

1-1-1994

The Death of Tupac: Will Gangsta Rap Kill the First Amendment?

Jason Talerman

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/twlj>

 Part of the [Entertainment and Sports Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

Jason Talerman, *The Death of Tupac: Will Gangsta Rap Kill the First Amendment?*, 14 B.C. Third World L.J. 117 (1994), <http://lawdigitalcommons.bc.edu/twlj/vol14/iss1/6>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Third World Law Journal by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

THE DEATH OF TUPAC: WILL GANGSTA RAP KILL THE FIRST AMENDMENT?

JASON TALERMAN*

I disapprove of what you say, but I will defend to the death your right to say it.

—attributed to Voltaire

I. INTRODUCTION

On April 11, 1992, in Edna, Texas, State Trooper Bill Davidson was just doing his job.¹ At a routine traffic stop,² he stopped and approached a car driven by Ronald Ray Howard, a nineteen-year-old eighth-grade dropout who was no stranger to trouble, or the law.³ Mr. Howard was driving a stolen car.⁴ Mr. Howard was also listening to *2pacalypse Now*, the latest recording by emerging young actor and rap star, Tupac Shakur.⁵ The timing was eerily perfect. The lyrics, to Tupac's *Sister Souljah*, seemingly made perfect sense:

Cops on my tail. . . .
They finally pull me over
and I laugh.
Remember Rodney King,
And I blast his punk ass.⁶

* Book Review Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL.

¹ Jerrey Urban, *Grandmother Pleads for Teen in Killing*, HOUS. CHRON., Apr. 16, 1992, at A21.

² *Id.* Trooper Davidson stopped the GMC truck that Mr. Howard was driving because a headlight was out. Chuck Phillips, *Texas Death Renews Debate over Violent Rap Lyrics*, L.A. TIMES, Sept. 17, 1992, at A1 [hereinafter *Texas Death*].

³ Urban, *supra* note 1, at A21. During Mr. Howard's criminal trial, he admitted that he was a crack dealer, gang member, and car thief. Janet Elliot, *When PR Sits Second Chair*, TEX. LAW., Aug. 2, 1993, at 4.

⁴ Urban, *supra* note 1, at A21.

⁵ Tupac was a former member of the rap group Digital Underground and was featured in the film *Juice*. See JUICE (Paramount 1992). He is the costar, along with Janet Jackson, of director John Singleton's *Poetic Justice*, a role which earned Tupac an NAACP Image Award Nomination. See POETIC JUSTICE (Columbia Pictures 1993); John Leland, *Criminal Records*, NEWSWEEK, Nov. 29, 1993, at 64. Tupac also appears in the recent film *Above the Rim*, and has recently released the album *Strictly 4 My N.I.G.G.A.Z.* See ABOVE THE RIM (1993); TUPAC SHAKUR, STRICTLY 4 MY N.I.G.G.A.Z. (Interscope 1993); Richard Lacayo, *Shootin' up the Charts*, TIME, Nov. 5, 1993, at 81.

⁶ *Texas Death*, *supra* note 2, at A1.

And Mr. Howard did just that, shooting and killing Trooper Davidson on the spot.⁷ Mr. Howard was charged with murder.⁸ In the criminal trial which concluded in July of 1993, Mr. Howard pled that Tupac made him pull the trigger.⁹ After over forty hours of deliberation, spanning six days, the jury rejected the contention that Tupac's music acted as a mitigating factor in the slaying.¹⁰ The jury believed that the recording did play a role in the crime, but that it did not decrease the blameworthiness of Howard.¹¹

Linda Davidson, the slain trooper's wife, plans to initiate a civil suit that was stayed pending the outcome of the criminal action.¹² The product liability suit alleges that Tupac, his label Interscope Records, and its distributor Time Warner were grossly negligent in the distribution of *2pacalypse Now*. Mrs. Davidson seeks millions of dollars in punitive damages, compensatory damages for her husband's death, payment of medical bills, and financial support for herself and her two children.¹³

Justice would seem to demand a finding of liability in Mrs. Davidson's suit. Advocates for liability are in unison. A dedicated law enforcement official and family man is shot dead in the line of duty, all because an irresponsible corporate act allowed for the distribution of a recording by a deranged young man who would actually advocate the murder of one of our men in blue.

To the supporters of liability, Tupac's own actions have served to bolster the homicidal message that is poisoning the listeners of his so-called music. Since Mrs. Davidson levied her accusations against Tupac, he has been involved in a string of violent incidents. In the Spring of 1993, Shakur allegedly attacked the director of the film *Menace II Society* after the director dismissed him from the project.¹⁴ Shortly afterward, on March 11, he was arrested in Los Angeles for carrying a concealed weapon, and two days later he was arrested again for allegedly attacking a limousine driver.¹⁵ In late October, Tupac was

⁷ Urban, *supra* note 1, at A1.

⁸ *Id.*

⁹ Chuck Phillips, *Testing the Limits*, L.A. TIMES, Oct. 13, 1992, at F1 [hereinafter *Testing Limits*].

¹⁰ Janet Elliot, *Slain Trooper's Family Seeks Damages from Rapper*, LEGAL TIMES, July 26, 1993, at 11 [hereinafter *Slain Trooper*].

¹¹ Chuck Phillips, *Will Tupac Pay?*, L.A. TIMES, July 16, 1993, at F25.

¹² *Slain Trooper*, *supra* note 10, at 10. The civil case is expected to begin in early 1994. *Id.*

¹³ *Testing Limits*, *supra* note 9, at F1.

¹⁴ Chuck Phillips, *Rapper-Actor Shakur Arrested in Sodomy Case*, L.A. TIMES, Nov. 20, 1993, at F2 [hereinafter *Sodomy*].

¹⁵ *Id.*

arrested for allegedly shooting two off-duty Atlanta police officers.¹⁶ Culminating what has been a crime-plagued year for Tupac, he was arrested on November 18 on charges that he and members of his entourage forcibly sodomized and sexually abused a woman during an incident in a Manhattan hotel.¹⁷

Tupac is not the only rapper whose personal acts of violence have tweaked the ears of critics. A week before Shakur was arrested in New York, Flavor Flav, a member of the group Public Enemy, was arrested for the attempted murder of his next-door neighbor, who the rap star suspected was sleeping with his girlfriend.¹⁸ On charges stemming from an August 25th slaying, rapper Snoop Doggy Dogg, whose recent debut album has crested at number one on the Billboard charts, has been indicted for murder.¹⁹ Indeed, the intentions of these artists would seem to be less than wholesome. If the violence is to be stopped, Tupac and Time Warner must be held accountable. Damages must ensue to ensure that this type of tragedy never happens again.

But the defendants have a large loophole: the Constitution of the United States, more specifically, the First Amendment.²⁰ The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech . . ." The First Amendment, on which Tupac and his record company(s) are relying for their defense, has, throughout the history of its application, vigorously upheld the freedom of expression. From nude dancing,²¹ to antiwar protests of the Vietnam era,²² to heavy metal lyrics suggesting suicide,²³ the First Amendment has triumphed as a defense in both civil and criminal contexts.

In the dogged pursuit of retribution, Mrs. Davidson does not dispute the power and protection of the Constitution. Rather, she

¹⁶ Lacayo, *supra* note 5, at 81. Tupac asserts his innocence in the case; some witnesses claim that the officers may have pulled their guns and fired first, and were injured only when Tupac returned fire. *Id.*

¹⁷ *Sodomy*, *supra* note 14, at F2.

¹⁸ Lacayo, *supra* note 5, at 81. It must be noted that Public Enemy is not known for a message that suggests violence against authorities in the same manner as are *gangsta* rappers. *Id.*

¹⁹ Chuck Phillips, *A Dogg's Life*, NEWSDAY, Nov. 18, 1993, at 72. Snoop Doggy Dogg's songs have frequently referred to the murder of undercover police officers.

²⁰ U.S. CONST. amend. I. The First Amendment is incorporated by the states via the due process clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1.

²¹ *Schad v. Mount Ephraim*, 425 U.S. 61, 65 (1981).

²² *Hess v. Indiana*, 414 U.S. 105, 108 (1973); *Cohen v. California*, 403 U.S. 15, 20 (1971).

²³ *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 195 (1988); *Waller v. Osborne*, 763 F. Supp. 1144, 1152 (1991), *cert. denied*, 113 S. Ct. 325 (1992). These two cases, alleging that lyrics written by "Ozzy" Osborne caused the suicides of two teenagers, were recently refused certiorari by the U.S. Supreme Court. A related case surrounded a suicide and an attempted suicide, allegedly spurred by the lyrics of Judas Priest. *See Judas Priest v. Second Judicial Circuit*, 760 P.2d 137 (1988).

merely is seeking an exception to the rule.²⁴ Every rule has one. The First Amendment is far from absolute. In narrow circumstances, the state may proscribe an individual's or group's freedom of expression. For example, speech which is intended, and likely, to incite or produce imminent lawless action is outside the scope of First Amendment protection.²⁵

Mrs. Davidson knows that she has a tough row to hoe. There has never been a suit against the film, television, or recording industry where the First Amendment has not triumphed over an incitement claim.²⁶ However, the prevailing climate regarding rap music may be such that Tupac, Time Warner, and the freedom of expression may come up losers this time around. Mrs. Davidson filed her suit just six weeks after another rapper, Ice-T, was pressured to pull the song *Cop Killer* off his most recent album.²⁷ The magnitude of the effort to force Ice-T's and Time Warner's hands was unprecedented in the post-McCarthy era. What was alarming about the effort was the identity of, and positions of authority held by, the figures who were indicating that the First Amendment did not apply to Ice-T. From the California Attorney General to President George Bush, public officials lined up in support of a ban on *Cop Killer*.²⁸ After Mrs. Davidson went public

²⁴ See *infra* note 25.

²⁵ The other three major categories which may justify an exception to First Amendment protection are as follows: 1. obscene speech. *Miller v. California*, 413 U.S. 15, 23 (1973), *reh'g denied*, 414 U.S. 881 (1974); *Skywalker Records v. Navarro*, 739 F. Supp. 578, 596 (S.D. Fla. 1990), *rev'd sub. nom.*, *Luke v. Navarro*, 960 F.2d 134 (11th Cir. 1992); 2. libel, slander, misrepresentation, perjury, false advertising conspiracy, solicitation of crime, complicity by encouragement, etc. *Konigsberg v. State Bar*, 366 U.S. 36, 49 n.10 (1961); 3. where "speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney v. Empire Storage Co.*, 336 U.S. 490, 498 (1949).

²⁶ *E.g.*, *McCollum*, 249 Cal. Rptr. at 194 (heavy metal lyrics allegedly inciting suicide); *Olivia N. v. National Broadcasting Co.*, 141 Cal. Rptr. 511 (1977) (plaintiff attacked and raped with bottle by persons who had seen similar scenario in TV movie *Born Innocent*).

²⁷ Lyrics to *Cop Killer* (also released on Time Warner, through subsidiary Sire Records) are:
 I got my 12-gauge sawed off
 I got my headlights turned off
 I'm about to bust some shots off
 I'm about to dust some cops off . . .

ICE-T, *Cop Killer*, on *BODY COUNT* (Sire Records 1992).

²⁸ The specific utterances will be further explored later in this Note but, for example, President Bush is on record as stating, "It's wrong for any company . . . to issue records that approve of killing a law enforcement officer." Chuck Phillips, *The Uncivil War: The Battle between the Establishment and Supporters of Rap Music Opens Old Wounds of Race and Class*, L.A. TIMES CALENDAR, July 19, 1992, at 6 [hereinafter *Uncivil War*] (Bush's comments at opening ceremonies for DEA office in New York). Although Bush did not strictly advocate the banning of recordings

with her intentions, both Oliver North and Vice President Dan Quayle visited Texas and made public statements supporting her allegations and declaring the lack of First Amendment applicability.²⁹

Ice-T and Tupac are not alone. Other rappers have faced government-sponsored censorship efforts,³⁰ whereas other forms of music, including heavy metal, have not had to endure such a direct affront on their First Amendment rights.³¹ There appears to be a double standard in the treatment of rap music under the Constitution. African-American artists have been singled out in this unparalleled censorship drive. The inescapable conclusion is that inherent racism spurs enhanced censorship efforts.

The purpose of this Note is to outline a scenario whereby a pervasive atmosphere of racism could lead to the unprecedented failure of the First Amendment to provide protection to a musician facing a charge of incitement. The body of this Note will be broken down into three main segments. Part II outlines the history of the First Amendment. Initial and brief attention will be paid to a general history and subsequent sections will be devoted to incitement issues in the entertainment industry. Part II concludes with an application of precedent to the Tupac case, justifying exoneration under a First Amendment defense. Part III examines the context that has fueled the current controversy. Initial focus is devoted to the relevant history of the *gangsta* rap genre. Although *gangsta* rap has its roots in many forms of music, it is a relatively new phenomenon. Born in South Central Los Angeles, *gangsta* rap often contains a violent message that depicts the struggles, concerns, and beliefs of the inner-city African-American and Hispanic experience. Inflammatory remarks directed to both intra-city rivals and the establishment are commonplace. Part III's overview of the political and social climate which has spawned artists like Tupac and Ice-T helps to show that the message is more than imaginative song

like *Cop Killer*, the weight of his office might make musicians and record companies apprehensive about releasing such objectionable recordings.

²⁹ *Id.*

³⁰ In 1989, an FBI official sent a letter on official Department of Justice stationery to rap group N.W.A.'s record label to protest the release of a song mentioning violence against police officers. John Pareles, *More Skirmishes on the Censorship Front*, N.Y. TIMES, Dec. 10, 1989, at 32.

³¹ Although heavy metal has been the focus of labeling efforts by the Parents Musical Resource Center (PMRC) and has been the subject of after-the-fact suits alleging incitement of suicide, public officials have not advocated the same prophylactic ban that they have suggested for Ice-T (and similar artists). See generally *Hearing before the Committee on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. (1985) [hereinafter *PMRC Hearings*].

writing and goes beyond a mere profit motive.³² This part will attempt to establish that the content of lyrics by artists like Tupac are, in fact, the expression of a sociopolitical message and, consequently, should be afforded the utmost deference under the First Amendment.³³ Part III then shifts its focus to the events that threaten the breakdown of constitutional rights for Tupac. A selected survey of public comments that are directed to songs which advocate violence against police officers brings the extraordinary efforts of the censors into focus. In a conclusory attempt to bring the racist double standard to light, Part IV compares the comments and actions of the would-be censors of rap to the efforts to regulate other mediums. The lack of appreciable difference between the content and social viability of rap and other protected mediums casts further suspicion on the detractors of rap. The differential treatment afforded to white artists versus the predominantly African-American medium of rap music draws a nexus to the racist predispositions of the censors. An exploration of the differing sentencing trends between Caucasian and African-American criminal defendants brings to light the disparate treatment that a black artist might receive under the First Amendment. An examination of the recent denunciation, by the U.S. Supreme Court, in *R.A.V. v. St. Paul, Minnesota*,³⁴ of a hate crime ordinance, lends credence to the argument that white speakers receive preferential treatment under the First Amendment. In an attempt to show that the efforts of the would-be censors are merely compounding the problems of the inner city,³⁵ at the expense of constitutional rights, Part IV further explores the racist motives of those who seek to put the shackles of censorship on rap music.

The conclusion paints a less than cheerful picture for artists like Tupac. A finding of liability will mark the continued inability to treat the disease before it becomes chronic. Should Mrs. Davidson's suit award damages, the death knell will have sounded for a generation of artists and First Amendment advocates.

³² Although rap is a proven seller for the recording industry, the profit earned from artists like Tupac is minuscule in comparison both to more successful mainstream artists and to the total amount of profit earned by the recording industry. *Uncivil War*, *supra* note 28, at 77.

³³ See *Spence v. Washington*, 418 U.S. 405, 410 (1974). Indeed, the crux of the message that pervades much of *gangsta* rap seems to reflect social problems that are prevalent in the inner city.

³⁴ 112 S. Ct. 2538, 2542 (1992).

³⁵ Jeff Ayeroff, cochair of Virgin Records and cofounder of Rock-the-Vote (the record industry's voter registration drive) countered President Bush's appraisal of *Cop Killer* by stating, "It's not like the White House expresses any interest in trying to resolve the polarization that this song reflects." *Uncivil War*, *supra* note 28, at 6.

II. THE FIRST AMENDMENT, ARTISTIC EXPRESSION, AND TUPAC

A. *The First Amendment, Generally*

The freedom of expression was codified, in 1791, by the ratification of the first ten amendments to the Bill of Rights. The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or the press”³⁶ The main thrust of the First Amendment is that the government is powerless to proscribe expression because of its message, subject matter, or content.³⁷

Among other forms of speech, all artistic and literary expression—including music, concerts, plays, pictures, and books—is guaranteed protection under the First Amendment.³⁸ Artistic expression is protected not only due to the desire for a more aesthetically pleasing landscape, but also because it acts as a unique conduit for cultural edification.³⁹ Similarly, First Amendment rights extend not only to the artist, but to the audience as well.⁴⁰ Only through this reciprocal relationship can society realize the potential of a true marketplace of ideas. The free interchange of ideas is integral in the promulgation of progress.⁴¹

Although artistic expression has been incorporated under the umbrella of free speech rights, the very impetus of the drafters of the First Amendment was the protection of political speech and the assurance of a vehicle to protest a stagnant and tyrannical government.⁴² *New York Times v. United States* specifically was concerned with the proscription of a newspaper’s ability to publish material that the government considered too sensitive for the public domain.⁴³ In a per curiam decision, Justice Hugo Black outlined the underlying theory of freedom of expression: “The Government’s power to censor the press was abolished so that the press would remain free to censure the

³⁶ U.S. CONST. amend I.

³⁷ *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Cohen*, 403 U.S. at 24.

³⁸ *See, e.g., Schad*, 425 U.S. at 65 (nude dancing); *Cinevision v. City of Burbank*, 745 F.2d 560, 567 (9th Cir. 1984) (concerts).

³⁹ *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 793 (1989) (case decided on valid state concern for control over public concerts, but music asserted as worthy of First Amendment protection due to social and intellectual value to society).

⁴⁰ *See Virginia State Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 757 (1976).

⁴¹ *See Spiritual Psychic Science Church v. City of Azusa*, 703 P.2d 1119, 1124 (1985).

⁴² *New York Times v. United States*, 403 U.S. 713, 717 (1971) (per curiam) (Black, J., concurring).

⁴³ *Id.* at 714.

Government. The press was protected so that it could bare the secrets of government and inform the people."⁴⁴

Similarly, artistic expression, which often serves to further a valid political agenda, must be assured constitutional protection.⁴⁵ Popularity, or lack thereof, is not an accurate meter by which to judge the worthiness of First Amendment protection,⁴⁶ as "it is irrelevant that the work is not stylish, tasteful, or even popular."⁴⁷

Although the drafters of the Bill of Rights declined to qualify the scope of the First Amendment, the freedom of expression has never been treated as an absolute. The twentieth century has seen the evolution of the First Amendment and the development of four limited classes of speech which lie outside its sphere of protection. The federal or state government may implement appropriate preventative or punitive measures in order to halt the dissemination of expression that falls into any of these categories: (1) speech which is considered obscene,⁴⁸ (2) speech which constitutes "libel, slander, misrepresentation, . . . perjury, false advertising, solicitation of crime, conspiracy, and the like,"⁴⁹ (3) expression which is integral to the violation of a valid criminal statute,⁵⁰ (4) or speech which is directed to the incitement of imminent lawless action, and which has a high probability of producing such action.⁵¹ It is this last exception that is most relevant to the suit initiated by Mrs. Davidson against Tupac, Interscope, and Time Warner.

B. *Incitement, Entertainment, and Heavy Metal*

The First Amendment faced its first major obstacle in the arena of incitement. In the years immediately following the First World War,

⁴⁴ *Id.* at 717.

⁴⁵ *Skywalker*, 578 F. Supp. at 594.

⁴⁶ *See Miller*, 413 U.S. at 25.

⁴⁷ *Skywalker*, 578 F. Supp. at 594.

⁴⁸ Obscene speech must contain an erotic component, although mere sexual content may not be sufficient for a finding of obscenity. *See Roth v. United States*, 354 U.S. 476, 487 (1957) (expression that contains sexual content but has other value to society as art, literature, etc., may be worthy of First Amendment protection). Rather, expression may be obscene if an average person applying contemporary community standards finds that the work appeals to the prurient interest, and lacks substantial social value. *Miller*, 413 U.S. at 30. An obscenity finding must also be founded on a valid statute. *Id.*

⁴⁹ *Konigsberg*, 366 U.S. at 49 n.10.

⁵⁰ *Giboney*, 336 U.S. at 498. In order to maintain public safety and order, a state is within constitutional parameters when it imposes valid time, place, and manner restrictions on the freedom of expression. *Ward*, 491 U.S. at 791.

⁵¹ *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969); *McCollum*, 249 Cal. Rptr. at 193.

the United States responded to the 1917 communist overthrow of Tsarist Russia by unleashing a legal and social barrage against all those who expressed opinions in favor of a socialist regime. The birth of the Soviet Union precipitated the strict enforcement of statutory proscriptions on political subversions.⁵² During this period, known as the Red Scare, the courts, reflecting society's fears, placed sharp restrictions on expression that advocated any shift in status quo governmental policies.⁵³ Utilizing the incitement exception, the courts repeatedly denied First Amendment protection to a variety of allegedly revolutionary concerns.⁵⁴ In support of the theory that the First Amendment was never intended to provide absolute freedom from governmental regulation of undesirable modes of expression, the Supreme Court, in *Schenck v. United States*, set forth an easily digestible example for the general populace: "The most stringent protection of freedom of speech would not protect a man shouting fire in a theater and causing a panic."⁵⁵

This doctrine is also commonly referred to as the fighting words exception.⁵⁶ With reasoning analogous to the incitement exception, *Chaplinsky v. New Hampshire* defines fighting words as those that "men of common intelligence would understand would be words likely to cause an average addressee to fight."⁵⁷

The Franklin D. Roosevelt-appointed Court brought an increased focus on the affirmation of individual constitutional rights. *Bridges v. California* marked the weakening power of the incitement exception.⁵⁸ The Court, in *Bridges*, put a higher burden on the censors, so as to ensure that individuals would not be restrained from valid criticism of the abuse of power by the government.⁵⁹ The Court held that enforcing

⁵² See *Abrams v. United States*, 250 U.S. 616, 619 (1919) (utilizing the Espionage Act of Congress); *Gitlow v. New York*, 268 U.S. 652, 657 (1925) (utilizing a state statute prohibiting criminal anarchy).

⁵³ See *Gillow*, 268 U.S. at 653 (New York law used as censorship tool).

⁵⁴ *Id.* at 653 (admitted socialist censored for the advocacy of "industrial revolt" and mass strikes); *Schenck v. United States*, 249 U.S. 47, 58 (1919) (distribution of leaflets urging opposition to the draft). *Schenck* produced the "clear and present danger" standard, which based the inapplicability of First Amendment protection on the probability that the expression in question would "bring about substantive evils that Congress has a right to prevent." 249 U.S. at 48.

⁵⁵ *Schenck*, 249 U.S. at 58.

⁵⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

⁵⁷ *Id.*

⁵⁸ 314 U.S. 252, 259 (1941). One possible explanation for the diminished use of the incitement exception is that the onset of the depression reduced the amount of consternation that people felt toward the Soviet Union.

⁵⁹ *Bridges* revolved around a contempt charge that was brought when a series of newspaper editorials were published criticizing recent court decisions. The Court, elaborating on the "clear

silence upon critics of the government would foster resentment, at the expense of respect.⁶⁰ However, the onset of World War II brought a resurgence of patriotic zeal, and a return of the anxiety that punctuated the Red Scare. With the fight against communism in Korea came the onset of the Cold War and McCarthyism. In *Dennis v. United States*, the court upheld a conviction of the Communist Political Association, on the grounds that the organization threatened the overthrow of the United States government by “force and violence.”⁶¹ The First Amendment underwent a further period of regression as Senate hearings inspired by Senator Joseph McCarthy sought to silence thousands of individuals due to alleged communist affiliation.⁶² Among those who were adversely affected by this backlash of anticommunist sentiment were some of the entertainment industry’s most prominent artists.⁶³

Not until the mid-1960s, when the war in Vietnam brought about a period of national introspection, did the First Amendment fully rebound. In *Cohen v. California*, the Supreme Court reversed a conviction of a man who was arrested when, in a California courthouse, he wore a jacket bearing the words “Fuck the Draft.”⁶⁴ Diminishing the risk of incitement, the Court asserted that the censorship of ideas, regardless of their vulgarity or unpopularity, could lead to unchecked abuses of power by an intolerant government.⁶⁵

The current standard for the incitement exception was formulated by the Supreme Court in *Hess v. Indiana*, which reversed a disorderly conduct conviction.⁶⁶ The petitioner, Gregory Hess, was attending an anti-Vietnam war demonstration in 1968 when local authorities tried to clear the streets. Police arrested him for stating, “We’ll take the fucking street later.”⁶⁷ In ruling that Hess’s actions could not

and present danger” standard, ruled that for the incitement exception to be applicable, “the substantial danger must be extremely serious and the degree of imminence extremely high before utterances can be punished.” *Id.* at 263.

⁶⁰ *Id.* at 262–63.

⁶¹ 341 U.S. 494, 516 (1951). The official program of the Communist Political Association was one of cooperation between labor and management, designed to achieve tranquillity during the postwar period. *Id.* at 498.

⁶² WILLIAM MANCHESTER, *THE GLORY AND THE DREAM* 628–50 (1974).

⁶³ “The Hollywood Ten,” a group of blacklisted figures in the film industry, included prominent director Otto Preminger, and screenwriter Dalton Trumbo, who also wrote *Johnny Got His Gun*. McCarthyism came to an abrupt halt when Congress voted to censure McCarthy and his activities. James Reston, *Final Vote Condemns McCarthy*, N.Y. TIMES, Dec. 3, 1954, at 1. McCarthy later drank himself to death. MANCHESTER, *supra* note 62, at 1003.

⁶⁴ 403 U.S. at 18.

⁶⁵ *Id.*; *New York Times*, 403 U.S. at 719 (Black, J., concurring).

⁶⁶ 414 U.S. at 108 (per curiam).

⁶⁷ *Id.* at 105.

have reasonably exhorted the crowd to lawlessness, the Court articulated the contemporary incitement standard.⁶⁸ The majority ruled that for the restraint or punishment of speech to be justified on grounds of incitement, the speech: (1) must be intended or directed toward the goal of production of imminent, lawless action, (2) must be likely to produce such imminent conduct, and (3) will not satisfy this test if it is directed to the incitement of action at some indefinite time in the future.⁶⁹

The incitement doctrine has unique applicability to the entertainment industry. A number of high profile cases were initiated throughout the 1970s and 1980s claiming that individual acts of violence were instigated, or even encouraged, by similar acts in films and television programs. While psychological studies drawing a connection between violence on film (or TV) and violence in real life have varied in their conclusions, courts have unanimously upheld the First Amendment in the extinguishment of liability. In *Olivia N. v. National Broadcasting Co.*, the plaintiff charged that National Broadcasting Company (NBC) was liable when a group of persons, imitating a scene in the television film "Born Innocent," raped her with a bottle.⁷⁰ The court rejected the claim on First Amendment grounds, as it did with a series of subsequent, similar claims.⁷¹

The realm of music has only recently been affected by the incitement debate. The principal case in this area involved a song by heavy metal artist "Ozzy" Osborne, which allegedly induced a teenager to commit suicide.⁷² The suspect song, *Suicide Solution*, contains two sets of lyrics. The first set of lyrics, which are overt, dwell upon the despair and lack of avenues for an excessive alcoholic:

Wine is fine but whiskey's quicker
Suicide is slow with liquor
. . . where to hide,

⁶⁸ *Id.* at 107-09.

⁶⁹ *Id.*; *McCollum*, 249 Cal. Rptr. at 193.

⁷⁰ 141 Cal. Rptr. at 511 (1977).

⁷¹ *Id.*; *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982) (plaintiffs' son died while imitating a hanging stunt that he saw on television); *Walt Disney Productions Inc. v. Shannon*, 276 S.E.2d 580 (Ga. 1981) (plaintiff partially blinded while imitating a TV sound effect consisting of rolling around a lead pellet in an inflated balloon, which exploded); *see also Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199 (S.D. Fla. 1979) (plaintiff had become so desensitized by television violence that he became sociopathic and shot and killed a neighbor).

⁷² *McCollum*, 249 Cal. Rptr. at 189-90; *see also Waller*, 763 F. Supp. 1144 (same fact pattern, but plaintiffs pursued a cause of action rooted in alleged subliminal messages).

Suicide is the only way out
Don't you know what it's really about.⁷³

The second set of lyrics, which are not listed on the album jacket, were recorded at one and one-half the rate of normal speech, and are sung during an instrumental break in the song:

Ah know people
You really know where its at
You got it
Why try, why try
Get the gun and try it
Shoot, shoot, shoot⁷⁴

The plaintiffs' son John had been listening to *Suicide Solution* on the family stereo before he went to his bedroom, where he shot himself while listening to other songs by "Ozzy."⁷⁵ In arguing that *Suicide Solution* was the proximate cause of their son's suicide, the plaintiffs maintained that the defendant, Central Broadcasting Service (CBS) was grossly negligent in its dissemination of "Ozzy's" work.⁷⁶ The plaintiffs countered CBS's First Amendment defense by asserting that the song constituted culpable incitement and, subsequently, was outside of the realm of constitutional security.⁷⁷

Applying the *Hess* test, the Court held that "Ozzy's" music was neither intended nor likely to induce the suicides of its listeners.⁷⁸ The court also found that the nexus between the song and John's suicide was too attenuated to warrant the incitement exception.⁷⁹

The *McCollum* court also ruled that musical lyrics cannot reasonably be considered a "call to action."⁸⁰ "Reasonable persons" exhibiting "common sense" understand that musical lyrics are merely figurative, and should not be taken literally.⁸¹ Moreover, the lyrics of *Suicide*

⁷³ *McCollum*, 249 Cal. Rptr. at 190.

⁷⁴ *Id.* (this line was repeated for ten seconds).

⁷⁵ *Id.* at 190-91.

⁷⁶ "Gross Negligence consists of conscious and voluntary act or omission which is likely to result in grave injury when in face of clear and present danger of which alleged tortfeasor is aware." BLACK'S LAW DICTIONARY 717 (6th ed. 1990). Gross negligence will lie only where the defendant owes a legal duty to the plaintiff. *Id.* Thus, barring a First Amendment defense, CBS would have been grossly negligent if it had been aware of the potentially disastrous effects of *Suicide Solution*, yet had distributed the recording anyway.

⁷⁷ *McCollum*, 249 Cal. Rptr. at 193.

⁷⁸ *Id.*

⁷⁹ *Id.* at 193, 197. The delay and passage of time between John's suicide and the composition and distribution of the song was too great to warrant a finding of negligent incitement. *Id.*

⁸⁰ *Id.* at 194.

⁸¹ *Id.*

Solution were construed by the court's findings to be mere poetic devices that may actually convey meanings which run counter to the commission of suicide.⁸²

The court was unwilling to extend, to either CBS or "Ozzy," culpability on the basis of the actions of extraordinarily fragile individuals.⁸³ John McCollum was nineteen years of age at the time of his suicide and had serious emotional problems in addition to an addiction to alcohol.⁸⁴ It was not reasonably foreseeable by CBS that the song could have caused John to punctuate his self-destruction with suicide.⁸⁵

In the affirmation of the defendants' First Amendment rights, the court reasoned that if liability had been extended, the recording industry would become apprehensive about the future dissemination of controversial works.⁸⁶ The deterrent or "chilling" effect would limit creative expression to the lowest common denominator of taste and acceptance.⁸⁷ Such a public policy exists without precedent, and is the antithesis of the intentions of freedom of expression as delineated in the First Amendment.⁸⁸

C. "Ozzy" and Tupac

Given the limited treatment of music in an incitement context, and the factual similarities between *McCollum* and the Tupac case, the court's eventual judgment should not be in doubt. The application of *McCollum* and other relevant precedent should lead to a favorable finding for Tupac and his fellow defendants.⁸⁹ Applying the *Hess* test, it would be unreasonable to conclude that Tupac's lyrics were either intended or likely to produce the shooting of a state trooper. Similarly, the gap between the shooting and the composition and dissemination

⁸² *Id.* at 193. The court also held that, even if *Suicide Solution* existed as advocacy of suicide, "Ozzy" would still be within the parameters of First Amendment protection. Advocacy of suicide has a long intellectual and artistic tradition, including Hamlet's "to be or not be" soliloquy (William Shakespeare, *Hamlet*, Act III, Scene 1) and Arthur Miller's Pulitzer Prize-winning play *Death of a Salesman*, where Willy Lowman, facing failure, defends his plan to commit suicide. See *id.* at 190 n.4.

⁸³ *Id.* at 198.

⁸⁴ *Id.* at 189.

⁸⁵ *Id.* at 197.

⁸⁶ *Id.* at 195.

⁸⁷ *Id.* at 195, 197-98.

⁸⁸ *Id.*

⁸⁹ The television and film "copycat" cases contained incidents of comparable violence (gang rape and murder) as the shooting of Trooper Davidson, and courts, without exception, have upheld a First Amendment defense in such cases. See, e.g., *DeFilippo*, 446 A.2d 1036; *Walt Disney*, 276 S.E.2d 580.

of the song was too wide to satisfy the imminence requirement of the incitement exception.⁹⁰

The facts of the two cases have glaring similarities. Like John McCollum, Ronald Ray Howard had deep-rooted problems.⁹¹ Violent tendencies, stemming from a broken home and a criminal history, existed in Mr. Howard's persona long before he put that Tupac tape into the car radio and shot Bill Davidson.⁹² At his criminal trial, Mr. Howard testified that he had been beaten by his father, dealt crack, habitually stole cars, and shot Trooper Davidson to earn his gang stripes.⁹³ It was not reasonably foreseeable that Tupac's lyrics, regardless of their content, would spur such a tragically disturbed young man to murder a law enforcement official. Dr. David Stewart, a psychologist who followed the case, acknowledged that violent entertainment may exacerbate a violent tendency, but concluded that Howard's earlier troubles made him a prime candidate for homicide even if he had never heard a rap song.⁹⁴

Although the actual lyrics of Tupac's songs⁹⁵ were arguably more blatant, and more comprehensible than the lyrics of "Suicide Solution," they cannot reasonably be considered a "call to arms." The song, which depicts a young man who, out of rage, shoots a police officer, is pure fiction, and should, according to the *McCollum* precedent, be treated as such.⁹⁶ As was stated in *McCollum*, reasonableness and com-

⁹⁰Mrs. Davidson's lawyer is likely to attempt to introduce into evidence Tupac's recent brushes with the law. If it could be shown that Tupac's subsequent clash with the Atlanta Police indicated his intention imminently to incite the murder of the police officers, then the first arm of the *Hess* test will have been satisfied. 414 U.S. at 107-09. The Federal Rules of Evidence do not allow for the admission into evidence of other crimes or wrongs "to show action in conformity therewith," but such admission may be predicated upon other purposes, such as the proof motive. FED. R. EVID. 404(b). For a variety of reasons, however, it is unlikely that a court would admit such evidence. First, the incident in Atlanta occurred a considerable length of time after the Texas shooting, and the satisfaction of the *Hess* standard is predicated on the incitement of subsequent imminent action. *See* 414 U.S. at 109. Second, the officers who Tupac allegedly shot were not in uniform, giving Tupac no indication that they were police officers. Thus, any admission would surely fall outside the dictates of the Federal Rules, as its prejudicial value would surely outweigh its relevance. FED. R. EVID. 403. Still, a jury's inevitable exposure to the recent backlash against *gangsta* rap could only prove harmful to the defense.

⁹¹*Texas Death*, *supra* note 2, at A1.

⁹²*Slain Trooper*, *supra* note 10, at 11; *Grandmother Pleads*, *supra* note 1, at A21.

⁹³*Slain Trooper*, *supra* note 10, at 11; Janet Elliot, *Killer's Sentence Sets Stage for Civil Case*, TEX. LAW., July 19, 1993, at 4 [hereinafter *Killer's Sentence*].

⁹⁴Chuck Phillips, *Rap Defense Doesn't Stop Death Penalty*, L.A. TIMES, July 15, 1993, at F1.

⁹⁵*Texas Death*, *supra* note 2, at A1.

⁹⁶*Id.* In response to criticisms of his controversial song *Cop Killer* (*see Uncivil War*, *supra* note 28), Ice-T explained that the song's protagonist is merely playing a character Ice-T invented "who

mon sense dictate that musical lyrics are merely figurative poetical devices not to be taken literally.⁹⁷

Rap music, like all other forms of artistic (and nonartistic) expression, deserves the security that the First Amendment provides.⁹⁸ Although a song that is premised upon the killing of police officers is, not surprisingly, unpalatable to mainstream tastes, the right to produce such controversial works must be maintained.⁹⁹ Should artists like Tupac be censored, the resulting effect would be especially offensive, as the expression in question was arguably motivated by political and social concerns.¹⁰⁰

Tupac's lyrics might be worthy of even more stalwart First Amendment protection due to their sociological message.¹⁰¹ The recent reversal by the Eleventh Circuit Court of Appeals of the finding of obscenity in *Skywalker v. Navarro* was predicated on the lower court's disregard for testimony concerning the social value of rap music.¹⁰² One of the appellant's witnesses, Dr. Carl Long, testified that rap music contains certain traditions that cannot be divorced from African-American culture.¹⁰³ He also testified that 2 Live Crew's album *As Nasty as They Wanna Be* reflected the culture, heritage, and struggles of poor, inner-city blacks.¹⁰⁴ In addition to Dr. Long's testimony, two music critics testified to the artistic and musical significance of the work of 2 Live Crew and of rap music in general.¹⁰⁵ Relying on such testimony, the Eleventh Circuit stood behind the First Amendment and vindicated the controversial album by 2 Live Crew.¹⁰⁶ Although rap has cleared the hurdles in an obscenity context, it now faces a bitter struggle against the legions of detractors who seek to apply to it the fighting words exception.

is fed up with police brutality." Carla Hall and Richard Harrington, *Ice-T Drops "Cop Killer,"* WASH. POST, July 29, 1992, at A1 [hereinafter *Ice-T Drops*].

⁹⁷ See *supra* notes 81-82 and accompanying text.

⁹⁸ See *Skywalker*, 739 F. Supp. at 594.

⁹⁹ See *id.*; *McCullum*, 249 Cal. Rptr. at 197.

¹⁰⁰ *New York Times*, 403 U.S. at 719 (Black, J., concurring).

¹⁰¹ *Id.* Although Tupac has been silent regarding the current controversy, Eric Kronfeld, CEO and president of Polygram Holding, Inc., stated in defense of Ice-T's *Cop Killer* that "it would be seriously myopic for anyone to seriously insist that the voice of a disenfranchised oppressed minority should be repressed." *Uncivil War*, *supra* note 28, at 6.

¹⁰² *Luke*, 960 F.2d at 137-39.

¹⁰³ *Id.* Dr. Long explained that the music of 2 Live Crew contained the traditional elements of expression: "boasting, call and response, and doing the dozens." *Id.* at 137.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 136.

¹⁰⁶ *Id.*

III. GANGSTA RAP'S MESSAGE AND DETRACTORS

A. *History, Politics, and Protection*

Like any art form, the content, message, and style of rap music is spread across a wide spectrum. As is the case with other forms of music, including rock and roll, rap artists align themselves along definite lines and are concerned with differing themes.¹⁰⁷ Rappers like M.C. Hammer are pop-oriented. The messages of his songs are light and center around "boasting" and a strong dance beat. On the other hand, rap groups such as Public Enemy are exclusively concerned with a sociopolitical message that they seek to convey through their songs.¹⁰⁸ Rappers of the *gangsta* genre seek to express a similar sociopolitical concern, but their methodology is quite different from that of artists such as Public Enemy. The intellectual reasoning and historical perspective that pervades many of the songs by artists such as Public Enemy is often sacrificed for rage.¹⁰⁹ *Gangsta* songs routinely depict inner-city life in a straightforward manner, without elaborating on any means of a civilized remedy.¹¹⁰ The songs mirror the inner-city life of a disenfranchised minority, and the content is often extremely violent.¹¹¹ A current theme of *gangsta* rap involves vengeance directed at institutions which oppress inner-city minorities. Songs that depict the shooting of police officers, in retaliation for a perceived influx of police brutality, are common in the genre.¹¹² Indeed, Tupac and Ice-T are not alone in the penning of a violent antiestablishment message.¹¹³

Although, stylistically, *gangsta* rap may be a new phenomenon, its roots, and, perhaps, its justification, are long and deep. From slavery, to a century of inequality, to the 1992 Los Angeles riots, African-Ameri-

¹⁰⁷ Rock and roll has well-known and documented subdivisions, including R&B, heavy metal, punk, etc.

¹⁰⁸ The court, in *Luke*, inferred a potentially important sociological message in rap music. See *supra* notes 99-100 and accompanying text.

¹⁰⁹ *Uncivil War*, *supra* note 28.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* Rap groups and artists such as Dr. Dre, Sir Mix-a-lot, Ice Cube, and House of Pain (an all-white group) all have current hits which discuss retaliatory violence against police officers.

¹¹³ Willie D., formerly of the group The Geto Boys, has recently recorded a solo project which contains a song with the following lyrics: "Fuck all that singing/ I'm gonna be too busy swinging/ . . . I still got a lot of grudges/ It's high time we take out some judges." Chuck Phillips, *Rapper Willie D's Song Criticizes Rodney King*, L.A. TIMES, July 17, 1992, at F2 [hereinafter *Rapper Willie D.*].

can culture has endured a perpetual cycle of repression at the hands of the predominantly white majority. Violent reprisals have not been uncommon. In the mid-1960s, Malcolm X repudiated Martin Luther King's peaceful methodology message by asserting violence as a possible avenue.¹¹⁴ Twenty-six years ago, in response to poverty and oppression in Tupac's hometown of Oakland, California, Bobby Seale and Huey Newton founded the controversial Black Panther party. Among other targets, Seale pointed the finger at white police officers: "Our politics come from hungry stomachs and our crushed heads and the vicious service revolver at a cop's side. . . . We must organize and put a shotgun in every black man's home."¹¹⁵ Drawing a connection between himself and Seale, Tupac has said, "In a '90s way, I am a Black Panther."¹¹⁶

In August, 1965, Watts, a 98% black, poor urban neighborhood of Los Angeles became the site of a bloody riot.¹¹⁷ Not so ironically, the violence started during the harassment of a black youth by a white police officer. Nearly thirty years later, tensions have gone largely unabated. During the continued cycle of poverty, which has spawned an epidemic of criminal gang activity, *gangsta* rap was born. This same tension, ignited by the acquittal of four police officers who beat a black motorist, resulted in the 1992 riots in Los Angeles.¹¹⁸

Ice-T, one of the pioneers of *gangsta* rap, has been vehement in the defense of his genre of music: "Don't these politicians realize the country was founded on the kind of revolutionary political thought expressed in my song?"¹¹⁹ Songs like *Cop Killer* must not be understood as literal messages advocating the rampant slaughter of all police officers.¹²⁰ Rather, the songs must be viewed as figurative expressions of rage, designed to force the government to pay heed to the pleas of a disenfranchised minority.¹²¹ The violent content of the songs is an attempt to fight back against oppression with equal force, and to not

¹¹⁴MANCHESTER, *supra* note 62, at 1251.

¹¹⁵Tom Scanlon, *The New Motown*, L.A. TIMES CALENDAR, Nov. 22, 1992, at 65.

¹¹⁶*Id.*

¹¹⁷MANCHESTER, *supra* note 62, at 1301-05.

¹¹⁸Richard A. Serrano and Tracy Wilkinson, *All Four in King Beating Acquitted; Violence Follows Verdicts*, L.A. TIMES, Apr. 30, 1992, at A1. Fires swept Los Angeles, 38 people were killed, and massive looting ensued. David Whitman, *The Untold Story of the L.A. Riot*, U.S. NEWS & WORLD REP., May 31, 1993, at 35.

¹¹⁹*Uncivil War*, *supra* note 28.

¹²⁰See *McCollum*, 249 Cal. Rptr. at 194.

¹²¹See *Luke*, 960 F.2d at 137.

be ignored. In support of *gangsta* rap's First Amendment protection, observers have drawn the nexus: "Just watch the Rodney King tape once again and understand where this sentiment is coming from."¹²² Tupac's rage might be justified by his own experience. He has recently filed a ten million dollar lawsuit against the City of Oakland, alleging that two police officers beat him in 1991 for jaywalking.¹²³

At the 1992 Democratic National Convention, Jesse Jackson addressed the hopelessness that has inspired *gangsta* rap. He stated, "Their rap, their music, their videos, reflect their broken world."¹²⁴ If, indeed, the mistreatment of poor urban blacks is the result of bias that has its root in governmental forces, then rappers like Tupac and Ice-T must be allowed open channels of communication through which to voice their protests.¹²⁵

The rappers themselves seem to be more keenly aware of the parameters and purposes of the First Amendment than are the advocates of censorship. In one of the few statements that he has made regarding the Texas murder, Tupac said, "I am not trying to recruit your little kids, I'm not looking to be the black people's savior."¹²⁶ In defense of his constitutional rights, Ice-T describes the characters in *Cop Killer* as mere actors created to express dissatisfaction with police brutality.¹²⁷ In a speech to Harvard Law School students, Ice-T stated, "[i]f I felt it [violent lyrics] would push someone over the edge, I wouldn't do it."¹²⁸ Willie D., whose recent works depict a renewal of the violence of the L.A. riots, as well as violence directed toward a wide array of public officials, has a firm grasp on the extent of his First Amendment freedoms:

The way to get control is not by protesting. . . . It's by violence. . . . But I'm not advocating anything here. . . . If somebody decides to go out and do something that I mention in

¹²² *Crier and Company* (CNN television broadcast, July 20, 1992) (comments of columnist Julia Malveaux, speaking in defense of Ice-T).

¹²³ *Testing the Limits*, *supra* note 9, at F1.

¹²⁴ Jae-Ha Kim, *The Rap on Rap*, *FIRST*, Nov. 9, 1992, at 102. Nevertheless, Jesse Jackson, perhaps affected by the politicization of the debate, has shed a stalwart First Amendment stance in favor of a boycott on *gangsta* rap. Jackson has declared: "We're going to take away the market value of these attacks on our person. Anyone white or black who makes money calling our women bitches and our people niggers will have to face the wrath of our indignation." Leland, *supra* note 5, at 64.

¹²⁵ See *New York Times*, 403 U.S. at 719 (Black, J., concurring).

¹²⁶ Esther Iverem, *The Softer Side of Tupac*, *L.A. TIMES*, July 24, 1993, at F12.

¹²⁷ See *McCollum*, 249 Cal Rptr. at 196.

¹²⁸ *Ice-T Lashes out at Police, Censorship*, *UPI*, Feb. 17, 1993.

my song, it's not because I say to go out and do it, it's because they want to do it.¹²⁹

The censors do not agree.

B. *The critics, the censors*

Although many of the critics of *gangsta rap's* lyrics do not actually sponsor the application of the incitement exception, their comments may be intended to "chill" future releases by rap artists. In *New York Times v. Sullivan*, Justice Brennan, writing for the majority, warned of the danger of deterring, or chilling expression.¹³⁰ Fearful of stepping on the sensitive toes of a potentially successful censorship effort, record companies would "steer far wide[r] of the unlawful zone" and release the recordings of uncontroversial artists.¹³¹ The effect may already have been realized. Tupac's label, Interscope, has decided to curtail its releases of recordings that suggest violence toward the law enforcement community.¹³² Due to the magnitude of the protest, and the authoritative weight of the public officials who supported it, Ice-T voluntarily withdrew *Cop Killer* from his album *Body Count*.¹³³ Two weeks after Ice-T pulled *Cop Killer* from circulation, Warner Group executives met with Ice-T and other rappers, and told them to change their lyrics or find another label.¹³⁴ Citing business reasons, Ice-T has now parted ways with Warner Brothers, although he praised them as the "home of free speech."¹³⁵ Other record companies, fearful of boycotts and potential lawsuits, have aborted plans to release similar recordings.¹³⁶ After the well-publicized condemnation of the actions of

¹²⁹ *Rapper Willie D.*, *supra* note 113. John Cager, a minister at First African Methodist Episcopal Church in Los Angeles, says of Willie D.: "He bears no social responsibility. . . . There is no one who stands above criticism. . . . Maybe he's raising some valid issues. That's his First Amendment right." *Id.*

¹³⁰ *See* 376 U.S. at 264.

¹³¹ *See id.*

¹³² Chuck Phillips, *Putting the Cuffs on Gangsta Rap Songs*, L.A. TIMES, Dec. 10, 1992, at F1 [hereinafter *Cuffs*]. Interscope's release of Dr. Dre's *The Chronic* was made contingent upon the removal of the song *Mr. Officer*. *Id.*

¹³³ *Uncivil War*, *supra* note 28, at 76. Prior to its initial release, Ice-T was persuaded by Time Warner to change the name of the album from *Cop Killer* to *Body Count*. *Id.*

¹³⁴ *Cuffs*, *supra* note 132, at F1. The other rappers at the meeting were Kool G. Rap, Live Squad, and Paris. *Id.*

¹³⁵ Richard C. Paddock, *Ice-T Tells it Like it Is to Stanford Students*, L.A. TIMES, Feb. 22, 1993, at F2. Ice-T subsequently signed a contract with Priority Records for substantially less money. *Id.*

¹³⁶ Geffen Records pulled the scheduled release of a Geto Boys recording. *Uncivil War*, *supra* note 28, at 77. Similarly, the Boston band Almighty RSO was prevented from releasing the song *One in the chamba* by its record label, Tommy Boy. Chuck Phillips, *Can We Blame Rap Music?*, HOUS. CHRON., Sept. 24, 1992, at 1.

Tupac, Snoop Doggy Dogg, and the like, Los Angeles radio station KACE-FM adopted a ban on the airing of all *gangsta* recordings.¹³⁷ By instilling fear in the decisionmaking processes of the recording industry, the vigor, variety, and importance of public debate, through music, is correspondingly watered down.¹³⁸

It is not surprising that individuals would come forward in protest of Tupac, Ice-T, and the like. Such is their constitutional prerogative. What is alarming is the massive size of the protest and the identities of those who have jumped on the bandwagon. The campaign to silence *gangsta* rap became pronounced when the FBI's chief spokesman, Milt Ahlerich, sent a letter to Brian Turner, president of the Priority Records label that distributed the music of N.W.A., one of the first groups to rap about violence against the police.¹³⁹ Although the letter did not threaten agency action, it expressed moral disapproval of the band's message and supported its position with statistical information.¹⁴⁰ The letter, sent on official Department of Justice stationery, marked the first time in history that the FBI had taken an official position against a work of art.¹⁴¹ Instigating a boycott against providing security at N.W.A. concerts, police groups forced the band to cancel several appearances.¹⁴² At one concert, when the group began the song "F___ the Police," police stormed the stage, pulling the plug on the show.¹⁴³

Ice-T's music has attracted attention since 1987, when his *Rhyme Pays* was the first album to bear a label warning of explicit content.¹⁴⁴ However, it was not until the release of *Cop Killer*, in the summer of 1992, that the censors assumed an attack position. In response to the release of *Cop Killer*, U.S. Attorney General William P. Barr stated, "The song and Time Warner's promotion of it are reprehensible. This disgraceful conduct cannot be justified by an incantation of the First Amendment."¹⁴⁵ California Attorney General Daniel E. Lungren urged

¹³⁷ Leland, *supra* note 5, at 64.

¹³⁸ See *New York Times*, 376 U.S. at 264.

¹³⁹ Pareles, *supra* note 30, at 32.

¹⁴⁰ *Id.* The letter stated that "advocating violence and assault is wrong." *Id.*

¹⁴¹ *Id.* Mr. Ahlerich wrote the letter while admitting that he was unaware of any incidents in which an N.W.A. song provoked violence against a police officer. Richard Harrington, *The FBI as Music Critic*, WASH. POST, Oct. 4, 1989, at B7.

¹⁴² Pareles, *supra* note 30, at 32.

¹⁴³ *Id.*

¹⁴⁴ See generally *PMRC Hearings*, *supra* note 31. Album labeling is an industry-imposed form of warning against content which may not be suitable for some listeners. The recording industry was pressured by the Parent's Musical Resource Center (PMRC) to label records following a 1985 Congressional hearing. *Id.*

¹⁴⁵ *Ice-T Drops*, *supra* note 96, at A1.

the cessation of sales of the record, by sending letters on official stationery to retail stores throughout the state.¹⁴⁶

Speaking in his official capacity, Robert Macy, president of the National District Attorney's Association, stated, "If an officer is killed by someone influenced by 'Cop Killer,' the fires of hell will not be hot enough for distributors of the song."¹⁴⁷ Ron DeLord, then president of the Combined Law Enforcement Association of Texas (CLEAT), commented directly upon Ice-T's First Amendment rights, saying "Most Americans do not believe that the Constitution was designed to allow irresponsible people to call for the murder of others under the guise of entertainment."¹⁴⁸ After Mrs. Davidson filed suit against Tupac, Mr. DeLord added, "If it is illegal to produce physical pollution, it ought to be illegal to produce mental pollution."¹⁴⁹

Over sixty members of Congress wrote letters condemning Ice-T's work,¹⁵⁰ including Representative Susan Molinari, who claimed that Time Warner's profit motive removed *Cop Killer* from constitutional protection.¹⁵¹ Oliver North, known principally for his role in the Iran-Contra scandal, echoed a similar message, stating "What we have here is a bunch of businessmen who have irresponsibly decided to make money on products that threaten lives"¹⁵²

As a representative of his newly formed Freedom Alliance, Oliver North visited Mrs. Davidson at her home in Texas and, as a show of his support, offered to provide her with free legal representation.¹⁵³ On a campaign swing through Texas, Vice President Quayle visited with Trooper Davidson's daughter.¹⁵⁴ Even the presidency has been involved. Speaking at the opening ceremonies for a Drug Enforcement

¹⁴⁶ *Uncivil War*, *supra* note 28, at 77. The L.A. City Council and County Board of Commissioners sent similar letters. *Id.*

¹⁴⁷ *Ice-T Drops*, *supra* note 96, at A1. Mr. Macy's comments were met with a round of applause. *Id.*

¹⁴⁸ *Uncivil War*, *supra* note 28, at 77.

¹⁴⁹ Chuck Phillips, *Music to Kill Cops By*, WASH. POST, Sept. 20, 1992, at G10 [hereinafter *Music to Kill*].

¹⁵⁰ *Uncivil War*, *supra* note 28, at 77.

¹⁵¹ *Crier and Company*, *supra* note 122.

¹⁵² *Uncivil War*, *supra* note 28, at 77. Actor Charlton Heston has also jumped into the fray, denouncing Time Warner's profit motives. Heston, a stock holder in Time Warner, helped organize a boycott of the company if *Cop Killer* was not withdrawn. At this point, Ice-T pulled the song, citing death threats and stating that he did not want Time Warner to suffer for his actions. *Ice-T Drops*, *supra* note 96, at A1. Similarly, an attack on the record industry because of an alleged profit motive might hold little water. Although Tupac sold 400,000 copies of the album containing *Souljah's Story*, sales of rap records make up a minuscule portion of Time Warner's multibillion dollar business. *Uncivil War*, *supra* note 28, at 77.

¹⁵³ *Testing Limits*, *supra* note 9, at F7.

¹⁵⁴ *ABC News with Peter Jennings* (Sept. 23, 1992).

Agency office in New York, President Bush commented on Ice-T's lyrics, insisting "It's wrong for any company . . . to issue records that approve of killing a law enforcement officer."¹⁵⁵

Mrs. Davidson's suit promises to revive the controversy regarding censorship. The motivations of the censors and the disparate treatment that rap music has experienced require thorough examination. Given the unprecedented magnitude of the effort to silence *gangsta* rap, issues of race cannot be avoided.

IV. RACIST CONCLUSIONS

A. *Separate and Different*

Although three-quarters of all rap albums are bought by whites,¹⁵⁶ rap music is still considered a *black* phenomenon. Although white rappers are increasing their share of the sales, *gangsta* rap is dominated by black artists. When such a small portion of such a large industry garners such a generous share of the negative criticism, it is hard not to take notice. When that small portion is composed almost exclusively of a disenfranchised minority, and the campaign against that minority is so pronounced, racial discrimination becomes a valid concern.

The disparate treatment that *gangsta* rap has received is not warranted. Never before has a single art form garnered so much negative attention from would-be censors. Heavy metal, which is proffered mainly by all-white bands, has also been subjected to a significant amount of scrutiny,¹⁵⁷ but there has never been a concerted push toward outright censorship as there has been with rap music. Rather, the main thrust of the effort to regulate heavy metal has been through voluntary labeling by the industry itself.¹⁵⁸ This double standard exists in spite of the fact that heavy metal lyrics are often every bit as violent as their counterparts in the rap genre. This is revealed in a sample of Motley Crüe lyrics in the song *Too Young to Fall in Love*, from the album *Shout at the Devil*. A segment of the song conjures up images of sexism, rape, and murder:

Not a woman, but a whore,
I can taste the hate.

¹⁵⁵ *Uncivil War*, *supra* note 28, at 77.

¹⁵⁶ *Id.*

¹⁵⁷ See *PMRC Hearings*, *supra* note 31.

¹⁵⁸ *Id.* The PMRC hearings focused almost exclusively on heavy metal, despite the fact that the first album to receive a label was Ice-T's *Rhyme Pays*, in 1987. *Id.*

Well, now I'm killing you. . . .
 Watch your face turning blue. . . .¹⁵⁹

When the censors do consider heavy metal, a different approach is utilized. The “Ozzy” cases, *Waller* in particular, and *Judas Priest*, point the finger at the psychological effects of subliminal lyrics.¹⁶⁰ Those incendiary sublimations are seen as affecting the fragile minds of a few troubled individuals.¹⁶¹ The censors approach rap lyrics differently, fearing a more volatile reaction from a black audience. The lyrics of *Cop Killer* are treated as if they possess the inherent ability to incite an entire race of African Americans to engage in a murderous crusade against the nation’s police forces. Says one critic, “‘Cop Killer,’ readily blaring in millions of young, angry ears, would cause the death of law enforcement officers.”¹⁶² Oliver North spoke of the Los Angeles riots as if there was a direct causal relationship between Ice-T and the violence that followed the Rodney King trial. Referring to *Cop Killer*, North said that the song could “encourage the kind of anarchy that *you folks* in Los Angeles have just been through.”¹⁶³ When asked how he could testify on behalf of 2 Live Crew’s legitimacy, Henry Louis Gates, renowned scholar and head of Harvard’s African-American Studies program, responded, “The premise was that young black males in the inner-city were dry tinder, waiting only for a spark to make them go wilding. Well, what about Madonna’s record—‘I don’t want you to thank me / You can just spank me’? They didn’t think that white women would go out and get into S&M relationships.”¹⁶⁴ Rap artists are not treated as individuals but, rather, as part of a larger incestual conspiracy which has as its sole purpose the promulgation of violence. Concerned African-American associations are fully cognizant of the ripple effect that *gangsta* rap might have on a racist white element. Von

¹⁵⁹ *Id.* at 37.

¹⁶⁰ *Waller*, 763 F. Supp. at 1146. The lyrics on *Suicide Solution* are not actually subliminal, but merely suggestive.

¹⁶¹ *Id.*

¹⁶² Sheilah James Kuehl, *Ice-T’s Critics Miss the Rapper’s Real Target*, L.A. TIMES, July 27, 1992, at F3.

¹⁶³ *Uncivil War*, *supra* note 28, at 76 (emphasis supplied). North’s characterization of African Americans as “you folks” brings to mind Ross Perot’s speech before the NAACP, where he referred to his audience as “you people.” This shortsightedness and patent racism was further evident when Vice President Dan Quayle blamed the L.A. riots on a lack of family values, rather than on the Rodney King verdict and the cycle of poverty and discrimination that pervades South Central Los Angeles and other urban centers. *See, e.g.*, Cathleen Decker, *Protesters Confront Quayle in Visit to Housing Project*, L.A. TIMES, June 24, 1992, at A1.

¹⁶⁴ John Powers, *Henry Louis Gates, Jr., Harvard Man*, BOSTON GLOBE MAGAZINE, May 12, 1991, at 12.

Alexander, of the National Political Congress of Black Women, fears that Tupac's music and subsequent arrest may serve to "label all African-American artists as violent."¹⁶⁵

Although *Skyywalker* was decided on obscenity charges,¹⁶⁶ and 2 Live Crew was later vindicated,¹⁶⁷ the case provides an appropriate basis for comparison. At about the same time that a Federal District Court judge in Florida held 2 Live Crew's album to be obscene, a court in Cincinnati cleared an exhibition of Robert Mapplethorpe photographs of similar charges.¹⁶⁸ In many ways, the Mapplethorpe exhibition was a great deal more graphic than 2 Live Crew's tongue-in-cheek tales of sexual bravado.¹⁶⁹ While the Mapplethorpe exhibition managed to withstand scrutiny under the last prong of the *Miller* test,¹⁷⁰ the Federal District Court in *Skyywalker* found no artistic or social value in the music of 2 Live Crew. Even heavy metal is given the benefit of the doubt.¹⁷¹ While the *McCullum* opinion defers (properly) to the message of *Suicide Solution*, the critics of *gangsta* rap leave no room for interpretation.¹⁷² In holding that the music of 2 Live Crew contained no artistic or social value, the court ignored testimony from music critics, a psychologist, and a Rhodes Scholar, all of whom spoke of the significance of rap music.¹⁷³ Referring to Dr. Carl Long's testimony¹⁷⁴ as "nonsense," the judge ruled that the only relevant evidence was the music itself.¹⁷⁵

¹⁶⁵ James T. Jones, *Art or Anarchy? Gunplay Spurs Rap Debate*, USA TODAY, Nov. 3, 1993, at D1.

¹⁶⁶ See 739 F. Supp. 578.

¹⁶⁷ See *Luke*, 960 F.2d 134.

¹⁶⁸ Although the Eleventh Circuit Court of Appeals has recently reversed the finding of obscenity, the earlier decision of *Skyywalker* exemplifies the differential treatment and heavy burden that befalls the black artist, a burden that Tupac might encounter in a Texas Federal District Court. See *Luke*, 960 F.2d at 134; *Skyywalker*, 739 F. Supp. at 596.

¹⁶⁹ Among the photos in the Mapplethorpe exhibition was a photograph depicting a human fist being inserted into a human anus. See EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE* (1992).

¹⁷⁰ An obscene work "lacks serious artistic, scientific, literary or political value." 413 U.S. at 25.

¹⁷¹ *McCullum*, 249 Cal. Rptr. at 196.

¹⁷² See *id.* at 193 (holding that the message of a song may run completely counter to its overt content).

¹⁷³ *Luke*, 960 F.2d at 136; *Skyywalker*, 739 F. Supp. at 595.

¹⁷⁴ See *supra* notes 103-06 and accompanying text.

¹⁷⁵ *Skyywalker*, 739 F. Supp. at 595. In reversal, the Eleventh Circuit ruled that the *Skyywalker* court improperly discarded the testimony of the appellants' experts and that a finding of obscenity could not be supported on the lyrics alone. *Luke*, 960 F.2d at 138.

B. *R.A.V.*

The campaign against *gangsta* rap does not exist in only a few isolated incidents. It has ranged from patent racism to disparate treatment in a court of law. It is arguably the largest censorship drive since the McCarthy era, and yet, it focuses on just one, single form of expression. The differential treatment coincides with the fact that the single characteristic that separates rap music from other forms of music is race. The United States Supreme Court, in a controversial opinion authored by Justice Scalia, recently held that "special prohibitions on those speakers who express views on disfavored subjects" would constitute a content-based exclusion on speech that would be offensive to the First Amendment.¹⁷⁶ The *R.A.V.* decision placed a heavy burden on any state seeking to enact a proscriptive regulation on hate speech.¹⁷⁷ The specific facts of the case involved a cross-burning on the lawn of a black family.¹⁷⁸ A clear, if not precedential, parallel can be drawn to the current controversy. If, as *R.A.V.* affirms,¹⁷⁹ the First Amendment precludes selective content-based limitations on speech, then the unique "chilling" of rap music would run counter to the logic of *R.A.V.*¹⁸⁰ Applying Scalia's analysis in general terms, the only justification for the censorship of Ice-T and Tupac would be a contiguous and complete ban on all bias-motivated expression, which would include, among other forms of expression, the incendiary lyrics that are peculiar to *gangsta* rap.¹⁸¹ Thus, the singular proscription of *gangsta* rap lyrics because of their "disfavored subject matter" constitutes a content-based exclusion that offends the general dictates of *R.A.V.*¹⁸²

The irony is that *R.A.V.* has become the law with regard to the invalidation of statutes that seek to proscribe hate speech against African Americans, but remains merely dicta when extended to the censorship of inflammatory remarks made to white police officers by black rappers. Comparing *R.A.V.*'s affirmation of the First Amendment for

¹⁷⁶ See *R.A.V.*, 112 S. Ct. at 2542. *R.A.V.* must, however, be distinguished from the current controversy, and be viewed merely as an illustration. At issue in *R.A.V.* was an affirmative state act in the form of a hate crime ordinance; there is no affirmative law at issue in the Tupac case.

¹⁷⁷ *Id.* at 2549.

¹⁷⁸ *Id.* at 2541.

¹⁷⁹ *Id.* at 2549.

¹⁸⁰ *Id.* at 2545.

¹⁸¹ See *id.*

¹⁸² See *id.* at 2547. Again, *R.A.V.* must be distinguished due to the presence of clear state action in the enactment of the hate crime ordinance.

white bigots to the official campaign of censorship that has targeted *gangsta* rap, it becomes evident that freedom of speech has a racist pallor.¹⁸³

C. A History of Unkind Law

Rap music is just beginning to confront the law. Analogy to other forms of music lends itself to a superficial justification for feeling confident of a successful First Amendment defense. However, reference to the unending history of harsher sentencing for black criminal defendants plants a pessimistic seed for Tupac's advocates.

African Americans are viewed as more susceptible to violent tendencies even before any offense has been alleged. In a University of California study, Caucasian subjects, viewing a videotape of one person ambiguously shoving another, were more apt to label the act as violent when it was performed by a black than when the same act was perpetrated by a white.¹⁸⁴ However, where the initiator of the shove was white, the same viewers sought to apply any label to the act other than "violent," in effect making excuses for the white perpetrators.¹⁸⁵

Treatises abound on the disparate treatment that African-American defendants receive in the criminal justice system. Regarding felonies in general, statistics reveal that prosecutors are more likely to pursue full prosecution, file more serious charges, and seek more stringent penalties for minority defendants.¹⁸⁶ A study of Los Angeles prosecution trends has revealed that felony charges against African-American and Hispanic defendants are pursued with far more vigor than those against their white counterparts.¹⁸⁷

Before application of the death penalty in rape cases was declared unconstitutional,¹⁸⁸ 455 persons were executed for rape between 1930

¹⁸³ More recently, the Supreme Court upheld a hate speech ordinance that provides for the enhancement of sentences in bias-motivated crimes. *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993). Ironically, the test of the ordinance was initiated by a black defendant. *Id.* at 2194. Although *Mitchell* was distinguished from *R.A.V.* because the statute at issue was content neutral, the decision illustrates the unwillingness of the Court to support the claims of a black defendant.

¹⁸⁴ Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 591 (1976).

¹⁸⁵ *Id.* at 596. Other labels applied to the shove included "aggressive behavior" and "playing around." *Id.*

¹⁸⁶ Spohn et al., *The Impact of Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175, 180 (1987).

¹⁸⁷ *Id.* White defendants' cases were rejected 59% of the time, African Americans' cases were rejected 40% of the time, and Hispanics' cases were rejected 37% of the time. *Id.*

¹⁸⁸ *Coker v. Georgia*, 433 U.S. 584 (1977).

and 1968.¹⁸⁹ In stark contrast to the low percentage of blacks to whites in society as a whole, 405, or 89% of the total, of those 455 sentenced to death were African Americans.¹⁹⁰ During the same period, 36% of the black men convicted of raping white women were sentenced to death, whereas only 2% of all other rape defendants were executed.¹⁹¹ A 1983 study of capital cases in Georgia found that, while 70% of cases involving a black defendant and a white victim resulted in the death penalty, only 32% of the cases involving a white defendant and a white victim resulted in the issuance of the death sentence.¹⁹²

The correlation between the rape of white women and the slaying of white police officers is obvious. The predominantly white male infrastructure that has sought to protect the honor of its women today seeks to protect the sanctity of its beleaguered police officials. Unfortunately, the fallout from these paternalistic efforts has traditionally fallen on the shoulders of a scapegoat. For the past two centuries, white society has tapped the African-American population for assignment of blame. In *Furman v. Georgia*, Justice Marshall condemned assignment of the death penalty for rape because of the heavy burden that the African-American man must bear when sentences are handed down: "Regarding discrimination, it has been said that 'it is usually the poor, the illiterate, the underprivileged, the member of the minority group . . . who becomes society's sacrificial lamb.'" ¹⁹³

Given the institutional and societal bias that exists toward African-American defendants, and Tupac's well-publicized brushes with the law, it is not surprising that Mrs. Davidson's attorney perceives a decided advantage if the civil case is heard before a Texas jury.¹⁹⁴ A potentially biased jury might produce a different holding than in either of the "Ozzy" cases, both of which were decided on summary judgement.¹⁹⁵

¹⁸⁹ *Furman v. Georgia*, 408 U.S. 238, 364 (1972) (per curiam).

¹⁹⁰ *Id.*

¹⁹¹ Jennifer Wriggins, Note, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 112 (1983).

¹⁹² Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 709-10 (1983).

¹⁹³ 408 U.S. at 364 (quoting *Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess. at 11 (1968) (statement of M. DiSalle)).

¹⁹⁴ *Killer's Sentence*, *supra* note 93, at 4.

¹⁹⁵ *Id.*

D. *Misplaced priorities, dire consequences*

A primary by-product of the racist approach of the censors is the misappropriation of resources that could reverse the trend in our inner cities. A secondary by-product is the maturation of a mindset that could disregard two hundred years of societal progress under the First Amendment.

Society must decide whether Trooper Davidson was killed by a "bullet or a song."¹⁹⁶ The root of the problem clearly resides in the rage that inspired the lyrics. The problems are real. "The problem that we're facing in this country is not a record called 'Cop Killer.' The problem is that we're facing killer cops."¹⁹⁷ Bruce Rogow, defense attorney for 2 Live Crew and a professor of law at Nova University of Law, offers an age-old solution: "Our leaders need to listen, not chide or censor these artists."¹⁹⁸

Although an overwhelming body of precedent points to a favorable outcome for Tupac, his situation presents a novel predicament. The massive backlash against *gangsta* rap might solely be due to the fact that artists such as Tupac are black men who are threatening white authority figures.¹⁹⁹ Says Ice-T, "as soon as you stand on the First Amendment, they'll knock you down every time."²⁰⁰ Although the First Amendment has survived McCarthyism, flag burning,²⁰¹ and heavy metal, it might not survive Tupac.

¹⁹⁶ The comments of James George, Time Warner's attorney in the Tupac case. *Testing the Limits*, *supra* note 10, at F1.

¹⁹⁷ *CNN News: Police Protest "Cop Killer" Song at Annual Meeting* (CNN television broadcast, July 17, 1992) (comments of Clark Kissinger, of the group Refuse and Resist).

¹⁹⁸ *Uncivil War*, *supra* note 28, at 77.

¹⁹⁹ The Public Enemy song *Revolutionary Generation* contains the lyrics, "It's just a matter of race/ 'Cause a black male's in their face." PUBLIC ENEMY.

²⁰⁰ *Ice-T Lashes out at Police, Censorship*, UPI, Feb. 17, 1993.

²⁰¹ See *Texas v. Johnson*, 491 U.S. 397 (1989).