

affect slavery, war, or sexual roles, but a book about slavery is not itself slavery, or a book about death by poison a murder.

771 F.2d at 330. The Seventh Circuit's ruling striking down the Indianapolis law was upheld by the Supreme Court without argument or opinion: see 475 U.S. 1001 (1986).

The Supreme Court itself adopted essentially the same position as Judge Easterbrook's in *Hudnut* with respect to the analogous question of the constitutionality of laws that prohibit "hate speech" directed at racial or religious groups. Recall that in the 1950s, the Supreme Court had upheld a law of this kind: see *Beauharnais v. Illinois*, 343 U.S. 250 (1952). In *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), the Court, by a narrow 5-4 margin, struck down a St. Paul ordinance that prohibited the burning of crosses and swastikas with that kind of racial or religious connotation. Though the Minnesota Supreme Court had construed the local ordinance to cover only racist and religious epithets, the kinds of "fighting words" that are assumed to be unprotected by the First Amendment (see *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)), the Supreme Court majority found it unconstitutional to target only those hate speech epithets that had a distinctively racist or anti-religious point of view.

As sketched in the last several pages, the last five decades have produced a dramatically different First Amendment jurisprudence since the Supreme Court, in *Burstyn*, brought the entertainment industry under that constitutional umbrella. As noted at the outset of this chapter, the issues remain hotly contested in both the popular and political spheres, and there is nothing intrinsic to the wording, historical intent, or philosophical underpinning of the First Amendment that precludes equally radical changes and reversals during this new century. In tracking and appraising the legal treatment of entertaining speech throughout this book, keep the following questions in mind.

1. The current American stance towards freedom of speech is considerably more absolutist than in any other democratic nation. Noted earlier was the Supreme Court of Canada's endorsement of the feminist conception of anti-pornography law, and that same country, as well as most members of the European Union, have also adopted even more stringent restraints on hate speech than those struck down by the Supreme Court in *R.A.V.* What lessons can be drawn from this contrasting treatment of speech in these various countries and cultures?

2. Interestingly, there is a comparative history of the treatment of speech within the United States itself, derived from the fact that the Supreme Court has long approved the effort by the federal government to hold broadcast speech to somewhat more "civilized" standards. Most

(though not all) constitutional scholars believe that television and radio stations should now enjoy the same full-bodied freedom of speech as their other media counterparts (more and more of whom are owned by the same corporate entities). It is at least logically possible that the constitutional movement could be in the opposite direction. Reflect on your own experience with television as compared with movies, or radio and music concerts, to assess how these types of media should be treated.

3. From the point of view of philosophical principle rather than legal doctrine, should entertaining speech enjoy the same constitutional stature as the political speech in *Sullivan, Brandenburg*, et al.? Recall the passages quoted earlier by Holmes in *Abrams*, with its preference for free trade in ideas, and Brandeis in *Whitney*, with its emphasis on public discussion in a democracy. Why exactly is it crucial to protect speech from unwarranted restraints through the judicial rather than just the political process? Should such First Amendment entitlements apply not just to Robert Rossellini's *The Miracle* or James Joyce's *Ulysses*, but to any kind of entertainment product whose combination of sex and violence has consumer appeal in the marketplace?

4. As the scope of the First Amendment has expanded over the last fifty years, so also has its use by business entities (e.g., broadcast companies). In the 1990s, for example, the telephone companies have used the First Amendment to challenge the long-standing federal ban on phone companies also offering cable services within their same local areas, on the grounds that this was equivalent to an unconstitutional restraint on political dissent and artistic creativity. See *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993). Should businesses have to make this case for a free market in speech in the political rather than in the judicial arena? (In fact, as we shall see in Chapter 13, the "Baby Bells" did win this struggle in Congress in early 1996 at the very same time that the Supreme Court was grappling with the First Amendment implications of this issue.)

5. The flip side of that latter coin is whether the First Amendment should permit or preclude the use of the law by a business rather than a government entity to restrict speech on or with the business's "private" property. If, as the Supreme Court held in *Metromedia v. San Diego*, 453 U.S. 490 (1981), the First Amendment limits government's power to restrict the use of billboards on public highway space, should it also limit the use of trespass law by a shopping center owner to stop people from passing out anti-Vietnam War leaflets in the part of the mall that was otherwise open to and regularly used by everyone in the neighborhood? See *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

B. ENTERTAINING SEX

The foregoing is a rather truncated account of several major First Amendment victories won by the entertainment industry over the last half century. It is clearly the case that extending to entertainment products

essentially the same constitutional freedom as is enjoyed by public policy debates, scientific inquiry, and artistic creativity has made life much better for entertainment producers. The more fundamental question, though, is whether this has made life better for Americans generally.

While the Supreme Court still has not rendered an explicit verdict about entertaining violence, it continues to produce a host of decisions about entertaining sex. But one of the very few recent occasions in which anti-sex laws, formulated according to the *Miller v. California* guidelines, have been targeted at notable figures in the entertainment world involved a highly controversial recording by the rap music group, 2 Live Crew.^c The lyrics of the album, *As Nasty as They Wanna Be*, together with its hit single, "Me So Horny," made constant references to the genitalia and to intercourse, cunnilingus, fellatio, and the like. Representative lines included "He'll tear the cunt open 'cause its satisfaction," and "Grabbed her by the hair, threw her on the floor, opened up her thighs, and guess what I saw." The unexpurgated *Nasty* version had sold over 2 million copies and soared high on the 1989 Billboard Hits Chart. An alternative version, *As Clean As They Wanna Be*, with the same melodies but different lyrics, sold 250,000 copies.

That winter the South Florida Broward County Sheriff's Department received complaints from local residents about *Nasty*. The Sheriff investigated, secured an *ex parte* probable-cause-of-obscenity determination from a county judge, and used this to warn local record stores not to sell *Nasty* if they wanted to avoid prosecution. All the local stores immediately removed *Nasty* from their shelves. The 2 Live Crew group, led by Luther Campbell, and their record company, Skyywalker Records, filed suit under § 1983 of the United States Code, claiming violation of their federal constitutional rights. Following is the opinion of the lower court judge applying the *Miller* criteria about what amounts to "obscenity."

SKYYWALKER RECORDS, INC. v. NAVARRO

United States District Court, Southern District of Florida, 1990.
739 F. Supp. 578.

GONZALEZ, JR., DISTRICT JUDGE.

This is a case between two ancient enemies: Anything Goes and Enough Already.

Justice Oliver Wendell Holmes, Jr. observed in *Schenck v. United States*, 249 U.S. 47 (1919), that the First Amendment is not absolute and that it does not permit one to yell "Fire" in a crowded theater. Today, this court decides whether the First Amendment absolutely permits one to yell

c. For a review of the constitutional issues posed by this and other such proposals, see Daniel A. Cohen, *Compensating Pornographic Victims: A First Amendment Analysis*, 29 Valparaiso U. L. Rev. 285 (1994). For an insightful debate about the underlying empirical issues, see Daniel Linz, Steven D. Penrod, and Edward Donnerstein, *The Attorney General's Commission on Pornography: The Gap Between "Findings" and Facts*, 1987 Amer. Bar Found. Res. J. 713; Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, id., 737.

another "F" word anywhere in the community when combined with graphic sexual descriptions.

* * *

The Florida Legislature has . . . enacted a statutory scheme outlawing obscenity. It is apparent that this legislation is intended to regulate obscenity to the maximum extent allowed by the Constitution of the United States. Section 847.001(7), Florida Statutes, tracks the language of the controlling case of *Miller v. California*, 413 U.S. 15 (1973), in defining obscenity for purposes of the state ban.

* * *

[The judge first addressed 2 Live Crew's argument that obscenity should not be a concern of the criminal law, but rather should be left to the free market of ideas. Let each individual member of the public decide whether they wish to buy the material. 2 Live Crew has labeled their work with an explicit warning. They claim this label allows adults who would object to the recording's contents to exercise the consumer's right of free choice to not buy the product. To use the example of television, if the viewer does not like what he sees on Channel X, he may switch to Channel Y or turn off the set. In the case of obscene music, people who do not want to listen to obscenity do not have to buy it.]

* * *

[After quoting from the Supreme Court's opinion in *United States v. Reidel*, 402 U.S. 351, 356-57 (1971), Judge Gonzales told 2 Live Crew that if they] subscribed to the view that obscenity should be legalized, they should take their petitions to Tallahassee, the Florida capital, not to the steps of the U.S. courthouse.

* * *

[Under the Supreme Court's current reading of the First Amendment, the only issue here was whether criminal proceedings against *Nasty* met] the controlling test enunciated in *Miller v. California*, 413 U.S. 15 (1973). To be obscene, there must be proof of all three of the following factors: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (2) measured by contemporary community standards, the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. . . .

* * *

The Average Person Standard

[This] is more difficult because this court must determine what are the standards for determining prurient interest and patent offensiveness in Palm Beach, Dade, and Broward Counties. The fact that the state

legislature has enacted laws prohibiting obscenity is certainly relevant and entitled to great weight. The state's anti-obscenity stance as a whole, however, is overinclusive because other communities outside the three counties are included in the majority who passed the legislation.

In determining the views of the "average person" in this area, the court has not focused only on the views of the most tolerant or the most sensitive individuals. The "average person" does not necessarily represent any one segment of the community. It is a legal concept whereby a single perspective is derived from the aggregation or average of everyone's attitudes in the area, including persons with differing degrees of tolerance. The court has not considered minors in its considerations because there was not sufficient evidence adduced at trial that the music was targeted at such persons or that it actually reached children.

This court finds that the relevant community standard reflects a more tolerant view of obscene speech than would other communities within the state. This finding of fact is based upon this court's personal knowledge of the community. The undersigned judge has resided in Broward County since 1958. As a practicing attorney, state prosecutor, state circuit judge, and currently, a federal district judge, the undersigned has traveled and worked in Dade, Broward, and Palm Beach. As a member of the community, he has personal knowledge of this area's demographics, culture, economics, and politics. He has attended public functions and events in all three counties and is aware of the community's concerns as reported in the media and by word of mouth. In almost fourteen years as a state circuit judge, the undersigned gained personal knowledge of the nature of obscenity in the community while viewing dozens, if not hundreds of allegedly obscene films and other publications seized by law enforcement.

* * *

In deciding this case, the court's decision is not based upon the undersigned judge's personal opinion as to the obscenity of the work, but is an application of the law to the facts based upon the trier of fact's personal knowledge of community standards. In other words, even if the undersigned judge would not find *As Nasty As They Wanna Be* obscene, he would be compelled to do so if the community's standards so required.

* * *

The First Miller Test: Prurient Interest

This court finds, as a matter of fact, that the recording *As Nasty As They Wanna Be* appeals to the prurient interest. . . .

Nasty appeals to the prurient interest for several reasons. First, its lyrics and the titles of its songs are replete with references to female and male genitalia, human sexual excretion, oral-anal contact, fellatio, group sex, specific sexual positions, sado-masochism, the turgid state of the male sexual organ, masturbation, cunnilingus, sexual intercourse, and the sounds of moaning. . . .

Furthermore, the frequency and graphic description of the sexual lyrics evinces a clear intention to lure hearers into this activity. The depictions of ultimate sexual acts are so vivid that they are hard to distinguish from seeing the same conduct described in the words of a book, or in pictures in periodicals or films.

It is also noteworthy that the material here is music. It is true that it would be difficult, albeit not impossible, to find that mere sound without lyrics is obscene. Music is sufficiently subjective that reasonable persons could disagree as to its meaning. But, the focus of the *Nasty* recording is its lyrics. Based on the evidence at trial, music of the "rap" genre focuses upon verbal messages accentuated by a strong beat. 2 Live Crew itself testified that the *Nasty* recording was made to be listened and danced to. The evident goal of this particular recording is to reproduce the sexual act through musical lyrics. It is an appeal directed to "dirty" thoughts and the loins, not to the intellect and the mind.

* * *

The record at trial indicates that the plaintiffs' commercial exploitation of this work was done in a manner calculated to make a salacious appeal. The title of the recording, *As Nasty As They Wanna Be*, in addition to the names of many of the songs and the illustration on the recordings' insert, certainly fit within the confines of the *Ginzburg v. United States*, 383 U.S. 463 (1966) case for materials "looking for titillation."

One of the more interesting points suggested by the evidence at trial, but not dwelt on by the defendant, was that 2 Live Crew made two apparently identical albums with the only difference being the sexually explicit lyrics. The plaintiffs' own expert, John Leland, testified that the *Nasty* recording, without the salacious lyrics, would not have been expected to sell more than 500,000 copies nationwide. To date, the *Nasty* version has sold 1.7 million copies. The identical recording sans sexual lyrics (*Clean*) has sold only 250,000 copies. The difference between the actual sales of the two recordings can reasonably be found to have been motivated by the "leer of the sensualist". The plaintiffs cannot claim they needed the vulgar lyrics to promote their message since the plaintiffs' own experts testified that music from neither the "rap" or "hip-hop" genre does not require the use of such language.

Finally, the plaintiffs rely upon testimony, both lay and expert, that the *Nasty* recording did not actually physically excite anyone who heard it and indeed, caused boredom after repeated play. However, based on the graphic deluge of sexual lyrics about nudity and sexual conduct, this court has no difficulty in finding that *As Nasty As They Wanna Be* appeals to a shameful and morbid interest in sex.

The Second Miller Test: Patently Offensive

The court also finds that the second element of the Miller test is satisfied in that the *Nasty* recording is patently offensive. This is a

question of fact, which must be measured by contemporary community standards.

It is quite true that not all speech with sex as its topic is obscene. The *As Nasty As They Wanna Be* recording is another matter.

The recording depicts sexual conduct in graphic detail. The specificity of the descriptions makes the audio message analogous to a camera with a zoom lens, focusing on the sights and sounds of various ultimate sex acts. Furthermore, the frequency of the sexual lyrics must also be considered. With the exception of part B on Side 1, the entire *Nasty* recording is replete with explicit sexual lyrics. . . .

As already noted, Florida's Legislature has defined obscene acts to include sadomasochistic sexual conduct, oral sex, and anal intercourse. States may outlaw certain portrayals of sexual conduct and nudity if they constitute "hardcore pornography." See *Jenkins v. Georgia*, 418 U.S. 153 (1974). In *Jenkins*, the Supreme Court reversed a conviction for distribution of the film *Carnal Knowledge* which contained scenes of a woman with a bare midriff and several lovemaking sessions. This depiction was held by the Court to not be within the hardcore category. As noted by the Court,

While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards.

Id. at 161. In *Miller*, the Supreme Court gave two examples of the type of conduct subject to state regulation: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." The conduct described in the *Nasty* recording is certainly within the scope of the Florida statutes. The state law, of course, is not dispositive on the question of whether this particular community would be patently offended, but it is entitled to significant weight.

While the above facts are sufficient to support a finding that this material is patently offensive, there are additional considerations that support such a finding. First, the *Nasty* lyrics contain what are commonly known as "dirty words" and depictions of female abuse and violence. It is likely that these offensive descriptions would not of themselves be sufficient to find the recording obscene. See, e.g., *American Booksellers Association, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (sexual subordination of women). When these terms are used with explicit sexual descriptions, however, they may be considered on the issue of patent offensiveness. Secondly, the material here is music which can certainly be more intrusive to the unwilling listener than other forms of communication. Unlike a

video tape, a book, or a periodical, music must be played to be experienced. A person can sit in public and look at an obscene magazine without unduly intruding upon another's privacy; but, even according to the plaintiffs' testimony, music is made to be played and listened to. A person laying on a public beach, sitting in a public park, walking down the street, or sitting in his automobile waiting for the light to change is, in a sense, a captive audience. While the law does require citizens to avert their ears when speech is merely offensive, they do not have an obligation to buy and use ear plugs in public if the state legislature has chosen to protect them from obscenity.

Finally, in determining whether the *Nasty* recording is patently offensive, it is again proper to consider the plaintiffs' commercial exploitation of sex to promote sales. As noted by the Supreme Court in *Ginzburg v. United States*, 383 U.S. 463, 470 (1966), representations of a publication as erotically arousing "would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material." Such is the case here, as already discussed. Again, while this factor has not been given great weight, it is entitled to consideration.

The Third *Miller* Test: Social Value

The final factor under *Miller* is whether the *Nasty* recording, taken as a whole, lacks serious literary, artistic, political, or scientific value. This factor is not measured by community standards. The proper inquiry is whether a reasonable person would find serious social value in the material at issue. The plaintiffs correctly note that the value of a work can pass muster under *Miller* if it has serious merit, measured objectively, even if a majority of the community would not agree.

As a preliminary matter, it is again important to note what this case is not about. Neither the "Rap" or "Hip-Hop" musical genres are on trial. The narrow issue before this court is whether the recording entitled *As Nasty As They Wanna Be* is legally obscene.

This is also not a case about whether the group 2 Live Crew or any of its other music is obscene. The third element of the *Miller* test focuses upon the social value of the particular work, not its creators. The fact that individuals of whom we approve hold objectionable ideas or that people of whom we do not approve hold worthy ideas does not affect judicial review of the value of the ideas themselves.

The Phillistines are not always wrong, nor are the guardians of the First Amendment always right.

This court must examine the *Nasty* recording for its content; the inquiry is objective, not ad hominem.

Finally, this court's role is not to serve as a censor or an art and music critic. If the *Nasty* recording has serious literary, artistic, political,

or scientific value, it is irrelevant that the work is not stylish, tasteful, or even popular.

[The judge rejected a claim made by one witness, Professor Carlton Long, an expert on the culture of African Americans, that *Nasty* should be protected as "political speech" with "serious sociological value." The judge noted that 2 Live Crew members had themselves testified that "neither their music nor their lyrics were created to convey a political message."]

* * *

Prior to *Miller*, the government had to demonstrate that a work was utterly without redeeming social value to be judged obscene. The present test is less stringent, only requiring proof of an absence of serious social worth. This leads to the plaintiffs' strongest argument: that the *Nasty* recording has serious artistic value. This category of social worth is broad enough to include the value contributed by the political, literary, and cultural aspects of the particular work.

The plaintiffs stress that the *Nasty* recording has value as comedy and satire. Certainly, people can and do laugh at obscenity. The plaintiffs point to the audience reaction at trial when the subject recording was played in open court. The audience giggled initially, but the court observed that after the initial titillation, it fell silent.

In a society where obscenity is forbidden, it is human nature to want to taste forbidden fruit. It is quite another thing to say that this aspect of humanity forms the basis for finding that *Nasty* has serious artistic value. Furthermore, laughter can express much more than enjoyment and entertainment. It is also a means of hiding embarrassment, concealing shame, and releasing tension. The fact that laughter was only heard at the time that the first song of the tape was played is probative on what the audience's outbursts really meant. It cannot be reasonably argued that the violence, perversion, abuse of women, graphic depictions of all forms of sexual conduct, and microscopic descriptions of human genitalia contained on this recording are comedic art.

The *Nasty* recording is not comedy, but is first and foremost, music. Initially, it would appear very difficult to find a musical work obscene. As noted by the American Civil Liberties Union, the meaning of music is subjective and subject only to the limits of the listener's imagination.

Music nevertheless is not exempt from a state's obscenity statutes. Musical works are obscene if they meet the *Miller* test. Certainly it would be possible to compose an obscene oratorio or opera and it has probably been done.

The plaintiffs claim that this case is novel since it seeks to determine whether music can be obscene. The particular work here, although belonging to the general category of music, however, is to be distinguished from a purely instrumental work, or other more common recordings with a fairly equal emphasis on music and lyrics. The focus of the *Nasty* record-

ing is predominately on the lyrics. Expert testimony at trial indicates that a central characteristic of "rap" music is its emphasis on the verbal message. Rhythm is stressed over melody, not for its own sake, but to accentuate the words of the song. The pounding beat and the presence of near continuous lyrics support this conclusion. 2 Live Crew's music is explicitly clear as to its message. Although music and lyrics must be considered jointly, it does not significantly alter the message of the *Nasty* recording to reduce it to a written transcription. The Supreme Court's decision in *Kaplan v. California*, 413 U.S. 115 (1973), is applicable here. The Court held that an expression by words alone, albeit in a written form, can be legally obscene even if there are no accompanying pictorial depictions. The case at bar is an extension of the law to the extent that words, as lyrics in music, can be obscene.

The key to judging the *Nasty* recording is to consider it as a whole. 2 Live Crew has "borrowed" components called "riffs" from other artists. Taking the work in its entirety, the several riffs do not lift *Nasty* to the level of a serious artistic work. Once the riffs are removed, all that remains is the rhythm and the explicit sexual lyrics which are utterly without any redeeming social value.

Obscenity is not a required element for socially valuable "rap" or "hip-hop" music. 2 Live Crew itself proved this point by the creation of its *Clean* recording.

The court is reminded of a story by Charles Baudelaire, a poet who also had problems with the civil authorities of his day. In *My Heart Laid Bare* (Vanguard Press 1951), he writes:

All the imbeciles of the Bourgeoisie who intentionally use the words, "immoral", "immorality", "morality in art" and other such stupid expressions remind me of Louise Vildieu, a five-franc whore who once went with me to the Louvre. She has never been there before, and began to blush and cover her face with her hands, repeatedly plucking at my sleeve and asking me, as we stood before deathless statutes and pictures, how such indecencies could be flaunted in public.

One of the plaintiffs' expert witnesses testified at trial that material is art if it causes a reaction in the audience perceiving it. If that reaction is an appeal to the prurient interest in a patently offensive way, and if the material lacks serious literary, artistic, political or scientific, the law does not call that art—it calls it obscenity and, when so proven beyond a reasonable doubt, is a crime in Florida.

Obscenity? Yes!

The recording, *As Nasty As They Wanna Be*, taken as a whole, is legally obscene.

* * *

[After declaring that *Nasty* was "obscene" under both the First Amendment and Florida criminal law, the district judge then ruled that the Sheriff's Office's *ex parte* warnings to the music stores constituted unconstitutional "prior restraint," and issued a permanent injunction against future such behavior with respect to any recordings.]

QUESTIONS FOR DISCUSSION

1. One ground for the 2 Live Crew appeal was that the Sheriff's case consisted simply of having the trial judge listen to the tape and read the lyrics of "As Nasty As They Wanna Be." Should either (or both) sides in obscenity trials have to present expert testimony on the issues, and if so, with respect to which features of the *Miller* test? See *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992). Recall the comment by Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), that while he had trouble defining hardcore pornography, he certainly knew it when he saw it. Do you think the judges in the Georgia state courts might have seen the early 1970s movie, *Carnal Knowledge* (starring Jack Nicholson, Ann Margret, Art Garfunkel, and Candace Bergen), differently than did the members of the Supreme Court? See *Jenkins v. Georgia*, 418 U.S. 153 (1974). How do you think a Canadian court would react to *Nasty*, post-*Butler*? See *R. v. Emery*, 4 O.R. (3d) 344 (Ont. Prov. Ct. 1991). If you were a judge or juror, what would be your verdict?

2. Another controversial album, titled "Mind of Lunatic" and written and performed by the Geto Boys, was filled with lyrics like the following:

Her body's so beautiful, so I'm thinking rape. Shouldn't have had the curtains open; so that's her fate. Slit her throat and watched her shake.

Does the popularity of record albums like these influence your appraisal of the contrasting views of Professor MacKinnon and Judge Easterbrook that we saw detailed in *Hudnut*? Keep this brand of "Gangsta Rap" music in mind while reading the cases and materials in the next section, on *Entertaining Violence*.

3. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Supreme Court made it clear that even fully-informed consenting adults had no federal constitutional right to watch movies that passed the *Miller* obscenity test. However, in *State v. Henry*, 302 Ore. 510, 732 P.2d 9 (1987), the Oregon Supreme Court found such a right under that state's constitution. Would you advocate other state courts or legislatures following the Oregon lead and abolishing any legal restrictions on sexual entertainment for adults?

4. Suppose that the south Florida authorities had simply refused to allow 2 Live Crew to perform this music at a concert in a publicly-owned facility that is regularly used for musical events in the area. See *Cinevision v. City of Burbank*, 745 F.2d 560 (9th Cir. 1984). What if the public authority refuses to license use of its facility by "hard rock" bands whose music is judged too loud for the surrounding community? See *Fact Concerts, Inc. v. City of Newport*, 626 F.2d 1060 (1st Cir. 1980), vacated on other grounds, 453 U.S. 247 (1981), and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). What if the authority requires the band to secure costly liability insurance following

prior altercations, drug use, and injuries at rock band concerts? See *Rock Against Racism v. Ward*, 658 F. Supp. 1346 (S.D.N.Y. 1987).

5. The 1995 Thanksgiving weekend witnessed a tragic event in the New York subway system. Early Sunday morning, a Brooklyn token clerk was severely burned when two arsonists squirted inflammable liquid into his booth and ignited it. This was exactly the same scenario that had been depicted in the Wesley Snipes/Woody Harrelson movie, *Money Train*, which had opened that same weekend. As it turned out, the Transit Authority had assisted Columbia Pictures in filming the movie, though the Authority had objected to this scene (which was based on an actual event that had taken place five years earlier). This combination of real and fictional violence gave a real edge to the ongoing debate about whether public authorities should make their facilities available for movies like *Money Train* (or its 1974 predecessor, *The Taking of Pelham One, Two, Three*, about the hijacking of New York subway car for ransom, which was recently remade).

While Senator Robert Dole was calling for a boycott of *Money Train's* "pornography of violence as a way to sell movie tickets," his fellow Republican, New York Mayor Rudy Giuliani, was saying that city officials "should not be reading the script of every movie and acting as a censor." With whom do you agree? Does it affect your judgment on that score to learn that in this case the offenders said they had *not* seen *Money Train*? Even if a city agency (or a state university) might be inclined to withhold permission to film a movie on its premises unless a scene of explicit violence (or sex or drug use) was cut from the script, would such a position be constitutionally permissible? On the broader cultural phenomenon of rap music, see Tricia Rose, *Black Noise* (Wesleyan U. Press, 1994). On the legal issues posed by the 2 Live Crew case, see 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 William & Mary L. Rev. 741 (1992); Blake D. Morant, *Restraint of Controversial Musical Expression After Skyywalker Records v. Navarro and Barnes v. Glen Theater: Can the Band Play On?*, 70 Denver U. L. Rev. 5 (1992).^d

In the spring of 2000, the Supreme Court rendered its verdict about another form of sexual entertainment, one that was not based on the *Miller* obscenity standards. In 1994, the City of Erie, Pennsylvania proclaimed that it "has, at various times over more than a century, expressed its findings that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and the serious criminal activity . . ." The Council then passed a general ban on anyone appearing in public space in "a state of nudity."

d. For an in-depth analysis of the economic as well as the First Amendment features of this problem, see Jon Garon, *Star Wars: Film Permitting, Prior Restraint, & Government's Role in the Entertainment Industry*, 17 Loyola of L.A. Enter. L. Rev. 1 (1996).

A company called Pap's A.M. had been operating an entertainment establishment called Kandyland, which featured totally nude and erotic dancing performed by women. When told that the only way to avoid prosecution under the new Ordinance was to clothe the women in at least some "panties" and a "G-string," the company sued the City, alleging an infringement of its First Amendment right to free speech.

There had been a prior Supreme Court decision, *Barnes v. Glen Theatre*, 501 U.S. 560 (1991), which had upheld an analogous state-wide law in Indiana. However, the five different opinions written by Justices in *Barnes* satisfied the Supreme Court of Pennsylvania that *Barnes* was too much of a "hodgepodge" to be a binding First Amendment verdict: see *Pap's A.M. v. City of Erie*, 553 Pa. 348, 719 A.2d 273 (1998) After characterizing nude dancing as a form of "speech," the Pennsylvania Court dismissed as "highly circuitous" the notion that the city could "prevent rape, prostitution, and other sex crimes by requiring a dancer in a legal establishment to wear pasties and a G-string before appearing on stage." But when the City of Erie took this case up to the U.S. Supreme Court, the majority of a still-divided court (at 529 U.S. 277 (2000)) found that banning nude dancing was constitutional.

The majority opinion written by Justice O'Connor found nude dancing to be a form of "expressive conduct," though "it falls only within the outer ambit of the First Amendment protection." *Id.* at 289. However, this city ordinance was "a content neutral restriction that regulates conduct, not First Amendment expression." *Id.* at 298. Erie did have a legitimate objective of trying "to deter crime and the other deleterious effects caused by the presence of such a [nude dancing] establishment in the neighborhood." *Id.* at 297. Finally, "the requirement that dancers wear pasties and G-strings is a minimal restriction in favor of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message." *Id.* at 301.

Justice Souter's dissent accepted the basic jurisprudential principles in the O'Connor opinion, but wanted the case sent back to require Erie to provide some evidence that its ordinance was "reasonably designed to mitigate real harms." *Id.* at 317. The concurring opinion of Justices Scalia and Thomas was "highly skeptical . . . that the addition of pasties and G-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease." However, they believed there was no constitutionally-protected "expression" here at all, and that instead the traditional power of government to foster good morals and the acceptability of the "traditional judgment that nude public dancing *itself* is immoral, have not been repealed by the First Amendment." *Id.* at 310. By contrast, the other dissent (by Justices Stevens and Ginsburg) found unconstitutional Erie's total ban (rather than zoning locational regulation) on nude dancing, which was "a species with expressive conduct that is protected by the First Amendment" because it "fits well within a broad cultural tradition." *Id.* at 326.

In reflecting on these rather diverse First Amendment perspectives on nude dancing, consider as well how they fit with the constitutional treatment we have and will be seeing courts giving in this (and the next) chapter to a host of other forms of entertainment.

In the spring of 2002, the Supreme Court issued a major—and divided—ruling on the application of that kind of First Amendment exception to technological rather than real depiction of child sex. Two decades before, in *New York v. Ferber*, 458 U.S. 747 (1982), the Court had ruled that the *Miller* obscenity standard did not bind the government's power to prohibit pornography using children having sex. However, the development of the new computer technology facilitated the creation of these virtual images without any real children actually engaged in the sex.

Thus, the Congress, led here by Missouri Senator John Ashcroft, placed in the 1996 budget legislation a Child Pornography Prevention Act that was signed by President Clinton. This broadened the definition of child pornography to include "any visual depiction, including any photograph, film, video, picture, or computer-generated image or picture [that] is, or appears to be, of a minor engaging in sexually explicit conduct." Among the congressional aims in this new "virtual child pornography" was to preclude pornographers who had actually used children from defending by claiming they had just used their computer; to prevent "pedophiles" from using just digital images to recruit real children who had witnessed films apparently showing their counterparts "having fun" with sex; and also to insulate from these images adults who might "harbor illicit desires for children and commit criminal acts to gratify these impulses" (with reports that annually, more than 90,000 children were the victims of such child sexual abuse).

Over the next five years, four different circuit courts had upheld the constitutionality of this legislation in cases involving criminal prosecution of the offenders. However, a body called the Free Speech Coalition, an organization of California adult movie producers and video stores, brought a class action suit claiming a violation of their First Amendment rights, which the full Ninth Circuit accepted in *Free Speech Coalition v. Reno*, 220 F.3d 1113 (2000). This appeal followed:

ASHCROFT v. FREE SPEECH COALITION

Supreme Court of the United States, 2002.
535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403.

MR. JUSTICE KENNEDY delivered the opinion of the Court.

II

* * *

The Child Pornography Prevention Act (CPPA) prohibits speech despite its serious literary, artistic, political, or scientific value. The statute proscribes the visual depiction of an idea—that of teenagers

engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages. Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age. This is higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations. See U.S. National Survey of State Laws 384–388 (R. Leiter ed., 3d ed. 1999) (48 States permit 16-year-olds to marry with parental consent); W. Eskridge & N. Hunter, *Sexuality, Gender, and the Law* 1021–1022 (1997) (in 39 States and the District of Columbia, the age of consent is 16 or younger). It is, of course, undeniable that some youths engage in sexual activity before the legal age, either on their own inclination or because they are victims of sexual abuse.

Both themes—teenage sexual activity and the sexual abuse of children—have inspired countless literary works. William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. See *Romeo and Juliet*, act I, sc. 2, l. 9 (“She hath not seen the change of fourteen years”). In the drama, Shakespeare portrays the relationship as something splendid and innocent, but not juvenile. The work has inspired no less than 40 motion pictures, some of which suggest that the teenagers consummated their relationship. E.g., *Romeo and Juliet* (B. Luhrmann director, 1996). Shakespeare may not have written sexually explicit scenes for the Elizabethan audience, but were modern directors to adopt a less conventional approach, that fact alone would not compel the conclusion that the work was obscene.

Contemporary movies pursue similar themes. Last year’s Academy Awards featured the movie, *Traffic*, which was nominated for Best Picture. The film portrays a teenager, identified as a 16-year-old, who becomes addicted to drugs. The viewer sees the degradation of her addiction, which in the end leads her to a filthy room to trade sex for drugs. The year before, *American Beauty* won the Academy Award for Best Picture. In the course of the movie, a teenage girl engages in sexual relations with her teenage boyfriend, and another yields herself to the gratification of a middle-aged man. The film also contains a scene where, although the movie audience understands the act is not taking place, one character believes he is watching a teenage boy performing a sexual act on an older man.

Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach. Whether or not the films we mention violate the CPPA, they explore themes within the wide sweep of the statute’s prohibitions. If these films, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work’s redeeming value. This is

inconsistent with an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene. See *Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Mass.*, 383 U.S. 413, 419, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966) (plurality opinion) (“The social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness”). Under *Miller*, the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive. For this reason, and the others we have noted, the CPPA cannot be read to prohibit obscenity, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity.

The Government seeks to address this deficiency by arguing that speech prohibited by the CPPA is virtually indistinguishable from child pornography, which may be banned without regard to whether it depicts works of value. See *New York v. Ferber*, 458 U.S. at 761. Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. The production of the work, not its content, was the target of the statute. The fact that a work contained serious literary, artistic, or other value did not excuse the harm it caused to its child participants. It was simply “unrealistic to equate a community’s toleration for sexually oriented materials with the permissible scope of legislation aimed at protecting children from sexual exploitation.” *Id.* at 761, n. 12.

Ferber upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were “intrinsically related” to the sexual abuse of children in two ways. *Id.* at 759. First, as a permanent record of a child’s abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child’s reputation and emotional well-being. See *id.* at 759, and n. 10. Second, because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network. “The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.” *Id.* at 760. Under either rationale, the speech had what the Court in effect held was a proximate link to the crime from which it came.

* * *

In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not “intrinsically related” to the sexual abuse of children, as were the materials in *Ferber*. While the Government asserts that the images can lead to actual instances

of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.

The Government says these indirect harms are sufficient because, as *Ferber* acknowledged, child pornography rarely can be valuable speech. This argument, however, suffers from two flaws. First, *Ferber's* judgment about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.

The second flaw in the Government's position is that *Ferber* did not hold that child pornography is by definition without value. On the contrary, the Court recognized some works in this category might have significant value, but relied on virtual images—the very images prohibited by the CPPA—as an alternative and permissible means of expression. . . . *Ferber*, then, not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting its holding. *Ferber* provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well.

III

The CPPA, for reasons we have explored, is inconsistent with *Miller* and finds no support in *Ferber*. The Government seeks to justify its prohibitions in other ways. It argues that the CPPA is necessary because pedophiles may use virtual child pornography to seduce children. . . .

Here, the Government wants to keep speech from children not to protect them from its content but to protect them from those who would commit other crimes. The principle, however, remains the same: The Government cannot ban speech fit for adults simply because it may fall into the hands of children. The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well beyond that interest by restricting the speech available to law-abiding adults.

The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Stanley v. Georgia*, 394 U.S. 557, 566, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969). First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be

protected from the government because speech is the beginning of thought.

To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. . . . There is here no attempt, incitement, solicitation, or conspiracy. The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.

The Government next argues that its objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well. Virtual images, the Government contends, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, virtual images promote the trafficking in works produced through the exploitation of real children. The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.

In the case of the material covered by *Ferber*, the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive. Even where there is an underlying crime, however, the Court has not allowed the suppression of speech in all cases. We need not consider where to strike the balance in this case, because here, there is no underlying crime at all. Even if the Government's market deterrence theory were persuasive in some contexts, it would not justify this statute.

Finally, the Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children. Experts, we are told, may have difficulty in saying whether the pictures were made by using real children or by using computer imaging. The necessary solution, the argument runs, is to prohibit both kinds of images. The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.

The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.

To avoid the force of this objection, the Government would have us read the CPPA not as a measure suppressing speech but as a law shifting the burden to the accused to prove the speech is lawful. In this connection, the Government relies on an affirmative defense under the statute, which allows a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children.

The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor. The statute, moreover, applies to work created before 1996, and the producers themselves may not have preserved the records necessary to meet the burden of proof. Failure to establish the defense can lead to a felony conviction.

We need not decide, however, whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms. It allows persons to be convicted in some instances where they can prove children were not exploited in the production. A defendant charged with possessing, as opposed to distributing, proscribed works may not defend on the ground that the film depicts only adult actors. So while the affirmative defense may protect a movie producer from prosecution for the act of distribution, that same producer, and all other persons in the subsequent distribution chain, could be liable for possessing the prohibited work. Furthermore, the affirmative defense provides no protection to persons who produce speech by using computer imaging, or through other means that do not involve the use of adult actors who appear to be minors. In these cases, the defendant can demonstrate no children were harmed in producing the images, yet the affirmative defense would not bar the prosecution. For this reason, the affirmative defense cannot save the statute, for it leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones.

In sum, § 2256(8)(B) covers materials beyond the categories recognized in *Ferber* and *Miller*, and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment. The provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional.

* * *

The judgment of the Court of Appeals is affirmed.

JUSTICE THOMAS, concurring in the judgment.

In my view, the Government's most persuasive asserted interest in support of the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § 2251 et seq., is the prosecution rationale—that persons who possess and disseminate pornographic images of real children may escape conviction by claiming that the images are computer-generated, thereby raising a reasonable doubt as to their guilt. At this time, however, the Government asserts only that defendants raise such defenses, not that they have done so successfully. In fact, the Government points to no case in which a defendant has been acquitted based on a “computer-generated images” defense. While this speculative interest cannot support the broad reach of the CPPA, technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children. In the event this occurs, the Government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense or some other narrowly drawn restriction.

The Court suggests that the Government's interest in enforcing prohibitions against real child pornography cannot justify prohibitions on virtual child pornography, because “this analysis turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech.” But if technological advances thwart prosecution of “unlawful speech,” the Government may well have a compelling interest in barring or otherwise regulating some narrow category of “lawful speech” in order to enforce effectively laws against pornography made through the abuse of real children. The Court does leave open the possibility that a more complete affirmative defense could save a statute's constitutionality, implicitly accepting that some regulation of virtual child pornography might be constitutional. I would not prejudge, however, whether a more complete affirmative defense is the only way to narrowly tailor a criminal statute that prohibits the possession and dissemination of virtual child pornography. Thus, I concur in the judgment of the Court.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA joins in part, dissenting.

* * *

We normally do not strike down a statute on First Amendment grounds “when a limiting instruction has been or could be placed on the challenged statute.” *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). This case should be treated no differently.

Other than computer generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct, the CPPA can be limited so as not to reach any material that was not already unprotected before the CPPA. The CPPA's definition of “sexually explicit