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# ARTICLES

## ROCK & ROLL CONTROL: CENSORING MUSIC LYRICS IN THE '90's

SHOSHANA D. SAMOLE\*

*Music expresses that which cannot be said and on which  
it is impossible to be silent.*

—Victor Hugo<sup>1</sup>

### I. INTRODUCTION

Censorship of music lyrics is a hotly debated issue. Advocates of censorship believe that certain lyrics corrupt the minds of young people, leading them to drugs, violence, and rebellion. In his 1993 law review article, Edward de Grazia asked, “Why should our daughters have to grow up in a culture in which musical advice on the domination and abuse of women is accepted as entertainment?”<sup>2</sup>

Opponents of censorship object to any measure restricting the free flow of artistic expression. The late musician Frank Zappa, who referred to censors as “cultural terrorists,” believed that “when people say ‘that’s not music,’ it’s a manifestation of closed-mindedness.”<sup>3</sup>

However heated, the conflict over censorship is not new. Rock music has been censored and subjected to investigation as early as its inception in the mid-1950’s. In 1956 Elvis Presley, whose

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1. THE GIFT OF MUSIC 45 (Louise Bacelder ed. 1975).

2. Edward de Grazia, *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius, Chapter 30 Just a Pro-Choice Kind of Gal*, 11 CARDOZO ARTS & ENT. L.J. 777, 780 (1993) (book excerpt).

3. Richard Lacayo, *The Other Partner, Tipper*, TIME, July 20, 1992, at 30.

gyrating hips were considered too risqué for *The Ed Sullivan Show*, was televised from the waist up.<sup>4</sup> In the early 1970's, Spiro Agnew conducted a short-lived campaign to ban rock music from the radio, which he felt promoted drug use and the "drug-culture."<sup>5</sup> In 1975 the Reverend Charlie Boykin in Florida set fire to thousands of dollars worth of rock records, citing a local poll that said 984 of 1000 unwed mothers interviewed got pregnant while listening to pop songs.<sup>6</sup>

The decade of the 1980's ushered in a new wave of shocking sexuality and aggression in popular music.<sup>7</sup> In thirty years, popular music has moved from "I Wanna Hold Your Hand" to "I Wanna Fuck You Like an Animal."<sup>8</sup> In 1984 teen John D. McCollum committed suicide while lying on his bed listening to the song "Suicide Solution" by Ozzy Osbourne.<sup>9</sup> In 1985 two emotionally disturbed teens listened to the record album *Stained Class* by the British heavy metal group Judas Priest and subsequently shot themselves on a church playground.<sup>10</sup> The surviving families both filed, and lost, lawsuits blaming the teen suicides on the record companies that produced the albums. The *McCollum* court found

4. Marc D. Allan, *Shock & Roll; The Theme of Modern Music Lyrics Seems to be "Anything Goes." Should We Be Concerned?*, THE INDIANAPOLIS STAR, July 9, 1995, at I01.

5. Steven Dougherty, *From "Race Music" to Heavy Metal: A Fiery History of Protests*, PEOPLE, Sept. 16, 1985, at 52.

6. *Id.*

7. The following songs are examples of sex and violence theme songs that emerged in the 1980's:

MOTLEY CRUE, *Bastard*, on SHOUT AT THE DEVIL (Warner Brothers Records 1984):

Out go the lights,  
In goes my knife,  
Pull out his life,  
Consider that bastard dead.

PRINCE, *Darling Nikki*, on PURPLE RAIN (Electra/Asylum Records 1983):

I met a girl named Nikki  
I guess you could say she was a sex fiend  
I met her in a hotel lobby masturbating with a magazine.

2 LIVE CREW, *Dick Almighty*, on AS NASTY AS THEY WANNA BE (Luke Records 1989):

She'll climb a mountain, even run the block  
Just to kiss the head of this big black cock.

8. NINE INCH NAILS, *Closer*, on DOWNWARD SPIRAL (Nothing/TVT/Interscope Records 1994).

9. *McCollum v. CBS*, 249 Cal. Rptr. 187, 191 (Ct. App. 1988).

10. *Judas Priest v. Second Judicial Dist. Court*, 760 P.2d 137 (Nev. 1988).

that "no rational person would . . . mistake musical lyrics or poetry for literal commands."<sup>11</sup>

The shocking musical trend of the 1980's led to a new wave of national cries for censorship. Industry groups, concerned parents, and reactive legislators began advancing new tactics to protect American children from music lyrics. This attack occurred on many fronts, which included enacting "Harmful to Minors" legislation, arresting retailers for selling adult music to teenagers, and lawsuits to declare rap music obscene. The record industry responded by affixing "PARENTAL ADVISORY—EXPLICIT LYRICS" stickers to albums, adopting "Eighteen to Buy" policies, and removing controversial recordings from store shelves. These changes were largely the result of the industry capitulating to political threats, ostensibly to forestall legislation regulating rock lyrics, rather than actual government censorship.

In the fall of 1995, Time Warner bowed to political pressure and sold back its interest in Interscope Records after becoming the target of a much publicized campaign that accused rappers of promoting violence and misogyny in their records.<sup>12</sup> According to the *Wall Street Journal*, Time Warner "walk[ed] away from one of the most successful new music companies in recent years."<sup>13</sup> There was subsequently a bidding war that ended with MCA entering into a \$200 million partnership with Interscope in February 1996.<sup>14</sup> Nonetheless, MCA still included an "escape clause" in the contract that allows MCA to pass on distributing any Interscope album that it considers objectionable.<sup>15</sup>

Most recently, in December 1996, Wal-Mart, the country's leading pop music retailer with 2300 stores across the nation, implemented a new censorship policy. Wal-Mart now refuses to carry record albums with "PARENTAL ADVISORY" stickers and even asks artists to change objectionable lyrics and CD cover artwork.<sup>16</sup> Aware that an album can lose up to ten percent of its sales if not carried by the chain, many artists agreed to make adjustments.<sup>17</sup> Alternative-pop singer Beck agreed to delete an

11. 249 Cal. Rptr. at 194.

12. Jeffrey A. Trachtenberg, *Time Warner Sells Its Stake in Label Criticized for Rap*, WALL ST. J., Sept. 28, 1995, at B9.

13. *Id.*

14. Bruce Haring, *MCA Buys Half of Interscope Label—Controversial Rap Included in Deal*, USA TODAY, Feb. 22, 1996, at 1D.

15. *Id.*

16. Steve Morse, *Up Against the Wal-Mart, Some Artists Change Their Tunes*, MIAMI HERALD, Dec. 28, 1996, at 1G.

17. *Id.* at 6G.

obscenity for a cleaned-up version of his first album, *Mellow Gold*.<sup>18</sup> John Mellencamp agreed to airbrush out images of Jesus Christ and the devil on his latest album, *Mr. Happy-Go-Lucky*.<sup>19</sup> Cleaned-up copies of *Superswingin' Sexy Sounds* by metal-rock band White Zombie include bikini straps painted on naked women.<sup>20</sup> According to band member Rob Zombie, "I didn't do it for Wal-Mart, but for the kids who have no other way of getting the music."<sup>21</sup>

Thus far in the 1990's, the music industry has chosen to exercise self-restraint rather than test the government's regulatory powers. The enduring question is how much can the government regulate lyrics, if at all. Part II of this article summarizes the development of First Amendment obscenity standards as they apply to adults, minors, and music. Part III discusses legislation attempting to criminalize the sale of music deemed "harmful to minors." Part IV describes the recent movement towards industry self-regulation, which is critically attacked in Part V. Ultimately, this article concludes that the government poses no actual threat to the music industry because of the rights guaranteed by the U.S. Constitution.

## II. THE FIRST AMENDMENT APPROACH

The most obvious standpoint from which to address the music lyric problem is to treat the material as obscene. However, this approach raises two important questions: first, whether music lyrics can be obscene from a constitutional standpoint; and, second, even if the lyrics are obscene, whether they can be constitutionally regulated. The following section explores answers to these questions.

### A. *The Adult Obscenity Standard*

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech."<sup>22</sup> However, First Amendment protection is not absolute.<sup>23</sup> On the basis of early cases discussing obscenity in its dicta, the Supreme Court had "assumed"

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18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. U.S. CONST. amend. I.

23. See *Chaplinsky v. N.H.*, 315 U.S. 568, 571 (1942).

that obscenity was an exception to the First Amendment.<sup>24</sup> In actuality, the Supreme Court was not faced squarely with the issue of obscenity until 1957 in *Roth v. United States*.<sup>25</sup> The *Roth* Court converted the traditional assumption into a rule of law holding that "obscenity is not within the area of constitutionally protected speech."<sup>26</sup>

In creating an "obscenity" exception to the First Amendment, the Court faced a new task: establishing a concrete definition of obscenity that all justices could agree upon. The definition proffered in *Roth*, when reduced to a formula, provided that material may be deemed obscene, and therefore wholly without constitutional protection, if it (a) appeals to a prurient interest in sex; (b) has no serious literary, artistic, political, or scientific merit; and (c) is on the whole offensive to the average person under contemporary community standards.<sup>27</sup> However, there is a problem with the word "prurient." To the *Roth* Court, prurient material was that which has "a tendency to excite lustful thoughts."<sup>28</sup> Yet, it is possible that material can be "both prurient and political; that it can be possessed of a tendency to excite lustful thoughts and contain profound social commentary; or that it can create in an individual morbid and lascivious desires and constitute poetry of the highest order."<sup>29</sup> Thus, the *Roth* Court rendered a definition framed in terms that would not easily address the surplus of varying factual circumstances that would burden the Court in the years to come.

The difficulties created by the vague standards of the *Roth* test were perhaps best described by Justice Stewart in his concurring opinion in *Jacobellis v. Ohio*.<sup>30</sup> Unable to clearly apply the *Roth* test to an allegedly obscene motion picture, Stewart stated, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description

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24. See, e.g., *id.* Justice Murphy stated that the "lewd and obscene" are among "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Id.* at 571-72. See also *Beauharnais v. Ill.*, 343 U.S. 250, 266 (1952) (equating obscenity with group libel as being beyond the area of constitutionally protected speech).

25. 354 U.S. 476 (1957).

26. *Id.* at 485.

27. *Id.*; see also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1137 (1991).

28. 354 U.S. at 487 n.20.

29. NOWAK & ROTUNDA at 1138 (1991).

30. 378 U.S. 184 (1964).

["obscenity"]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it."<sup>31</sup> During the next several years, the Court continued to grapple unsuccessfully with several tests to apply to allegedly obscene material.<sup>32</sup>

Finally, in 1973, in *Miller v. California*,<sup>33</sup> five Justices agreed on a definition. The Court held that the basic guidelines for the trier of fact must be:

- (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.<sup>34</sup>

The *Miller* test is currently the state of the law for obscenity.

### B. Variable Obscenity: State Interest in Protecting Minors

When children are the target of allegedly obscene materials, the Court applies a different standard. The approach, adopted in *Ginsberg v. New York*,<sup>35</sup> is known as "variable obscenity." According to this doctrine, the state has the power to adjust the definition of obscenity as it applies to minors to allow the state to restrict children's access to materials which would not otherwise be obscene.<sup>36</sup> The *Ginsberg* Court held that a statute defining obscenity in terms of an appeal to the prurient interest of minors was constitutional.<sup>37</sup> The Court justified "variable obscenity" by finding that the "state had an independent interest in protecting the welfare of children and in seeing that they are safeguarded from abuses which might inhibit their free, independent, and well-developed growth."<sup>38</sup> The Court further justified its holding as a

31. *Id.* at 197.

32. *See, e.g.*, A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass., 383 U.S. 413 (1966). The Court added "utterly without redeeming social value" to the definition of obscenity; however, the Justices were split as to a definition of the appropriate community standard. *Id.* *See also* *Ginzburg v. United States*, 383 U.S. 463 (1966), *reh'g denied*, 384 U.S. 934 (1966) (emphasizing the *intent* of the speaker in definition of obscenity).

33. 413 U.S. 15 (1973).

34. *Id.* at 24.

35. 390 U.S. 629 (1968), *reh'g denied*, 391 U.S. 971 (1968).

36. 390 U.S. at 637.

37. *Id.*

38. *Id.* at 640.

means to "support parents in their responsibility to raise children."<sup>39</sup>

The 1978 case *FCC v. Pacifica* expanded the notion of variable obscenity to include "indecent expression."<sup>40</sup> *Pacifica* created the concept of "lesser protected speech," finding that indecent words offend for the same reason that obscenity offends and that neither has social value.<sup>41</sup>

In any system of censorship, there is constant danger that the official in charge will be overzealous or unresponsive to the concerns and interests of the majority. Thus, in creating variable obscenity, the Court also created strict procedural safeguards to ensure against the curtailment of protected speech. Statutes for the protection of children must be narrowly drawn in two respects. First, the statute must not be overbroad; the state cannot prevent the general public from reading or having access to materials on the grounds that the materials would be objectionable if read or seen by children.<sup>42</sup> Second, the statute must not be vague.<sup>43</sup>

Even with these procedural safeguards in place, the adoption of variable obscenity was met with much opposition. Justice Douglas, in a strong dissent to *Ginsberg*, argued that "Big Brother can no more say what a person shall listen to or read than he can say what shall be published."<sup>44</sup> Harvard law professor, Laurence Tribe, discussing variable obscenity, argued that "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."<sup>45</sup> Justice Brennan in his *Pacifica* dissent argued that speech cannot properly be valued according to the preferences of the majority, stating, "The words that the Court and the Commission find so unpalatable may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that compose this nation."<sup>46</sup> Despite this controversy among legal theorists and Supreme Court Jus-

39. *Id.* at 639.

40. 438 U.S. 726 (1978).

41. *Id.* at 746.

42. *See* *Butler v. Mich.*, 352 U.S. 380, 383 (1957). Legislation must not "reduce the adult population . . . to reading only what is fit for children." *Id.*

43. *See, e.g., Interstate Circuit v. Dallas*, 390 U.S. 676 (1968). The Court struck down a city ordinance which classified films as "not suitable for children" because it lacked "narrowly drawn, reasonable and definite standards for the officials to follow," giving censors too much discretion. *Id.* at 690.

44. 390 U.S. 629, 654 (Douglas, J. dissenting).

45. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 937 n.52, (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976)).

46. 438 U.S. at 776 (Brennan, J. joined by Marshall, J., dissenting).



tices, variable obscenity has remained a valuable tool to protect children from indecent materials.

### C. *Obscenity and Music*

If music lyrics can be classified as obscene under the three-pronged test of *Miller*, they are unprotected by the First Amendment and subject to government regulation. However, it is not possible to find music lyrics "obscene" under the current *Miller* formulation. This shortcoming of the *Miller* test became evident in 1990 when a United States district court in Florida, for the first time, was asked to determine the obscenity of a work combining "hard core" pornographic speech and a constitutionally protected medium of artistic expression: music.<sup>47</sup> On appeal, the Eleventh Circuit was asked to apply the *Miller* test to a musical composition, which contained both instrumental music and lyrics.<sup>48</sup> In the much publicized *Luke Records, Inc. v. Navarro*,<sup>49</sup> the court determined that 2-Live Crew's musical recording *As Nasty As They Wanna Be* was not obscene under the standards of *Miller*.<sup>50</sup> With lyrics such as, "Let's go to my house and fuck forever," the court had little problem finding that the album "appealed to prurient interest" and "described sexual activity."<sup>51</sup> Nonetheless, because the lyrics were combined with music, the court could not satisfy the last prong of the *Miller* analysis and could not determine that the work "lack[ed] serious, artistic, scientific, literary or political value."<sup>52</sup> When unconstitutional speech and music are combined as a unit, applying the *Miller* test ultimately results in the speech taking secondary importance. Courts are not in a position to justifiably determine that music lacks artistic value. Judges are not music critics. Therefore, even at its worst, music cannot be considered obscene, and First Amendment guarantees remain.

## III. THE LEGISLATIVE APPROACH

Because music is not "obscene" and is protected by the First Amendment, music can never be completely banned unless the *Miller* test is revised. However, legislatures can still restrict chil-

47. *Skywalker Records, Inc. v. Navarro*, 739 F.Supp. 578 (S.D. Fla. 1990).

48. *Luke Records, Inc. v. Navarro*, 960 F.2d. 134 (11th Cir. 1992) (per curiam), cert. denied, 506 U.S. 1022 (1992).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

dren's access to music that would not otherwise be obscene under the "variable obscenity" exception promulgated in *Ginsberg*. Yet, there are problems inherent in this approach. Currently, many states have provisions regulating the sale and display of sound recordings to minors included in their "Harmful to Minors" statutes.<sup>53</sup> Few have been enforced to date, and no arrests have resulted in convictions.<sup>54</sup> In fact, a *New York Times* commentator argues that it may be impossible to convict anyone under obscenity laws at all.<sup>55</sup>

Although criminal prosecution may not be a reality in urban America, the actual harm is the chilling effect these statutes have on musicians and store owners. Many record store owners representing the nation's major retail chains, fearing consumer boycotts and prosecution under local obscenity ordinances, have discontinued selling records with warning labels to anyone younger than eighteen or simply removed questionable products from their shelves.<sup>56</sup> The State of Washington's recent attempt to regulate the sale of music to children illustrates these problems.

53. See Ark. Code Ann. § 5-68-502(a)(2) (Michie 1987); Colo. Rev. Stat. Ann. 18-7-502(1)(b) (West 1992); Del. Code Ann. tit. 11, § 1365(i)(1) 1991); Fla. Stat. Ann. § 847.012(2)(b) (West 1992); Ga. Code Ann. § 16-12-103(a)(2) (Michie 1992); Idaho Code § 18-1515(1)(b) (1992); Minn. Stat. Ann. § 617.293(1)(b) (West 1992); Neb. Rev. Stat. § 28-808(1)(b) (1991); Nev. Rev. Stat. Ann. § 30-37-2(B) (Michie 1992); N.H. Rev. Stat. Ann. § 571-B:2.I(b) (1991), N.M. Stat. Ann. § 30-37-2(B) (Michie 1992); N.Y. Penal Law § 235.21(1)(b) (McKinney 1992); 18 Pa. Cons. Stat. Ann. § 5903(c)(2) (1992); Tenn. Code Ann. § 39-17-911(a)(2) (Michie 1992); Wis. Stat. Ann. § 948.11(1)(a)(2) (West 1990).

54. The reason for the lack of convictions is that a sound recording must be deemed obscene before an arrest for sale of the sound recording can be made. Thus, the only prosecutions under "Harmful to Minors" statutes were during the period between the lower and upper court decisions in the *Luke Records* case, where the 2 Live Crew album *As Nasty As They Wanna Be* was temporarily classified as constitutionally obscene before reversal by the Eleventh Circuit. See, e.g., *Florida Judge Finds 2 Live Crew Album Legally Obscene*, ENT. LITIG. REP., July 9, 1990 (record-store clerk in Sarasota, Florida, arrested for selling a copy of 2 Live Crew album to an eleven-year-old girl, but charges eventually dropped); Stan Soocher, *It's Bad, It's Def — Is It Obscene?*, NAT'L L.J., June 4, 1990, at 1 (record store owner in Alexander City, Alabama arrested for selling copy of 2 Live Crew album to police officer, but ultimately earned jury acquittal).

55. See Steven Lee Myers, *Obscenity Laws Exist, But What Breaks Them?*, N.Y. TIMES, Jan. 19, 1992, § 4, at 1 (arguing that state obscenity laws have become virtually unenforceable).

56. These retailers include Musicland Stores Group (814 stores), Trans World Corp., (450 stores), Sound Warehouse (142 stores), and WaxWorks (140 stores). Chuck Philips, *A War on Many Fronts: Censorship: 1990 Was the Year That 'Free Expression' Ran Head-On Into 'Moral Concern.'* But the Conflict May Only Be Beginning, L.A. TIMES, Dec. 26, 1990, at F1. The retailer Wal-Mart (2300 stores) adopted this policy most recently. See Steve Morse, *Up Against the Wal-Mart, Some*

Effective June 11, 1992, Washington amended its "Harmful to Minors" statute to include sound recordings. The former version, enacted in 1969, applied only to erotic visual materials and had never been challenged.<sup>57</sup> Under the amended statute, prosecutors could bring a suspect sound recording before a judge to determine if it was "erotic."<sup>58</sup> Once a judge ruled that a sound recording was, in fact, "erotic," the law required that an "Adults Only" label be affixed to all copies of the recording in Washington.<sup>59</sup> Thereafter, any retailer in Washington who sold, distributed, or exhibited the "erotic" recording to a minor would be in violation of the statute.<sup>60</sup> The State contended that a shopkeeper who has perused the sound recordings before selling them would have ample notice which ones could not be sold to minors, thereby circumventing any legal action. The musical groups scoffed at this assumption. Indeed, the record industry issues a combined 50,000 songs a year.<sup>61</sup> At three minutes a song, it would take a staff of three people working year-round to listen to every one. This does not take into account the thousands of independent, underground, and foreign releases that can be found in the United States as well.<sup>62</sup>

Amid this atmosphere, Seattle-based artists (including Soundgarden, Nirvana, and Pearl Jam), the American Civil Liberties Union, and music industry groups, including PolyGram, Sony, and Warner Brothers, announced a facial challenge to the Washington amendment.<sup>63</sup> In 1994 the State was permanently enjoined from enforcing the statute.<sup>64</sup> Although the Washington

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*Artists Change Their Tunes*, MIAMI HERALD, Dec. 28, 1996, at G1. See also *supra* notes 17-22 and accompanying text.

57. *Soundgarden v. Eikenberry*, 871 P.2d 1050 n.4 (Wash. 1994).

58. Wash. Rev. Code Ann. § 9.68.060(1) (West 1992):

When it appears that material which may be deemed erotic is being sold, distributed, or exhibited in this state, the prosecuting attorney of the county in which the sale, distribution, or exhibition is taking place may apply to the superior court for a hearing to determine the character of the material with respect to whether it is erotic material.

59. Wash. Rev. Code Ann. § 9.68.060(3)(a) (West 1992). It is interesting to note that no materials have been judged erotic in the 22 years the Washington bill has been on the books. Richard Harrington, *2 Live Crew Beats the Rap*, WASH. POST, May 13, 1992, at B7.

60. Wash. Rev. Code Ann. § 9.68.060(d).

61. Bill Holland, *Sticker Review an RIAA Priority: Latest Lyrics Bill Blocked in Louisiana*, BILLBOARD, June 24, 1995.

62. Allan, *supra* note 5, at I01.

63. *Bid to Overturn Washington Ban on 'Erotic' Music*, S.F. CHRON., June 12, 1992, at D4.

64. *Soundgarden v. Eikenberry*, No. 92-2-14258-9, 1992 WL 486597 (Wash. Super. Ct., King County, Nov. 20, 1992), *aff'd*, 871 P.2d 1050 (Wash.), *cert. denied*, 115 S.Ct. 663 (1994). In addition to their traditional constitutional complaints, the

Supreme Court held that the statutory definition of "erotic material" satisfied the First Amendment test of obscenity for minors under the *Ginsberg* test, the statute did not survive the strict procedural safeguards that accompany "variable obscenity."<sup>65</sup> The court found the statute to be procedurally infirm and dedicated a large portion of its opinion to pointing out the constitutional flaws with the Washington statute.

First, the court held that the statute was overbroad because it reached constitutionally protected conduct. The court noted that the statute would create a "widespread chilling effect or self-censorship upon the whole industry" and that "shopkeepers have already instituted policies to prevent sale to minors of even recordings which have not been adjudged to be erotic."<sup>66</sup> The court was also responsive to artists claims that they must "curtail their protected speech and expression or risk loss of sales because of censorship by shopkeepers or the State."<sup>67</sup>

Second, the court held that the statute constituted an impermissible prior restraint upon protected speech as applied to adults.<sup>68</sup> The court noted that the statute authorized the State of Washington to conduct hearings to determine whether a recording was "erotic." The statute further authorized the court to require retailers to attach "Adults Only" stickers to the recordings and to enjoin retailers from displaying and selling the recording to minors. The retailer could then be subject to criminal contempt for violating the injunction, even if the retailer neither was aware of the hearing nor had knowledge of the injunction.<sup>69</sup> The State argued that the court could limit the statute so that contempt proceedings would apply only to dealers and distributors who were parties in the initial hearing.<sup>70</sup> The court did not accept this invitation to engage in judicial legislation.

Finally, the court held the statute violated due process.<sup>71</sup> The musical groups claimed the two-stage procedure of the statute, on

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plaintiffs filed affidavits and declarations that the statute interfered with their ability to express themselves, manage their businesses, and access ideas; and interferes with society's notion of a free marketplace of ideas, and, in general, the evolution of society itself. 871 P.2d at 1052.

65. See discussion *supra* part II.B.

66. 871 P.2d at 1057.

67. *Id.*

68. *Id.* at 1059.

69. *Id.* at 1059.

70. *Id.*

71. *Id.* In deciding the due process claim, the court balanced the following interests: (1) the private interest to be protected; (2) the risk of erroneous deprivation

its face, denied due process because not all interested parties were given timely notice of the initial hearing nor adequate notice concerning which recordings were deemed to be erotic.<sup>72</sup> The plaintiffs further argued that the five days notice to a single seller or distributor of an alleged "erotic" recording did not provide sufficient time for adequate legal preparation to defend the nature of the questioned recording.<sup>73</sup> Though the court recognized that the State of Washington had a "strong and legitimate interest in protecting minors . . . that protection can only be provided by constitutional means."<sup>74</sup>

In the aftermath of the *Soundgarden* trial, Washington proposed new bills remodeling the rejected legislation. These bills overwhelmingly passed the Democratic controlled Senate and the Republican controlled House, but both were ultimately rejected by then Washington Governor Lowry.<sup>75</sup>

Whether the legislation can be reformulated to withstand constitutional scrutiny, yet still bring about its desired effect, is questionable. One possible way to resolve the due process defect in the statute is to prosecute store owners who sell albums labeled by the record companies "PARENTAL ADVISORY—EXPLICIT LYRICS," rather than require a hearing. However, this is not a viable solution.

According to the court in *Motion Picture Ass'n v. Specter*,<sup>76</sup> the government cannot use a private organization's rating system to determine whether a form of expression receives constitutional protection. In *Specter*, a Pennsylvania criminal statute adopted the Code and Rating Administration (CARA) standards for rating motion pictures. The court ruled that because CARA does not have defined standards or criteria,<sup>77</sup> the Pennsylvania statute was

of that interest by the government's procedures; and (3) the government's interest in maintaining the procedures. *Id.* (citing *Morris v. Blaker*, 821 P.2d 482 (Wash. 1992))(citing *Mathews v. Eldridge*, 424 U.S. 319, 355 (1976)).

72. 871 P.2d at 1060.

73. *Id.* at 1062.

74. *Id.* at 1060.

75. David Postman, *Rockers' Pac Seeks Funds Nationwide — Organizers Commend Lowry For Veto On 'Harmful to Minors' Bill*, SEATTLE TIMES, Aug. 12, 1995, at A11.

76. 315 F. Supp. 824 (E.D. Pa. 1970).

77. See EDWARD DE GRAZIA & ROGER K. NEWMAN, BANNED FILMS: MOVIES, CENSORS & THE FIRST AMENDMENT 120 (1982). The standards applied to determine the ratings include upholding the dignity of human life; exercising restraint in portraying juvenile crime; not demeaning religion; prohibiting extreme violence and brutality, obscene speech, gestures or movements; and limiting sexual content and nudity. *Id.*

constitutionally vague and infringed upon rights of freedom of expression.<sup>78</sup>

Thus, if a theater owner admits a fifteen-year-old to an R-rated movie, he may have breached industry ethics, but he has not broken any laws. In the same way, if a retailer sells a CD with an industry-placed warning label to a fifteen-year-old, the retailer may not be exercising his best judgment, but the government does not have the right to stop him.

Nonetheless, other states are following Washington's initiative and attempting to amend their "Harmful to Minors" statutes. None of these proposals have survived. A recent Louisiana bill was stopped that would have criminalized the sale or distribution to minors of a tape or CD bearing the "PARENTAL ADVISORY" warning.<sup>79</sup> A similar bill is pending in Pennsylvania after a previous bill died in committee.<sup>80</sup>

The objective for these statutes is not the desire to turn music-loving children into criminals. Rather, state legislatures are trying to generate pressure on the music industry to self-censor. To illustrate, Pennsylvania agreed not to pursue its lyrics legislation if the National Association of Recording Merchandisers (NARM) formed a task force to deal with the issue.<sup>81</sup> Thus, the legislatures instead are looking for increased accountability from the record labels.

#### IV. THE SELF-REGULATION APPROACH

In 1985 the Parent's Music Resource Center (PMRC), alarmed by the new wave of shocking lyrics, began a crusade against popular music. The PMRC was a potent force, largely due to its four politically connected founders and its board of directors. With Tipper Gore and Susan Baker, the PMRC leadership included the wives of ten senators, six representatives, and one sitting Cabinet

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78. See also *Engdahl v. Kenosha*, 317 F. Supp. 1133 (E.D. Wis. 1970) (granting a preliminary injunction on the same grounds).

79. Holland, *supra* note 62. The bill would have made retailers responsible for screening the approximately 50,000 recorded songs that the RIAA releases each year. *Id.*

80. Richard Harrington, *A Harder Spin; Debate on Stricter Label Laws, Penalties Heat Up Again*, WASH. POST, Apr. 26, 1995, at C07. Retailers knowingly selling a stickered album would face a penalty of \$25, with each subsequent fine of \$100. A minor found buying a labeled album would be subject to as many as 10 hours of community service for a first offense and 25 hours for each subsequent offense. *Id.*

81. *Id.*

member.<sup>82</sup> Concerned about their children's exposure to messages they considered "destructive" and "negative," the PMRC used its high-powered connections and money from Occidental Petroleum, Merrill Lynch, and other political contributors to generate pressure on the music industry.<sup>83</sup>

In response, the Recording Industry Association of America (RIAA) agreed to institute a voluntary policy of affixing warning labels on music releases containing explicit lyrics, including depictions of sex and violence, so that parents could make intelligent listening choices for their children. However well-intentioned, the RIAA policy did not work to alleviate the problem. Many record companies found ways to side-step the agreement by varying the size and placement of the warnings, using the warning label as a sly marketing device, and even creating warning stickers that actually mocked the agreement. Rapper Ice T's album, *The Iceberg/Freedom of Speech*, contained the following warning label: "Parents strongly cautioned . . . some material may be X-tra hype and inappropriate for squares and suckers."<sup>84</sup> Additionally, a few underground bands devised the following label: "Warning - Explicit Lyrics. Hide from parents!"<sup>85</sup> Critics of the voluntary system claimed it was ineffective because the labeling decisions were made by the record companies.

Jean Dixon, then Missouri state representative, took action asserting, "If corporations who create degrading entertainment can't police themselves, then I think it's government's role to put

82. *The Women Behind the Movement; Group of Prominent Washington Wives Form Resource Center to Make Parents Aware of Lyrics; Parents Music Resource Center*, BROADCASTING, July 15, 1985, at 42. "[The PMRC] recognizes that their high-powered connections have helped them attract the public's attention" and "acknowledges there is congressional interest in the issue." *Id.*

83. Frank Zappa, *Protect Us From "Voluntary" Labels*, USA TODAY, Jan. 10, 1990, at 8A.

84. Amy Duncan, *Can Music Corrupt?* CHRISTIAN SCI. MONITOR, Jan. 10, 1989, at 10.

85. *Id.* Frank Zappa's album *Frank Zappa Meets the Mothers of Prevention* bore the following warning label:

WARNING/GUARANTEE: This album contains material which a truly free society would neither fear nor suppress . . . The language and concepts contained herein are GUARANTEED NOT TO CAUSE ETERNAL TORMENT IN THE PLACE WHERE THE GUY WITH THE HORNS AND POINTED STICK CONDUCTS HIS BUSINESS. This guarantee is as real as the threats of the video fundamentalists who use attacks on rock music in their attempt to transform America into a nation of check-mailing nincompoops (in the name of Jesus Christ). If there is a hell, its fires wait for them, not us. (Barking Pumpkin 1985).

the country back on course."<sup>86</sup> Inspired by Dixon, many state legislators around the country drafted similar record-labeling bills that would *require* record companies to affix warning stickers on albums, cassettes, and compact discs with lyrics deemed inappropriate for young people.<sup>87</sup> Each state legislature would require a different type of label<sup>88</sup> and some would criminalize the sale of offensive albums to youngsters.<sup>89</sup> As previously discussed, it is unlikely that these laws would have withstood a constitutional attack.<sup>90</sup>

Nonetheless, the threat was enough to cause the record companies to scramble to action. In 1990 the RIAA established a voluntarily-affixed, uniform, black and white "PARENTAL ADVISORY—EXPLICIT LYRICS" logo and uniform terms for its placement. Each record company, in consultation with the artist, determined which of their recordings would display the logo.<sup>91</sup>

The adoption of uniform stickering has received varying reactions from the music community. The groups concerned with explicit lyrics applaud this industry action, while First Amendment absolutists argue that this is quasi censorship.

Surprisingly, NARM was among those groups pleased by the labeling. Record store owners, especially those in Florida and Alabama whose employees had been jailed under local anti-obscenity laws for selling music containing lyrics about sex, violence, suicide, or drugs, felt that "things would certainly be made easier for them if manufacturers would label recordings."<sup>92</sup> Record retailers do not wish to become censors or surrogate parents for consumers who frequent their stores. At the same time, no retailer wants picket lines gracing their store entrance. Most retailers believe

86. Philips, *supra* note 57, at F1.

87. By 1990 record-labeling bills had been introduced in eight states: Missouri, Pennsylvania, Kansas, Iowa, Delaware, Maryland, Oklahoma, and Florida. *THE REC.*, Feb. 4, 1990. In addition, legislators in six other states, Arizona, Alabama, New Mexico, Illinois, Nebraska, and Washington, threatened to propose similar bills. *Id.*

88. The Pennsylvania proposed legislation would require such labels to be "printed with black letters of Number 12 type or more on a yellow fluorescent background, except that the words 'WARNING' and 'PARENTAL ADVISORY' shall be printed in letters which are 48-point typeface in the case of a phonograph record cover." *Id.* The Missouri labeling bill would require printed lyrics on the outside cover. *Id.*

89. *Id.*

90. See discussion *supra* part III.

91. See discussion *infra* part V.B examining the problems inherent in this method.

92. See *supra* note 55 regarding jailing of store owners. Desiree French, *Record Firms Create Own Warning Labels*, *BOSTON GLOBE*, Apr. 11, 1990, at 30.



that the "PARENTAL ADVISORY" sticker performs well in its primary function of helping parents make informed decisions about the music their children buy.<sup>93</sup>

Retailers have received mixed messages from their customers. Stores which implemented "Eighteen to Buy" policies in combination with the stickering found that after a period of months they "received as much feedback from parents who were angry that they had to accompany a teenager to buy a particular recording as they previously received from parents who were angry about a piece of music a teenager had bought unchaperoned before the policy was implemented."<sup>94</sup> Some commentators believe that the use of the stickers is being exploited as a sales tool. "You tell kids there's explicit lyrics on an album, that's the one they're going to want," notes Tom Schafer, owner of Soundwave CDs in Reno, Nevada.<sup>95</sup> Though these unanticipated problems have arisen, overall this self-censorship scheme has temporarily pacified those seeking change.

## V. PROBLEMS WITH SELF-REGULATION

### A. *The Position of First Amendment Absolutists*

The PMRC frequently asserts that it does not seek government censorship. Self-regulation, it argues, is less restrictive.<sup>96</sup> Private regulation, however, raises unique policy concerns. Cecelie Berry and David Wolin argued in the 1986 *Harvard Journal on Legislation* that "regulation by a private industry council can be an arbitrary, ungovernable form of restraint and a greater threat to First Amendment values than government-sponsored regulation."<sup>97</sup>

Where the government would focus on children's welfare, the music industry may be driven by business concerns. For example, the Grammy winning album *Dookie* by Green Day, which includes the lyrics "when masturbation's lost its fun" and other sexual ref-

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93. *Influence of Lyrics on Children: Hearings Before the U.S. Senate Judiciary Subcomm. on Juvenile Justice*, 103d Cong., 2d Sess. (1994) (statement of the National Association of Recording Merchandisers).

94. *Id.*

95. Mark Robison, *Another Music Phase, Or is it the Devil's Tune*, GANNETT NEWS SERVICE, Mar. 6, 1995.

96. Philips, *supra* note 57, at F1.

97. Cecelie Berry & David Wolin, Comment, *Regulating Rock Lyrics: A New Wave of Censorship?*, 23 HARV. J. ON LEGIS. 595, 597 (1986).

erences, does not carry a warning sticker.<sup>98</sup> Alan Levinson, president of Backstage Music, a retail outlet, explains, "Green Day is a best-selling record. But, the labels aren't going to sticker it, because they want it in K-Mart."<sup>99</sup>

Furthermore, the music industry may tend to overregulate in areas where the government would be unable to censor. For example, record companies frequently label rap music for its violent references, although the definition of obscenity only incorporates sexual references.

The belief that industry self-regulation is less intrusive than governmental regulation "misplaces the locus of the free speech concern, emphasizing the source rather than the substance of regulation."<sup>100</sup> The effect of self-regulation is to decentralize censorial power, not to eradicate it. Barry and Wolin assert that "[w]hen the government/non-government distinction blurs, the restraint most fundamental to freedom—the refinement and allocation of power through a system of checks and balances—is lost."<sup>101</sup> Therefore, when censorship is effectuated by private rather than government groups, it is beyond the reach of the law so that today's business elites clearly have the freedom to dictate our nation's policy.

## B. Finding the "Message" in Music

### 1. Misinterpreting the Lyrics

As private institutions embrace the task of censoring music without judicial standards, there emerges the problem of finding the correct "message" in the music. Lyrics, like poetry, are subject to more than one interpretation.<sup>102</sup> The court in *Skywalker Records, Inc. v. Navarro* acknowledged that "[m]usic is sufficiently subjective that reasonable persons could disagree as to its meaning."<sup>103</sup>

Many American songwriters, aware of this subjectivity, have kept busy over the years outwitting censors with lyrics that have

98. Eileen Fitzpatrick, *Georgia DA Issues Warning About Explicit-Music Sales*, BILLBOARD, Jan. 21, 1995.

99. *Id.*

100. Berry & Wolin, *supra* note 98, at 610.

101. *Id.* at 615.

102. *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (1988). The *McCollum* court interpreted *Suicide Solution* contrary to plaintiffs "to illuminate the very serious problems which can arise when litigants seek to cast judges in the role of censor." *Id.* at 193.

103. 739 F.Supp. 578, 591 (S.D. Fla. 1990).

multiple meanings. Lyrics such as "Pull up to my bumper," "Squeeze my lemon," and "Push, push in the bush" contain obvious sexual references while evading explicit profanity. Unfortunately, these clever artists augment the risk that songs intended to be harmless will be misread. John Denver's "Rocky Mountain High" was banned from some radio stations for its alleged reference to drugs, although Denver asserted that it is an ode to nature.<sup>104</sup> Even the innocuous folk singers Peter, Paul & Mary found their popular "Puff the Magic Dragon" on the list of songs having drug-related lyrics.<sup>105</sup> Fortunately, these misinterpretations usually garner few supporters.

However, in some instances, misinterpretation can have serious consequences. In *McCollum v. CBS*,<sup>106</sup> parents blamed Ozzy Osbourne's music for the death of their teenage son. After spending an evening listening to Osbourne's music, including a song called "Suicide Solution," the mentally disturbed nineteen-year-old shot himself.<sup>107</sup> Osbourne claimed that "Suicide Solution" is a song commenting on the terrible effects of alcohol, not a call to suicide as the plaintiffs asserted.<sup>108</sup>

Finally, choice of words plays a significant role in determining that music is offensive. Though the lyrics to the Pointer Sisters' hit "I'm So Excited" referred to sex, the song's lack of profanity evaded a negative reaction. However, 2 Live Crew's "Me So Horny," which more explicitly says precisely the same thing, fell subject to national attack.<sup>109</sup>

## 2. *The Influence of Harmony, Melody and Rhythm*

Although music can convey a message, an assertion that instrumental music alone could "appeal to prurient interests" would raise a few eyebrows. Even suggestive pieces, such as Ravel's "Bolero," cannot arouse "dirty" thoughts absent an imaginative exercise on the part of the listener. Terance Moran, in a *New Republic* article commented that "it's absurd for would-be censors to hold a magnifying glass to the words when it's the

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104. 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, 803 (1992).

105. *Id.*

106. *McCollum v. CBS*, 249 Cal. Rptr. 187 (Ct. App. 1988).

107. *Id.* at 189.

108. *Id.* at 194 n.8.

109. *See Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992) (per curiam) *cert. denied*, 506 U.S. 1022 (1992).

music itself that arouses people. There's something sexy in the pure pulse of a rock song."<sup>110</sup> Still, this "pure pulse" could not alone be found obscene. The only sound unaccompanied by words that could probably be found obscene would be utterances simulating those stimulated by sexual arousal.<sup>111</sup> A court might find that such sexually explicit sounds appeal to prurient interests.<sup>112</sup> However, considering the non-explicit nature of music in general, no rational person could find purely instrumental music obscene under *Miller* standards.

In litigation against musicians, the ability of music to enhance the power of words has been subject. In the suit against the British heavy metal group Judas Priest, the parents contended that their child's suicide was triggered not just by the song's words, but rather by a combination of "suggestive lyrics accompanied by hypnotic rhythms and beat."<sup>113</sup> In the liability action against Ozzy Osbourne, the parents brought a similar claim, alleging that "Osbourne's music utilized a strong, pounding and driving rhythm and . . . a 'hemisync' process of sound waves which impact the listener's mental state."<sup>114</sup> Finally, in *Skywalker Records, Inc.*, the court recognized that rap music accentuates lyrics by stressing rhythm over melody.<sup>115</sup> This suggests that rap music might be particularly vulnerable to determinations of obscenity because it might be deemed less "musical" and more like plain speech. As of yet, courts have found none of these arguments persuasive enough to override First Amendment protection.

## VI. CONCLUSION

The recent efforts to curb lyrical expression continue to intensify. Fortunately, with the current legal state in America, the die-hard censors have many legal obstructions to surmount. Unless or until the Court alters the present formulation of the *Miller* test as it applies to music, it may be impossible to judicially suppress music lyrics. It would be difficult, if not impossible, to draft a stat-

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110. Terance Moran, *Sounds of Sex, Why Daddy Took the T-Bird Away*, NEW REPUBLIC, Aug. 12, 1985, at 14.

111. Kenneth W. Masters, Comment, *Law in the Electronic Brothel: How Postmodern Media Affect First Amendment Obscenity Doctrine*, 15 U. PUGET SOUND L. REV. 415 (1993).

112. *Id.*

113. *Judas Priest v. Second Judicial Dist. Court*, 760 P.2d 137, 138 (Nev. 1988).

114. 249 Cal. Rptr. 187, 191.

115. 739 F.Supp. 578, 595 (1990).

ute which would survive the procedural safeguards of “variable obscenity.” Any statute which did survive would be so constricted due to these constitutional protections as to be rendered relatively harmless. Finally, industry imposed parental advisory ratings are not effective unless they are, to some extent, coercive. The industry’s move towards self-restraint has little bite without criminal enforcement.

Although the placement of warning labels has temporarily quelled paternalistically-minded legislators, the stickers set bad precedent for the music industry and society generally. For nearly two millennia music has served as an emotional and political sounding board for Western culture. Artists should not be discouraged from commenting on certain topics through their music. The Court has acknowledged that “[o]ne man’s vulgarity is another’s lyric.”<sup>116</sup> The fact that many ideas have “survived to become part of mainstream life is more a tribute to the tenacity of those who advocate them than to the willingness of Americans to allow new concepts into their lives.”<sup>117</sup> The zealous censors should leave the artists alone and reevaluate the power of effective parenting.

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116. *Cohen v. Cal.*, 403 U.S. 15, 25 (1971).

117. *Blanchard*, *supra* note 105, at 742.