sup> with the state supreme court finding that the law was an overbroad prior restraint in *Soundgarden v. Eikenberry* (1994).<sup>397</sup> Just like it did from the 1950s through the 1980s, Congress held more hearings on music in the 1990s, including a House subcommittee hearing in 1994 focusing on rap music<sup>398</sup> and a Senate committee in 1997 investigating the “Parental Advisory” labeling system,<sup>399</sup> although no legislation resulted from either hearing. To show how much First Amendment case law was protecting musical artists by the 1990s (compared to earlier decades), Marilyn Manson was arrested in 1994 for allegedly violating a Jacksonville, Florida adult entertainment ordinance with some of the more sexually explicit portions of his performance during a concert, but he was not convicted of any charges.<sup>400</sup>

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394. *Id.* at 138–39.

395. *Navarro v. Luke Recs., Inc.*, 506 U.S. 1022 (1992).

396. Jim McCormick, *Protecting Children from Music Lyrics: Sound Recordings and “Harmful to Minors” Statutes*, 23 GOLDEN GATE U. L. REV. 679, 680 (1993).

397. *Soundgarden v. Eikenberry*, 123 Wash. 2d 750, 778 (1994).

398. CORN-REVERE, *supra* note 54, at 147–49.

399. BLECHA, *supra* note 35, at 173.

400. Gary Dinges, ‘*We Are Chaos*’: *As Marilyn Manson’s Latest Album Arrives, We Look Back at His Most Shocking Moments*, USA TODAY (Sept. 11, 2020), <https://www.usatoday.com/story/entertainment/music/2020/09/11/we-chaos-look-back-marilyn-mansons-most-shocking-moments/3459633001/> [https://perma.cc/HZ3D-3JRM].

One of the most serious First Amendment cases involving music in the mid-to-late 1990s occurred in *Davidson v. Time Warner, Inc.* (1997). The case involved Tupac Shakur's 1991 album, *2Pacalypse Now*, which included songs like "Trapped" and "Soulja's Story," in which the lyrics depict characters killing police officers.<sup>401</sup> In April 1992, Ronald Howard was driving a stolen vehicle in Jackson County, Texas, when State Trooper Bill Davidson conducted a traffic stop of the vehicle.<sup>402</sup> Trooper Davidson was not aware the vehicle Howard was driving was stolen.<sup>403</sup> At the time of the stop, Howard was listening to *2Pacalypse Now*.<sup>404</sup> During the stop, Howard fatally shot Trooper Davidson.<sup>405</sup> After Howard's trial, in which he claimed that listening to *2Pacalypse Now* caused him to murder Trooper Davidson, Davidson's family filed a civil lawsuit against Shakur and the distributors and manufacturers of the album, including Time Warner and Interscope Records.<sup>406</sup> The Davidsons claimed in their lawsuit that the album was outside of First Amendment protection because it was obscene, included fighting words, was defamatory toward law enforcement officers, and incited imminent lawless action.<sup>407</sup>

In *Davidson*, U.S. District Judge John Rainey granted the Defendants' motion for summary judgment.<sup>408</sup> In beginning his constitutional analysis, Judge Rainey reasoned how "*2Pacalypse Now*, as music, receives full First

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401. BEN WESTHOFF, ORIGINAL GANGSTAS: THE UNTOLD STORY OF DR. DRE, EAZY-E, ICE CUBE, TUPAC SHAKUR, AND THE BIRTH OF WEST COAST RAP, 221–22 (2016).

402. *Davidson v. Time Warner, Inc.*, No. CIV. A. V-94-006, 1997 WL 405907, 1 (S.D. Tex. Mar. 31, 1997).

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*



Amendment protection,”<sup>409</sup> and “First Amendment protection is not weakened because the music takes an unpopular or even dangerous viewpoint.”<sup>410</sup> As to obscenity, Judge Rainey applied the *Miller* Test, finding that although the album “is riddled with expletives and depictions of violence, and overall the album is extremely repulsive,”<sup>411</sup> it “lacks the ‘patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals’ required by the Supreme Court” in *Miller*.<sup>412</sup> Put another way by the court, the album appealed to violence, but there was “no evidence the recording was made to appeal to the *prurient* interest.”<sup>413</sup>

Judge Rainey next dealt with the question of fighting words, which Judge Rainey recounted includes, under *Chaplinsky v. New Hampshire* (1942),<sup>414</sup> “when an individual hurls epithets at another, causing the latter to retaliate against the speaker.”<sup>415</sup> Citing *Cohen*,<sup>416</sup> Judge Rainey summarily explained how the album could not constitute unprotected fighting words under the First Amendment: “The ‘fighting words’ doctrine generally does not apply when one person’s epithets causes another to commit violence against a third, nonhearing party. In other words, the doctrine requires the epithets to be of a personal nature not present in this case.”<sup>417</sup> Since the album was “a recording which fails to direct its invective at any specific person in this case,”<sup>418</sup> it could not constitute fighting words that are outside of First Amendment protection. Indeed, as previously explained by the Supreme Court, fighting words are only “those which by their very utterance

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409. *Id.* at \*12.

410. *Id.* at \*15.

411. *Id.* at \*17.

412. *Id.*

413. *Id.* (emphasis in original).

414. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

415. *Davidson*, 1997 WL 405907, at \*18.

416. *Id.*

417. *Id.*

418. *Id.* at \*19.

inflict injury or tend to incite an immediate breach of the peace,”<sup>419</sup> and can only occur if they are directed to the person of the hearer.<sup>420</sup>

Judge Rainey then analyzed whether the album could constitute incitement to imminent lawless action according to *Brandenburg*, finding that while it was possible that Shakur *intended* to promote lawlessness, there was no proof that Shakur was *likely to imminently* incite Howard to kill.<sup>421</sup> The key to this analysis is that, “[a]t worst, Shakur’s intent was to cause violence some time after the listener considered Shakur’s message.”<sup>422</sup> Judge Rainey found no evidence that Shakur’s message was directed at Howard personally, and Judge Rainey reasoned that there would be difficulty in particular in showing that a recording (as opposed to a live performance) could imminently incite a person to act.<sup>423</sup> Additionally, Judge Rainey found that incitement was unlikely with this album, citing the fact that over 400,000 copies had been sold<sup>424</sup> without a resulting tsunami of music-induced violence breaking out among Shakur’s fans. Thus, another court made use of *Brandenburg*, *Cohen*, and *Miller* to find that a musical recording was protected by the First Amendment.

Collectively, these decisions sent a signal that incitement, obscenity, and profanity prosecutions or lawsuits against musical artists would be difficult, if not impossible, to win. Over the next several years, legal actions against musicians’ art became relatively sparse. Rapper Shawn Thomas, aka C-BO, was arrested for allegedly violating conditions of his parole.<sup>425</sup> Thomas was arrested due to lyrics from his song, “Deadly Game,” which were critical of California’s “three-strikes-and-you’re-out” law, because they were alleged to encourage violence against law enforcement in violation of Thomas’s parole conditions.<sup>426</sup> Although the terms of his parole raised

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419. *Chaplinsky*, 315 U.S. at 572.

420. *Cohen v. California*, 403 U.S. 15, 20 (1971).

421. *Davidson*, 1997 WL 405907, at \*20.

422. *Id.*

423. *Id.* at \*21.

424. *Id.* at \*20.

425. Anita M. Samuels, *Comebacks, Rap Smashes Spark R&B*, BILLBOARD, Dec. 26, 1998, at 36 [<https://perma.cc/MP9V-ZF7L>].

426. *Id.*

First Amendment questions,<sup>427</sup> Thomas was released after his arrest, with the only increase in his parole being due to testing positive for marijuana, not for any of his lyrics.<sup>428</sup> Rapper Marshall Mathers, aka Eminem, was investigated by the Secret Service in 2003 for lyrics in his song, “We As Americans,” as potential threats against President George W. Bush.<sup>429</sup> The lines at issue were as follows: “Fuck money/I don’t rap for dead presidents/I’d rather see the president dead/It’s never been said, but I set precedents.”<sup>430</sup> The investigation did not result in any criminal charges against Mathers.<sup>431</sup> This should not be surprising, as these lyrics are the same type of “political hyperbole” uttered by Watts,<sup>432</sup> and in Mathers’s case, the lines did not even refer to a specific president (Watts referred to President Lyndon Johnson in his speech<sup>433</sup>). The FCC for a time attempted to stop radio stations from playing the clean version of Mathers’s “The Real Slim Shady” for its “unmistakable offensive sexual references,” but months later the FCC revised its interpretation, finding that the radio edit version of the song was not “expressed in terms sufficiently explicit or graphic enough to be found patently offensive.”<sup>434</sup> This language used by the FCC reflects the standard from *Mil-ler*, showing the impact of that Court decision on protecting musical expression.

Following the Secret Service’s investigation of Mathers, relevant prosecutions and punishments imposed by government in the twenty-first century against musical artists have largely been focused on true threats, rather than

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427. Anita M. Samuels, *Rapper’s Lyrics Bring Parole Arrest*, BILLBOARD, Mar. 14, 1998, at 144 (The terms of Thomas’s parole included that he “not engage in any behavior that promotes the gang lifestyle, criminal behavior, and/or violence against law enforcement.” According to Taylor Flynn of the American Civil Liberties Union, that requirement “leaves the decision on what is acceptable material to a single parole officer, which is shocking. The government is not supposed to be in the business of policing ideas.”).

428. Samuels, *supra* note 425, at 36.

429. ANTHONY BOZZA, NOT AFRAID: THE EVOLUTION OF EMINEM 12 (2019).

430. *Id.*

431. *Id.*

432. *Watts v. United States*, 394 U.S. 705, 706-08 (1969).

433. *Id.* at 706.

434. CORN-REVERE, *supra* note 54, at 212–13.

incitement, obscenity, or profanity. One such threat case was *Bell v. Itawamba County School Board* (2015), involving a high school senior, Taylor Bell (aka T-Bizzle), who in January 2011 posted a rap song on Facebook and YouTube that alleged misconduct by two male coaches against female students.<sup>435</sup> The song identified the coaches by name, with several of the lyrics engaging in what the U.S. Court of Appeals for the Fifth Circuit categorized as threatening, harassing, and intimidating language.<sup>436</sup> Such language included the phrases “betta watch your back,” “I’m going to hit you with my rueger [*sic*],” and “going to get a pistol down your mouth.”<sup>437</sup> The school suspended Bell, eventually finding that the recording constituted, among other things, threats toward the teachers mentioned by name.<sup>438</sup> Bell, however, claimed that “he did not mean *he* was going to shoot anyone, but that he was only ‘foreshadowing something that might happen.’”<sup>439</sup> A U.S. district court judge ruled in favor of the school district, applying the *Tinker v. Des Moines Independent Community School District* (1969)<sup>440</sup> material and substantial disruption standard, rather than the *Watts* true threat analysis, because the case involved a student in a public school.<sup>441</sup> On appeal, a three-judge court of appeals panel declined to undertake the *Tinker* analysis because the song was composed, recorded, and posted online during non-

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435. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 383–84 (5th Cir. 2015).

436. *Id.* at 384–85.

437. *Id.* at 384.

438. *Id.* at 385–87.

439. *Id.* at 386 (emphasis supplied by the court).

440. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). (“In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.” (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

441. *Bell v. Itawamba Cnty. Sch. Bd.*, 859 F. Supp. 2d 834, 837–38 (N.D. Miss. 2012) aff’d in part, rev’d in part and remanded, 774 F.3d 280 (5th Cir. 2014), on reh’g en banc, 799 F.3d 379 (5th Cir. 2015), and aff’d, 799 F.3d 379 (5th Cir. 2015).

school hours while Bell was off campus.<sup>442</sup> Instead, that three-judge panel engaged in the *Watts-Black* true threat analysis,<sup>443</sup> and found by a vote of 2-1 that the song did not constitute a true threat.<sup>444</sup> An *en banc* review by the full Fifth Circuit was granted.<sup>445</sup>

The full Fifth Circuit applied *Tinker* to find that a substantial disruption reasonably could have been forecast from Bell's recording.<sup>446</sup> Thus, in the *en banc* review the court found that it was unnecessary to determine if the song constituted a true threat under *Watts*.<sup>447</sup> Interestingly, four judges dissented from the ruling. Judge James Dennis (who wrote the court's opinion in the three-judge panel court of appeals decision<sup>448</sup>) in dissent argued that *Tinker* should not apply to off-campus speech.<sup>449</sup> Judge Dennis cited *Snyder* and *Cohen* to reinforce the idea that speech on matters of public concern is protected by the First Amendment, even if it is offensive.<sup>450</sup> According to Judge Dennis, the school district failed to prove that Bell intended to threaten the coaches at issue, thus failing to meet the requirement in *Black* that "a speaker directs a threat to a person or group of persons with the *intent* of placing the victim in fear of bodily harm or death."<sup>451</sup>

The U.S. Supreme Court confirmed part of the *Bell* court majority's understanding of *Tinker* in *Mahanoy Area School District v. B.L.* (2021) by reasoning that a "school's regulatory interests remain significant in some off-

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442. *Bell v. Itawamba Cnty. Sch. Bd.*, 774 F.3d 280, 304 (5th Cir. 2014), on reh'g en banc, 799 F.3d 379 (5th Cir. 2015).

443. *Bell*, 774 F.3d at 300-04.

444. *Id.* at 304.

445. *Bell*, 799 F.3d at 389.

446. *Id.* at 391.

447. *Id.* at 400.

448. *Bell*, 774 F.3d at 282.

449. *Id.* at 404 (Dennis, J., dissenting).

450. *Id.* at 404, 418.

451. *Id.* at 421 (quoting *Virginia v. Black*, 538 U.S. 343, 360 (2003)) (emphasis in original); see also *id.* at 434 (Prado, J., dissenting) (explaining that "in the context of expressive rap music protesting the sexual misconduct of faculty members, no reasonable juror could conclude that Bell's rap lyrics constituted a 'true threat.'").

campus circumstances,”<sup>452</sup> including “threats aimed at teachers.”<sup>453</sup> However, to points raised by the *Bell* court’s dissent, the Court in *Mahanoy* also made clear that “a school, in relation to off-campus speech, will rarely stand *in loco parentis*”<sup>454</sup> and “courts must be more skeptical of a school’s efforts to regulate off-campus speech” than on-campus speech.<sup>455</sup> In this sense, the U.S. Supreme Court made clear that true threats to teachers would certainly qualify as off-campus speech that public schools could discipline. But in the absence of true threats and expression that falls into similar unprotected categories, student expression would need to cause “substantial disruption” “within the classroom” or at a “school-sponsored extracurricular activity” to be subject to discipline.<sup>456</sup> Without proof that Bell substantially disrupted school activities, any discipline in this case would need to be based on Bell’s music constituting a true threat, something the dissent argued could not be shown, particularly because the speech at issue occurred off-campus.

In *Bell*, the court’s analysis to determine whether the Defendant’s lyrics constituted a true threat was convoluted by the fact that the case involved a student in a public school. Such issues were not present in a decision from the Pennsylvania Supreme Court in *Commonwealth v. Knox* (2018). *Knox* arose with criminal narcotics and firearms charges<sup>457</sup> pending against Jamal Knox (aka Mayhem Mall) and Rashee Beasley (aka Soldier Beaz) stemming from a police traffic stop of a vehicle Knox was driving in April 2012.<sup>458</sup> The stop was initiated by Pittsburgh Police Officer Michael Kosko, and assistance on the scene was provided by Detective Daniel Zeltner.<sup>459</sup>

While the charges from that stop were pending, with Officer Kosko and Detective Zeltner scheduled to testify, Knox and Beasley composed a rap

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452. *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2045 (2021).

453. *Id.*

454. *Id.* at 2046.

455. *Id.*

456. *Id.* at 2047.

457. *Commonwealth v. Knox*, No. 1136, 2016 WL 5379299, at 1 (Pa. Super. Ct. Aug. 2, 2016).

458. *Commonwealth v. Knox*, 190 A.3d 1146, 1148 (Pa. 2018).

459. *Id.*

song titled, “Fuck the Police.”<sup>460</sup> The lyrics discuss killing police officers and express hatred toward police, referring to Officer Kosko and Detective Zeltner by name.<sup>461</sup> Some of the lyrics state the following about those two police: “I’m a jam this rusty knife all in his guts and chop his feet... Well your shift over at three and I’m gonna fuck up where you sleep.”<sup>462</sup> Another section of the song stated, “I spit with a tec/That like fifty shots...that’s enough to hit one cop on 50 blocks.../I said fuck the cops.”<sup>463</sup> In a recording of the song posted on Facebook and open to public viewing, a photo montage of Knox and Beasley show them “motioning as if firing weapons.”<sup>464</sup> In the background of the recording, there are sounds of police sirens and gunshots.<sup>465</sup>

When the video was discovered by the Pittsburgh police, Knox was charged with two counts of terroristic threats and witness intimidation.<sup>466</sup> At trial, Officer Kosko testified that he was “shocked” upon hearing the song, and it was one of the reasons he left the Pittsburgh police force.<sup>467</sup> Detective Zeltner testified that the video was “very upsetting” to him, and that he was provided time off and a security detail.<sup>468</sup> Knox was found guilty at trial, with the rap song being the sole basis for the terroristic threat and witness intimidation charges.<sup>469</sup>

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460. *Id.* at 1149; LISSA SKITOLSKY, HIP-HOP AS PHILOSOPHICAL TEXT AND TESTIMONY: CAN I GET A WITNESS? 3 (George Yancy ed., Lexington Books 2020).

461. *Knox*, 190 A.3d at 1149.

462. *Id.*

463. *Id.* at 1150.

464. *Id.* at 1149.

465. *Id.*

466. *Id.* at 1150.

467. *Id.* at 1151.

468. *Id.*

469. *Id.*

The Pennsylvania Supreme Court affirmed Knox's convictions.<sup>470</sup> Toward the beginning of its analysis, the court—citing *Hurley*, *Ward*, *Schad*, and *Cohen*—stated that “First Amendment freedoms apply broadly to different types of expression, including art, poetry, film, and music. Such freedoms apply equally to cultured, intellectual expressions and to crude, offensive, or tawdry ones.”<sup>471</sup> However, the Court reasoned, certain categories of expression are not protected by the First Amendment, including “speech which threatens unlawful violence [which] can subject the speaker to criminal sanction. See *Watts v. United States*.”<sup>472</sup> The *Knox* court then cited *Black*, stating that courts have disagreed whether the speaker's subjective intent is required to prove intimidation or if an objective, reasonable person standard should be used to determine if intimidation is present.<sup>473</sup> The Pennsylvania Supreme Court reasoned that *Black* required the subjective intent of the speaker to be considered,<sup>474</sup> and the court summarized its approach to evaluating First Amendment questions about true threats as follows:

[T]he two facets of *Black* which are most relevant to this dispute are as follows. First, the Constitution allows states to criminalize threatening speech which is specifically intended to terrorize or intimidate. Second, in evaluating whether the speaker acted with an intent to terrorize or intimidate, evidentiary weight should be given to contextual circumstances such as those referenced in *Watts*.<sup>475</sup>

Applying this to the facts of *Knox*, the court examined the content of “Fuck the Police,” beginning with the lyrics, which the court explained, “do not include political, social, or academic commentary, nor are they facially satirical or ironic. Rather, they primarily portray violence *toward* the police,

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470. *Id.* at 1161.

471. *Id.* at 1154.

472. *Id.* at 1155.

473. *Id.* at 1156.

474. *Id.* at 1156–57.

475. *Id.* at 1158.



ostensibly due to the officers' interference with Appellants' activities."<sup>476</sup> As the court went on to reason, "Appellant mentions Detective Zeltner and Officer Kosko by name, stating that the lyrics are 'for' them. Appellant proceeds to describe in graphic terms how he intends to kill those officers. In this way, the lyrics are both threatening and highly personalized to the victims."<sup>477</sup> Furthermore, the court reasoned that the lyrics "reference Appellant's purported knowledge of when the officers' shifts end and, in light of such knowledge, that Appellant will 'f—k up where you sleep.'"<sup>478</sup> Finally, when considering the overall video, the court found more evidence of its threatening nature through the use of "bull horns, police sirens, and machine-gun fire ringing out over the words."<sup>479</sup>

Unlike the case in *Watts*, where the speaker's comments were protected, in part, because they were conditional, the court in *Knox* found that Knox's threats were mostly unconditional.<sup>480</sup> Additionally, Knox's expression was posted online, making it available to the police officers who were described in it to view it with relative ease.<sup>481</sup> Thus, the court concluded that the music video was a true threat meant to intimidate, even though it also reasoned that musical artists sometimes adopt stage personas and make fictitious violent references in their music.<sup>482</sup> As explained by the *Knox* court, in many cases, "lyrics along such lines cannot be understood as a sincere expression of the singer's intent to engage in real-world violence."<sup>483</sup> The U.S. Supreme Court denied a writ of *certiorari* in the case in 2019.<sup>484</sup>

Although his conviction was upheld based on the music video he made, Knox's case represents the most prominent decision to date in which an appellate court applied the *Watts-Black* line of reasoning for true threats to a

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476. *Id.* (emphasis in original).

477. *Id.* at 1159.

478. *Id.*

479. *Id.*

480. *Id.*

481. *Id.* at 1160.

482. *Id.*

483. *Id.*

484. *Knox v. Pa.*, 139 S. Ct. 1547 (2019).

case involving musical expression. The court also gave deference to the fact that musicians often adopt an alter ego or persona when making their art.<sup>485</sup> Even more to the point, the *Knox* court considered subjective intent, in addition to examining the lyrics through an objective prism, when determining if song lyrics constitute a true threat, which provides greater First Amendment protection to musical expression.<sup>486</sup> Furthermore, the *Knox* court's consideration of the context of the song was also an important step, although even among those believing *Knox*'s conviction should have been sustained, the court's analysis of the totality of the circumstances surrounding the song has been criticized for not properly taking into account the use of "similes, metaphors, hyperboles, and rhyme schemes" as used within hip-hop as a genre of music.<sup>487</sup>

Indeed, there is a real concern with hip-hop lyrics being misinterpreted as true threats or incitement, when they are often intended as artistic expression, which is often provocative and critical of racism and state-based violence.<sup>488</sup> The danger of misinterpretation is particularly great when the criticism is aimed at racism and law enforcement through the now notorious phrase, "Fuck the Police,"<sup>489</sup> which was at issue in this case. Even if criticism is sharp and uses profane language, it is protected, and law enforcement must utilize their training to exercise self-control and ensure that First Amendment rights can be exercised.<sup>490</sup> Nevertheless, it is clear from the court's true threat analysis that if *Knox* had refrained from identifying the

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485. *Knox*, 190 A.3d at 1160.

486. *Stoner*, *supra* note 164, at 256–57.

487. *Id.* at 257.

488. SKITOLSKY, *supra* note 460, at 3–4; *see also* Virginia Langmaid, *RAP Act introduced in House would ban lyrics from being used as evidence in criminal cases*, CNN POLITICS (July 29, 2022), <https://www.cnn.com/2022/07/29/politics/lyrics-evidence-court-rap-act-house-bill/index.html> [<https://perma.cc/973A-J49X>] (noting concerns with hip-hop lyrics being used as evidence of criminal activity have led to the introduction of congressional legislation to curb the practice in federal court); *see generally* Sean-Patrick Wilson, *Rap Sheets: The Constitutional and Societal Complications Arising From the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA ENT. L. REV. 345 (2005) (analyzing issues associated with the use of hip-hop lyrics as evidence of criminal activity at trial).

489. SKITOLSKY, *supra* note 460, at 147–48.

490. *See Lewis v. New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring) ("a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'").

officers involved, or if his lyrics had focused on political grievances rather than direct warnings of violence, his song would have been protected by the First Amendment as abstract expression about, and criticism of, government. This ruling strikes the right constitutional balance between protecting musical expression and ensuring that true threats cannot escape prosecution by simply being put to music.

V. “...AND JUSTICE FOR ALL”: CONTINUING APPLICATION OF THESE COURT PRECEDENTS TO MUSIC (AND EXPANDING THEM) IS ESSENTIAL

As noted above, there has been a strong drive throughout world history, including in United States history, by those in power to censor musical expression by putting restrictions on what creators, performers, and consumers of music may do.<sup>491</sup> In some places around the world, that censorial power over music remains in full force today. In the United States, that is not the case, due in large part to key Supreme Court precedents from the 1960s, the 1970s, and beyond.<sup>492</sup> Perhaps due to this decades-long legal tradition in the United States, as a 2022 Knight Foundation survey found, there is currently strong support for “allowing musicians to sing songs with offensive lyrics.”<sup>493</sup> Indeed, 74 percent of teachers, 76 percent of college students, and 75 percent of the general public agreed that such music deserves protection.<sup>494</sup> The future, though, may be concerning in the United States, as that same survey found that high school students’ support for protecting offensive music dropped from 66 percent in 2018 to 56 percent in 2022.<sup>495</sup> This growing generational gap raises questions about the Court’s decisions in this area of constitutional law. Is the high level of protection now provided to musical expression by the First Amendment a good thing? Should the Court maintain those precedents, and even expand their protections? The answer to those questions is a resounding “yes.”

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491. See *supra* Part II .

492. See *supra* Part IV .

493. *Future of the First Amendment 2022: High Schooler Views on Speech Over Time*, KNIGHT FOUNDATION (May 24, 2022), [https://knightfoundation.org/wp-content/uploads/2022/05/2022\\_Future-of-the-First-Amendment\\_FINAL.pdf](https://knightfoundation.org/wp-content/uploads/2022/05/2022_Future-of-the-First-Amendment_FINAL.pdf) [<https://perma.cc/M8ZY-4XGF>].

494. *Id.*

495. *Id.*

Historically, musical artists have been targeted for engaging in expression that is seen as offensive or immoral, such as in the cases of Jim Morrison, Ozzy Osbourne, Judas Priest, and the Dead Kennedys.<sup>496</sup> Often, though, this type of musical expression is simply provocative because it questions the prevailing order and majoritarian opinion on political or cultural matters. John Peter Zenger's famous case is an example of musical expression with explicit political commentary, as was the music of both Phil Ochs and Country Joe McDonald.<sup>497</sup> Of the cases where majoritarian power has been used to try to censor the music of minority groups, it is discrimination against the songs of racial minorities that appears as frequently as any other. In the nineteenth century, when southern states banned enslaved persons from being taught how to read and write, spirituals were used to transmit coded information in ways that could not be easily understood by enslavers and others outside of the antebellum African American community.<sup>498</sup> Both abroad and in the United States, the historical record is replete with attacks on various forms of music (including ragtime, jazz, rock, and rap) that was developed predominantly by African American artists.<sup>499</sup> Almost all of the music banned in 1955 in Houston by the city's Juvenile Delinquency and Crime Commission were songs by Black musicians.<sup>500</sup> Moves to censor rock 'n' roll in the 1950s and 1960s were based in racism, stemming from hatred toward the music's basis in Black artists' rhythm and blues songs and interracial interactions that were common at rock 'n' roll concerts.<sup>501</sup> Censors have targeted many Black artists over the years, including Billie Holiday, Paul Robeson, James Brown, N.W.A., 2 Live Crew, Tupac Shakur, and Shawn Thomas.<sup>502</sup>

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496. See notes 120–25, 254–313, and 325–34 above and accompanying text.

497. See notes 80–81, 113, and 127–28 above and accompanying text.

498. RANDYE JONES, *SO YOU WANT TO SING SPIRITUALS: A GUIDE FOR PERFORMERS* 15–18 (2019).

499. CORN-REVERE, *supra* note 54, at 146–47.

500. GAIR, *supra* note 99, at 32.

501. RONALD K.L. COLLINS ET AL., *FIRST THINGS FIRST: A MODERN COURSEBOOK ON FREE SPEECH FUNDAMENTALS*, 283 (2019).

502. See notes 90–96, 119, 340–43, 349–96, and 402–29 above and accompanying text.

These attempts at censorship have been much more sporadic in the United States than in certain regimes globally, both historically and today.<sup>503</sup> The rule of law in the United States has always ensured that some level of musical expression has been protected here, even before the Supreme Court interpreted the First Amendment more broadly.<sup>504</sup> Even if civil rights protests and marches could be thwarted by authorities under the guise of protecting public order, music carried by recordings and over radio broadcasts to wider audiences was more difficult to censor under American jurisprudence.<sup>505</sup> In recent decades, it is through even more protective Supreme Court decisions that these attempts at censorship have waned, as we do not see the types of prosecutions of musicians for practicing their craft that were once commonplace.<sup>506</sup> These decisions protecting minority group free speech rights in the past help to promote protection for music artists from many communities today. For instance, past court decisions narrowing the definition of obscenity helped to provide protection for LGBTQ artists to be able to produce creative content without fear of government reprisal.<sup>507</sup>

What is it that makes musical expression so powerful and that drives music censors to try to quell the messages of these artists? Traditionally, protecting the freedom of expression is theoretically justified by three major reasons: (1) it promotes democratic self-governance, (2) it facilitates the search for truth, and (3) it protects individual autonomy.<sup>508</sup> Musical expression implicates all three of these interests.

Regarding democratic self-governance, many artists' songs provocatively call specific attention to questions of public policy that they want politicians to address or that they want people to consider when they decide which politicians to elect. As explained in one recent law review article, "[n]early everyone can name a current or past artist associated with a social

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503. See Part II above.

504. *Id.*

505. Pimentel, *supra* note 52, at 215.

506. See Parts II and IV above.

507. See, e.g., COLLINS ET AL., *supra* note 501, at 43–44 (recounting how the U.S. Supreme Court found First Amendment protection for creative content in the LGBTQ magazine *ONE* in 1958, citing its obscenity decision in *Roth v. United States*, 354 U.S. 476 (1957)).

508. TUSHNET ET AL., *supra* note 34, at 16.

movement,” including Bob Dylan singing in favor of peace, Bruce Springsteen composing songs about difficulties in small towns, Lady Gaga promoting LGBTQ rights, and Bono trying to eradicate global poverty.<sup>509</sup> As put succinctly by Justice William Douglas in his dissent from the denial of *certiorari* in the *Yale Broadcasting* case, “[s]ongs play no less a role in public debate, whether they eulogize the John Brown of the abolitionist movement, or the Joe Hill of the union movement, [or] provide a rallying cry such as ‘We Shall Overcome’”<sup>510</sup> for the Civil Rights Movement. For another colorful example, Woody Guthrie famously placed the slogan “THIS MACHINE KILLS FASCISTS” on his guitar.<sup>511</sup> These examples illustrate music’s ability to speak truth to power and express what is a minority or unpopular viewpoint according to those in authority.

The second justification—facilitating the broader search for truth—can involve music that addresses issues outside of the political process, either to provoke a new way of thinking or to inspire. This includes music of a spiritual or religious nature.<sup>512</sup> Certainly, there is a long history of music being used to express religious themes.<sup>513</sup> This category can also involve music about many other subjects, such as music opining about morality, music on questions of science, and even music that speaks to culture more broadly.<sup>514</sup> Justice Douglas explained in his *Yale Broadcasting* dissent how artists at the time (the early 1970s) were able to “express in music the values of the youthful ‘counterculture.’”<sup>515</sup>

The third justification, emphasizing personal autonomy, can apply to music with regard to (1) the creative opportunity for the composer or performer to create music, and (2) the listener to choose music that fits the mood

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509. Cindy A. Schipani & Kate Peterson, *The Impact of Recording Artists and Music on Legal and Social Change*, 28 MINN. J. INT’L L. 315, 318 (2019).

510. *Yale Broad. Co. v. F.C.C.*, 414 U.S. 914, 918 (1973).

511. GUSTAVUS STADLER, *WOODY GUTHRIE: AN INTIMATE LIFE* 58 (2020).

512. Chen, *supra* note 238, at 409.

513. See, e.g., PHILIP V. BOHLMAN, *MUSIC IN AMERICAN RELIGIOUS EXPERIENCE* 9 (Philip V. Bohlman et al. eds., 2006).

514. Chen, *supra* note 238, at 409.

515. *Yale Broad. & Co.*, 414 U.S. at 918.

or emotion they wish to experience.<sup>516</sup> In this sense, artists express certain ideas as a part of their freedom to create; listeners choose music to cultivate some sort of experience, such as crafting a playlist of songs to play while exercising, which may be very different from a playlist one fashions for studying or trying to fall asleep to. Indeed, music can be used to inspire a variety of emotions. In the concluding section of *Waller v. Osbourne*, Judge Duross Fitzpatrick spoke to this theme of personal autonomy by first noting how “the lyrics of a great many songs that come under the heading of rock music seem to foster an outlook on life that emphasizes alienation, cynicism, rebellion, and futility.”<sup>517</sup> Taking a page from the Supreme Court’s reasoning in *Cohen* “that one man’s vulgarity is another’s lyric,”<sup>518</sup> Judge Fitzpatrick went on to explain how “one man’s meat is another man’s poison (or woman’s as the case may be)”<sup>519</sup> because “[m]any young people find just as much relaxation and pleasure from rock music without the dreary lyrics of Suicide Solution as the rest of us get from the music of Beethoven, Gamble Rogers, Whitney Houston, or Hank Williams.”<sup>520</sup> Put simply, in a free society each musical artist, and each listener, should be at liberty to choose the soundtrack of one’s own life.

For these reasons and more, the Court should at least maintain those key precedents of *Brandenburg*, *Watts*, *Cohen*, *Black*, and others that have been invoked to protect musical expression. There are also ways the Court could expand relevant First Amendment protections for musical (and other) expression. One is through revisiting the power of the FCC to regulate musical expression deemed indecent on broadcast radio and television that stems from *FCC v. Pacifica Foundation* (1978).<sup>521</sup> This decision allows FCC restrictions on expression in broadcasting to be subject to a lower level

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516. Chen, *supra* note 238, at 436.

517. *Waller v. Osbourne*, 763 F. Supp. 1144, 1152 (M.D. Ga. 1991), *aff’d*, 958 F.2d 1084 (11th Cir. 1992).

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

519. *Waller*, 763 F. Supp. at 1152 n.16.

520. *Id.*

521. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

of scrutiny than for music in other media or in public forums.<sup>522</sup> As explained by Justice William Brennan in dissent in *Pacifica*, if the Court is to adhere to the reasoning in *Cohen* that “a listener who inadvertently tunes into a program he finds offensive...can simply extend his arm and switch stations or flick the ‘off’ button,”<sup>523</sup> and the fact that some listeners may find expression on the radio to be offensive should not negate “the broadcaster’s right to send, and the right of those interested to receive, a message entitled to full First Amendment protection.”<sup>524</sup> As articulated by Justice Douglas in *Yale Broadcasting*, offensive music that is broadcast should be protected to the same high degree as expression in print.<sup>525</sup> As argued by Justice Douglas:

The Government cannot, consistent with the First Amendment, require a broadcaster to censor its music any more than it can require a newspaper to censor the stories of its reporters. Under our system the Government is not to decide what messages, spoken or in music, are of the proper “social value” to reach the people.<sup>526</sup>

If the Court is not willing to revisit *Pacifica* and find more protection for speech (including musical expression) that is broadcast, it should at least maintain the current, higher level of protection for expression online, which it has held since *Reno v. ACLU* (1997).<sup>527</sup> Indeed, streaming access to virtually all music, even if it is indecent or offensive, has been available online for years, and this has not had a negative effect on society.<sup>528</sup> With the rise of non-broadcasting electronic media in the decades since *Pacifica*, serious

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522. Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 249 (2003).

523. *Pacifica Found.*, 438 U.S. at 765–66.

524. *Id.* at 766.

525. *Yale Broad. Co. v. F.C.C.*, 414 U.S. 914, 918 (1973).

526. *Id.*

527. *Reno v. ACLU*, 521 U.S. 844, 868–69 (1997) (finding that the factors justifying greater regulatory power over broadcasting—including a history of extensive government regulation, scarcities of available frequencies, and its invasive nature—are not present in cyberspace”).

528. CORN-REVERE, *supra* note 54 at 157.



questions have been raised about the validity of the ruling, as broadcasting no longer possesses the unique, pervasive position it did in the 1970s.<sup>529</sup>

One standard that applies online (and everywhere else) is that obscene expression falls outside of First Amendment protection. Although *Miller* today provides a greater level of protection for sexually explicit music than might have been true in the past, the *Miller* Test still requires a subjective moral determination when courts decide if this type of expression is protected by the First Amendment.<sup>530</sup> The trial judge's determination in *Skywalker Records* that *As Nasty As They Wanna Be* was obscene,<sup>531</sup> when the court of appeals easily drew the opposite conclusion in *Luke Records*,<sup>532</sup> is testament to that subjectivity. More to the point, *Miller*'s provision that "patently offensive" sexual expression may be banned—while *Cohen*, *Johnson*, and *Snyder* make it clear that offensive speech generally is protected by the First Amendment—is problematic, particularly when that distinction is not made for other content, including violent content.<sup>533</sup> Instead, a better approach, suggested by Justice Brennan in *Paris Adult Theatre I v. Slaton* (1973) would be to protect sexually oriented expression "in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults."<sup>534</sup> This alternative approach would eliminate many subjectivity concerns by providing more clarity, ensure broad protection for creative expression, and

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529. Brittney Pescatore, *Time to Change the Channel: Assessing the FCC's Children's Programming Requirements Under the First Amendment*, 33 COLUM. J.L. & ARTS 81, 91 (2009).

530. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 109–10 (1973) (Brennan, J., dissenting) (commenting on the *Miller* Test for obscenity, Justice William Brennan stated that "the effort to suppress obscenity is predicated on unprovable, although strongly held, assumptions about human behavior, morality, sex, and religion. The existence of these assumptions cannot validate a statute that substantially undermines the guarantees of the First Amendment.").

531. *Skywalker Recs., Inc. v. Navarro*, 739 F. Supp. 578, 591–96 (S.D. Fla. 1990), *rev'd sub nom.* *Luke Recs., Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992).

532. *Luke Recs., Inc. v. Navarro*, 960 F.2d 134, 135–39 (11th Cir. 1992).

533. See *U.S. v. Stevens*, 559 U.S. 460, 472 (2010) (finding First Amendment protection for depictions of animal cruelty); *Brown v. Entm't. Merchants Ass'n*, 564 U.S. 786, at 792–93 (2011) (holding that the First Amendment's obscenity exception does not include violent subject matter).

534. *Paris Adult Theater I*, 413 U.S. at 113 (Brennan, J., dissenting).

still provide the government with power to pursue legitimate interests as they relate to sexually oriented materials.<sup>535</sup>

Regarding violent content, it would be helpful for the Court to clarify that true threats under *Black* require subjective intent, as interpreted by the Pennsylvania Supreme Court in *Knox*. Similarly, before it becomes a justification to ban disfavored music, the U.S. Supreme Court should overrule *Chaplinsky* and end the fighting words doctrine. Fighting words as a concept is vague and overbroad, and it has been undermined by the Court's protection of offensive speech,<sup>536</sup> including in some of the same cases cited above, especially *Cohen*. Violence related to expression is sufficiently dealt with by the Court's tests excluding from First Amendment protection incitement (*Brandenburg* and *Hess*) and true threats (*Watts* and *Black*).<sup>537</sup> Thus, there is no need to keep another category of expression excluded from constitutional protection, especially one that is as unclear as fighting words. Although the Court continues to show lip service to *Chaplinsky* and the fighting words doctrine by citing it as precedent as recently as 2021,<sup>538</sup> the Court has not upheld a fighting words conviction since deciding *Chaplinsky* in 1942.<sup>539</sup> This is true because Court decisions in more recent decades have created something of a "Catch-22," in that the Court has repeatedly struck down general prohibitions on fighting words for being vague or overbroad while also striking down restrictions on specific types of fighting words for being content or viewpoint discriminatory.<sup>540</sup> For these reasons, fighting words as a concept should not be used to justify denying First Amendment protection to music.

All told, there are a myriad of reasons to provide more protection for musical expression, short of actual incitement to violence, true threats, and very narrow instances involving sexually explicit expression. The First

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535. *See id.* at 114.

536. Eric T. Kasper, *No Essential Reason to Restrict the Freedom of Speech: Why It Is Time to Knock Out Chaplinsky v. New Hampshire and the Fighting Words Doctrine*, 53 TEX. TECH L. REV. 613, 614 (2021).

537. *See id.* at 656–59.

538. *See Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2046 (2021) ("B. L.'s posts, while crude, did not amount to fighting words. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)").

539. ERWIN CHERMERINSKY & HOWARD GILMAN, *FREE SPEECH ON CAMPUS* 92 (2017).

540. *Id.* at 95; *see also* Kasper, *supra* note 536, at 648–49.

Amendment requires this free exchange of ideas, even in cases where music is seen as outrageous by the majority and those in power. What Justice Robert Jackson wrote in *West Virginia v. Barnette* (1943) is just as applicable to musical expression as it was to a refusal of public school children to salute the American flag:

“[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”<sup>541</sup>

In accordance with the First Amendment’s command that “Congress shall make no law...abridging the freedom of speech,”<sup>542</sup> our laws and law enforcement should not attempt to restrict the free exchange of musical ideas. It is not necessary to waste law enforcement’s precious time to fight crime by asking them to police musical expression; only cases involving incitement, true threats, and like categories merit such attention and prosecution. Our isolated and sporadic examples of historical musical censorship in America should continue to wane, including for explicit lyrics, leaving such attempts to punish musicians for their art in our past.

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541. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

542. U.S. CONST. amend. I.