2009

The "Spiritual Temperature" of Contemporary Popular Music: An Alternative to the Legal Regulation of Death-Metal and Gangsta-Rap Lyrics

Tracy Reilly

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ABSTRACT

The purpose of this Article is to contribute to the volume of legal scholarship that focuses on popular music lyrics and their effects on children. This interdisciplinary cross-section of law and culture has been analyzed by legal scholars, philosophers, and psychologists throughout history. This Article specifically focuses on the recent public uproar over the increasingly violent and lewd content of death-metal and gangsta-rap music and its alleged negative influence on children. Many legal scholars have written about how legal and political efforts throughout history to regulate contemporary genres of popular music in the name of the protection of children's morals and well-being have ultimately been foiled by the proper judicial application of solid First Amendment free-speech principles. Because the First Amendment prevents musicians from being held liable for their lyrics, and prevents the content of lyrics from being regulated, some scholars have suggested that the perceived problems with popular music lyrics could be dealt with by increasing public awareness and group action.

* Assistant Professor of Law, University of Dayton School of Law, Program in Law & Technology, Dayton, Ohio. J.D., Valparaiso University School of Law, 1995; B.A., Northern Illinois University, 1990. The author would like to dedicate this Article to the loving memory of her first and best teacher, friend and mentor—her mother, Eileen Reilly. She would also like to thank her husband, Mark Budka, for his constant love and support; Kelly Henrici, Executive Director of the Program in Law & Technology, for her insightful comments and continuous encouragement; and Dean Lisa Kloppenberg and the University of Dayton School of Law for research support.

This Article provides reasons why both direct legal regulation and indirect social regulation will ultimately result in the silencing of unpopular ideas—a phenomenon that is unacceptable to the well-settled "marketplace of ideas" approach to First Amendment jurisprudence. This Article is unique in its interdisciplinary approach because it explains that the "spiritual temperature," or the current moral state of society, can be determined largely by the words its members speak to one another through the high art of music. It concludes that members of society who are understandably concerned about the increasingly and unacceptably violent, sexually explicit, pro-crime, and pro-drug subject matter contained in certain genres of popular music should shift their focus of reform out of the courts, legislatures, and government offices and towards responsible education and a complete moral cultural transformation. This cultural transformation can only be achieved by the return to a moral mindset that respects and appreciates the power and animus of popular music and gears it toward the positive growth of the youngest members of society.

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Philosophers throughout ancient, pre-industrial, and modern society have all agreed: the barometer of a culture can, to a great extent, be measured by how its citizens entertain themselves during times of leisure.[1] Music, perhaps more than any other form of high art, has the potential to teach, inspire, and uplift the human spirit. However, music also has the powerful capacity to thrust humanity into an abject state of helplessness, subversion, and even hatred when its listeners and creators are indifferent toward violence and vulgarity. Plato taught that, in order to take the "spiritual temperature" of a particular individual or an entire society, one must "mark the music." He also believed that the purpose of music is to give form and beauty to the dark and chaotic forces present in the soul of man, enabling him to aspire to greatness and fullness of character.[2] Similarly, nineteenth-century German philosopher Friedrich Nietzsche posited that the very proof of man's origin—and of his absolute divinity—was found in the continuous development and betterment of his "spirit."[3]

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1. See, e.g., AARON RIDLEY, THE PHILOSOPHY OF MUSIC: THEME AND VARIATIONS 1-2 (2004).

2. ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND 72 (1987). Plato believed that music represents the soul's primitive and primary speech that is, in its essence, not only without reason, but hostile to reason. Id. at 71. It is only through civilization and the domestication of the soul's raw passions—or the harmonization of the "enthusiastic part of the soul"—that man becomes whole. Id.

3. FRIEDRICH NIETZSCHE, THE ANTICHRIST, (H.L. Mencken trans. 2003) (1895).

Modern American philosopher Neil Postman echoed the sentiments of Plato, Nietzsche, and other philosophers when he noted that music—like every medium of communication—has "resonance." In other words, music, according to Postman, has the ability to integrate our collective experiences of the world by imposing itself on our consciousness and social institutions in myriad forms—sometimes in goodness and beauty, but always implicating the "ways we define and regulate our ideas of truth."[4] Indeed, for many philosophers, music is considered to provide man's consciousness with the same experience as the other arts—a "concretization" or a fixed and measurable expression of his sense of life.[5]

Like philosophers, legal scholars also recognize that the answers that a culture gives to life's questions are not made in the abstract, but instead are made "in the most mundane and concrete decisions of life," which invariably include the type of music deemed popular by a majority of that culture.[6] In essence, we are what we listen to. Yet even when answers and solutions to life's problems found in the medium of music were thought of as off-base, dissonant, vulgar, or unpopular, classical philosophers historically did not encourage censorship of such music, but instead attempted to educate their creators and persuade them to follow an alternate point of view by using more positive forms of counterspeech.[7] Today, however, music's messages and lyrics that resonate in the ears and minds of the masses are not simply off-base, dissonant, or unpopular; rather, they have become the antithesis of any measure of growth, self-confidence, and self-examination that music in civilized society should strive to

4. NEIL POSTMAN, AMUSING OURSELVES TO DEATH 18 (1985). Neil Postman—critic, writer, educator, and communications theorist—was chairman of the Department of Communication Arts at New York University where he taught for more than forty years prior to his death in 2003. Dr. Postman's core message was that constant immersion in a media-influenced environment defined primarily by technological advancement shapes children's lives to their detriment and the detriment of society. See Wolfgang Saxon, Neil Postman, 72, Mass Media Critic, Dies, N.Y. TIMES, Oct. 9, 2003, available at http://query.nytimes.com/gst/fullpage.html?res=9403E4D81F3CF93AA35753C1A9659C8B63.

5. AYN RAND, THE ROMANTIC MANIFESTO 59-60 (1966) (surmising that one's reaction to a piece of music involves not only one's emotions, but also one's values and deepest sense of self).

6. John M. Breen, John Paul II, The Structures of Sin and the Limits of Law, 52 ST. LOUIS U. L.J. 317, 341 (2008) (claiming that the "salient features" of American culture can be gleaned from the music that is produced and consumed).

7. BLOOM, supra note 2, at 72-73 (noting the difference between classical philosophical ideals espoused by Plato and Aristotle regarding the cultural and educational goals of music and those espoused by more modern philosophers, such as Hobbes, Locke, and Smith, who believed that "such considerations ha[d] become unnecessary").

seek. The messages and lyrics of music have become contrary to the nature and spirit of both ancient and modern philosophy.

Popular music has historically been a target for explaining the demoralization and the destruction of the "spirit" of every contemporary culture's youth.[8] But is it possible that some of today's popular musicians have captured adolescent audiences in such a way that drastic acts of censorship—while abhorrent to our fundamental First Amendment principles—are necessary and justified? In many respects, popular music may be a race to the bottom. Artists jockeying for sales create excessively violent music that does little more than deceive and mock the values that are necessary for young people to achieve a healthy psychological and physical existence.[9] Is it time for politicians, music industry players, and the public at large to take notice? If so, what are the underlying causes of this unprecedented phenomenon, never before seen in music history and how are we to undo its effects?

Popular music is steadily becoming more violent, and, to many observers, downright vile.[10] Similarly, the number of reported crimes in the United States has risen in recent years.[11] A more alarming fact, however, is that children are increasingly the perpetrators of such crimes.[12] No longer confined to inner cities, child crime has spread

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8. GARY LADERMAN, LUIS D. LEÓN & AMANDA PORTERFIELD, RELIGION AND AMERICAN CULTURES: AN ENCYCLOPEDIA OF TRADITIONS, DIVERSITY, AND POPULAR EXPRESSIONS 437 (2003).

9. Recently, violent rap music has hit it big in Germany, where controversial musicians such as Bushido, with song titles such as "White and Full of Hate," are "riding on the coattails" of American rappers who utilize extremely violent and vulgar race-related themes in their lyrics. Andreas Tzortzis, Germany's Rap Music Veers Toward the Violent, N.Y. TIMES, Aug. 9, 2005, available at http://www.nytimes.com/2005/08/09/arts/music/09rap.html?pagewanted=print. These German rappers have shocked a society that is not used to hearing "tales of death and revenge in its own language." Id.

10. See, e.g., infra text and accompanying notes 69-164.

11. Dan Eggen, Violent Crime, A Sticky Issue for White House, Shows Steeper Rise, WASH. POST, Sept. 25, 2007, at A-07 (reporting FBI statistics from 2005 through 2006 that demonstrate the first steady increase in violent crime since 1993); see also Christian D. Rutherford, Note,"Gangsta" Culture in a Policed State: The Crisis in Legal Ethics Formation Amongst Hip-Hop Youth, 18 NAT'L BLACK L.J. 305, 307 (2004-2005) (noting that between the years 1985 and 2000, the increase in state spending on corrections was almost double that of the increase in spending on higher education). There has also been a substantial rise in the occurrence of crime committed by young women because today "female victims are more likely to respond to their victimizers by lashing out against them." Andrea T. Martinez, Superpredators: The Demonization of Our Children by the Law, 3 J.L. & FAM. STUD. 251, 259 (2001).

12. Editorial, Don't Teach Our Children Crime, N.Y. TIMES, July 3, 2008, available at http://www.nytimes.com/2008/07/03/opinion/03thu2.html?th&emc=th ("[A]s many as 150,000 people under the age of 18 are held in adult jails in any given year.").

and is now a nationwide problem.[13] While it would be impossible to isolate one specific factor—whether it be socio-economic, cultural, or educational—that is responsible for the dramatic rise in child-related crime, parents, teachers, lawmakers, and other members of modern society have expressed heightened concern in the past few decades that there might be a link between child violence and the content of popular musical lyrics.[14]

Unlike some commentators who have written on music censorship, I propose that the fundamental problem is not the positive portrayal of violence or other perceived "immoral" content of the lyrics per se. The issue that needs to be addressed is the fact that the bulk of death-metal and gangsta-rap music that young people listen to contains content without any kind of message—positive or negative—and lyrics that are created merely to shock parents, mock values, and sell records as opposed to portraying social change.[15] An analysis of the song lyrics themselves seems to suggest that many contemporary death-metal and gangsta-rap artists intentionally pen and cant the lyrics to their songs without the social meaning and spirit of dissonance that once characterized previous "immoral" forms of popular music in past decades.[16] As a result of this phenomenon, we are faced with a true social dilemma: children and adults alike are listening to popular music without thinking, and artists are creating the lyrics without any intent to use them as a vehicle for a positive change to address a societal ill. Our culture is rapidly losing its spirit and the content of popular music is a reflection of this downward-spiraling phenomenon.

It is commonly noted by legal scholars that there is no "legal justification" for holding musicians responsible for the violent acts of their fans.[17] While the history of First Amendment jurisprudence

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13. Martinez, supra note 11, at 254.

14. Clay Calvert & Robert D. Richards, Mediated Images of Violence and the First Amendment: From Video Games to the Evening News, 57 ME. L. REV. 91, 103-04 (2005) [hereinafter Calvert & Richards, Images of Violence] (reporting studies conducted by social scientists concluding that exposure to media violence leads to aggressive child behavior and noting the controversies inherent in introducing such studies as evidence in legal cases alleging related child violence).

15. See, e.g., NATALIE J. PURCELL, DEATH METAL MUSIC 131 (2003) (noting that fans of death metal indicate that one of the "innate thrills" of the music genre is knowing that it has the effect of "horrifying" nearby third parties who are inadvertently listening).

16. Id. (opining that death metal lyrics are, at best, indirectly reflective of a "metal philosophy" and exist for nothing more than an "adrenaline rush" for its listeners).

17. See, e.g., David Germaine, Case Notes and Comments, Regulating Rap Music: It Doesn't Melt in Your Mouth, 11 DEPAUL-LCA J. ART & ENT. L. 83, 127-29 (2001); Matthew Sampar, Comment, Rock 'N' Roll Suicide: Why Heavy Metal Musicians Cannot be Held

supports this proposition,[18] there is a "moral justification" for pointing fingers at musicians who create music that glorifies and encourages violence—a reality that society can no longer ignore. Furthermore, responsible members of society should also acknowledge the role that fans and non-involved parents play. After all, people have a choice. In fact, the ability to choose different music has become easier with services like iTunes.[19]

Today, an unprecedented amount of violent, inane, and overtly offensive content is marketed to children.[20] While this issue needs to be addressed, it must be approached in a manner that stops short of legal censorship. The founding fathers of our country, and philosophers like Aristotle and Plato, knew that some information presented to the public could be false, misleading, or irrelevant; however, they also believed that, through reason and good judgment, citizens in an ordered society would be able to make sense of what they read and heard and judge its utility—or lack thereof—to their individual lives.[21] What they failed to tell us, however, is what to do when a majority of the members of our society are unable or unwilling to so judge the forms of entertainment we take into our homes and, consciously or subconsciously, utilize to influence our lives.

Part I of this Article begins with a historical analysis of social reactions and public uproars that have occurred throughout history in response to new and popular genres of music, and then focuses on the recent public concern about the current content of death-metal and gangsta-rap music and its alleged negative influence on children. The Article then outlines the legal and social hurdles that politicians and

Responsible for the Violent Acts of Their Listeners, 15 SETON HALL J. SPORTS & ENT. L. 173, 174 (2005).

18. See infra Part I.

19. See Michelle Quinn & Dawn C. Chmielewski, Top Music Seller's Store Has No Door, L.A. TIMES, April 8, 2008, available at http://articles.latimes.com/2008/apr/04/business/fi-itunes4. The authors report that iTunes, the leading online seller of digital downloads, has officially surpassed the traditional CD retailer Wal-Mart to become America's leading music store. Id. They also note that video game and software companies are selling more products as downloads rather than CDs, and that television networks are even making more programs available online to directly "reach people at their computers." Id.

20. The new strain of violent and indecent media content directed to children is, unfortunately, not limited to popular music. In November 2004, a company called Traffic released a video game entitled JFK Reloaded that allows the player to take on the role of Lee Harvey Oswald by firing gunshots at Kennedy's passing motorcade. See Clay Calvert, The First Amendment, the Media and the Culture Wars: Eight Important Lessons from 2004 About Speech, Censorship, Science and Public Policy, 41 CAL. W. L. REV. 325, 355 (2005) [hereinafter Calvert, First Amendment].

21. See NEIL POSTMAN, TECHNOPOLY: THE SURRENDER OF CULTURE TO TECHNOLOGY 67 (1993).

parents continue to surmount in order to either win votes or shift blame for the errant acts of their children. Part II examines the legal obstacles that face plaintiffs who file lawsuits against musicians or other music industry players in an attempt to hold them responsible for the violent acts of children who are allegedly influenced by the plaintiffs' music. Part III explores the challenges experienced by those who attempt to gain social and political control over the content of music. It first explores how action by public-awareness groups has historically influenced content regulation in an effective manner that requires no direct government censorship. By examining the successes and failures of past and existing public-awareness groups that have waged similar wars against content appearing on television and in other forms of media, this part of the Article scrutinizes the efforts of such groups by showing that their actions lead to self-censorship by the entertainment industry and a breakdown of the First Amendment "marketplace of ideas."[22] It will next discuss how politicians and local government officials use the issue of child violence and the media as a political platform by advocating legislation that has no chance of passing strong First Amendment hurdles at the expense of naïve parents and taxpayers.

Finally, Part V concludes that concerned members of society can make a difference with respect to popular music lyrics by focusing on education, encouraging a moral and cultural transformation in society, and, most importantly, shifting the responsibility of controlling what children listen to away from the government and back to parents, guardians, and educators.

I. THE HISTORICAL INFLUENCE OF POPULAR MUSIC ON ITS LISTENERS

For as long as mankind has lived in a civilized society, music has been no stranger to threats of censorship.[23] Historically, the

22. For an explanation of the "marketplace of ideas" approach to First Amendment law, see infra text and accompanying notes 86-90.

23. Allen S. Hammond, Indecent Proposals: Reason, Restraint and Responsibility in the Regulation of Indecency, 3 VILL. SPORTS & ENT. L.J. 259, 262 n.11 (1996); see also Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (offering a brief history of music censorship, stating that "[m]usic is one of the oldest forms of human expression," and claiming that "[f]rom Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state.). In fact, the 1710 Statute of Anne (the first English copyright act) was almost entirely about disciplining artists via censorship rather than rewarding them; copyright was used as a mechanism for printers to name the author of works so that the Crown could institute prosecutions for heresy, sedition, or libel. See Catherine L. Fisk, Credit Where It's Due: The Law and Norms of Attribution, 95 GEO. L.J. 49, 61 (2006).

extent to which lyrics have been subject to both public and political debate has increased as lyrics have become more vulgar and technology has made it easier for children to access vulgar lyrics.[24]

A. The Early Targets: Jazz and Blues

As early as the 1920s, public concern was formally voiced in the United States over perceived pornographic lyrics in jazz music.[25] A group formed in 1921 known as the Music Publishers Protective Association concerned itself with indecent musical material and was aimed at censoring popular jazz songs.[26] Music has also been blamed as the source of national increase in crime since as early as the 1940s.[27] Musical genres whose lyrics have stirred controversy can be traced back to early blues music in America.[28] Sounds from boogie and blues in the South, jazz-flavored "jump blues," western swing, gospel rhythms, and country "hillbilly" coalesced into what would become mainstream pop music in the 1950s.[29] The cultural roots of these "new" sounds did not arise from the traditional record-industry cities like New York and Los Angeles, but grew out of the non-mainstream identities of small towns in middle-America as well as select larger cities like Memphis and Chicago.[30] Much of the

24. See Rupal Ruparel Dalal, Congress Shall Make No Law Abridging Freedom of Speech—Even if It Causes Our Children To Kill?, 25 SETON HALL LEGIS. J. 357, 373 (2001) (observing the steady increase in violent media content throughout the years and opining that the controversy over violence depicted in television, motion pictures, video games, and song lyrics has increased due to the popularity and prevalence of these recent forms of media in the hands of children).

25. Alan Jay Lazarus, Note, Rock Is a Four-Letter Word: The Potential for FCC Regulation of (Un)Popular Music, 9 COMM./ENT. L. J. 423, 428 (1987).

26. Id.

27. In addition to several songs that were banned by NBC radio in 1940, Duke Ellington's "The Mooche" was thought so provocative by some that they blamed the popularity of the song for a national rise in the number of rape incidences. See James R. McDonald, Censoring Rock Lyrics: A Historical Analysis of the Debate, 19 YOUTH & SOC'Y 294, 295 (1988); see also People v. Jaffe, 35 N.Y.S.2d 104, 107 (N.Y. City Magis.Ct. 1942) (denying the defendant's motion to dismiss after he was charged with selling "lascivious" phonorecords that were, according to the court, intended for indecent and immoral use).

28. McDonald, supra note 27, at 296.

29. See ROBERT PALMER, ROCK & ROLL: AN UNRULY HISTORY 16 (1995). The author notes that the origins of rock 'n' roll could not be defined by a single person, band, or event, but entailed a comingling of several artists, genres and unique ideas and represented an "opening of America's sonic floodgates." Id.

30. Id. For an excellent chronicle of the emergence and growth of soul music out of Chicago's famous rhythm 'n' blues industry known as "Record Row" from the late 1950s to the 1970s, see generally ROBERT PRUTER, CHICAGO SOUL (1991).

regulation during this decade was aimed at blues music; it was limited in scope, and censorship was not widespread.[31]

B. Rock 'n' Roll: The Fear of Cross-Culturalism

With the birth of rock 'n' roll, the 1950s ushered in a vast change in the market for music that was directed toward a young audience.[32] Not only did the number of people who purchased and listened to music increase,[33] but the content of music also took on a different meaning in the nation's psyche. Encouraged by political movements like McCarthyism[34] and the civil rights movement,[35] musicians sought to sway their listeners' personal beliefs. During this period, the nation "hungrily devoured" political, nationalist music in genres such as pop, blues, and gospel.[36]

As sales of rock 'n' roll records grew, public outrage over rock 'n' roll culture erupted.[37] The adult generation of the 1950s saw the swinging hips of Elvis Presley as a threat to sexually decent morals and viewed the lyrics and images of most rock 'n' roll songs as encouraging youngsters to challenge parental control.[38] In 1954

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31. Record companies at this point in time had basically a "don't-bite-the-hand-that-feeds-you" attitude when it came to censorship. McDonald, supra note 27, at 296.

32. Id.

33. Statistics reported an increase in record sales from $224 million in 1947 to $600 million in the 1950s. Id.

34. "McCarthyism" commonly describes the period between the 1940s and 1950s in the United States when Wisconsin Senator Joseph McCarthy led a campaign to purge the government of hundreds of "blacklisted" Communists who were working within various government agencies. Several of the Communist party members had been active in Hollywood since 1935 and had managed to take over leadership positions in the Screen Actors Guild and other influential intellectual and cultural groups. These party members had the intention of gaining control of all the major unions in Hollywood and, thus, substantially influencing the "greatest medium of communication in history" by producing films replete with Soviet Union propaganda. Members of the group would report Hollywood activities to party headquarters in New York, which would then send the information to officials in Moscow. See PETER SCHWEIZER, REAGAN'S WAR: THE EPIC STORY OF HIS FORTY-YEAR STRUGGLE AND FINAL TRIUMPH OVER COMMUNISM, 7-19 (2002).

35. The presence of political themes in popular music is not unique to the post-McCarthyism era. Jeffrey B. Kahan, Note, Bach, Beethoven and the (Home) Boys: Censoring Violent Rap in America, 66 S. CAL. L. REV. 2583, 2584 (1993). In fact, the use of popular music to influence the beliefs of listeners dates back as far as the Middle Ages, as reflected by the church's view that music was to serve only religious purposes. Id.

36. Id. at 2586.

37. See McDonald, supra note 27, at 297.

38. Protests came not only from parents, but also from Hollywood celebrities, academicians, and other musicians. Id.; see also Deborah Cazan, Concerts: Rated or Raided?: First Amendment Implications of Concert-Rating, 2 VAND. J. ENT. L. & PRAC. 170, 171 n.14 (2000) (citing a 1965 Newsweek article that lamented the Doors' lyrics, "Father I

"outraged parents" founded the Crusade for Decent Discs and lobbied radio stations for a ban on rock 'n' roll's "jungle sounds."[39] Indeed, a considerable amount of criticism of music in the 1950s was racially motivated as records made by African American rhythm and blues artists began making their way into white youngsters' music collections.[40] Rock 'n' roll was criticized because many young people of different races admired it.[41] Because rock concerts were a place where whites and African Americans "mixed freely," proponents of segregation feared that an appreciation of similar music would lead to social unification of the races.[42]

Public discontent with rock 'n' roll increased in the 1960s and 1970s, when religious groups focused on anti-Christian messages in songs by the Beatles and the explicit lyrics of such songs like the Rolling Stones' "Let's Spend the Night Together."[43] Lyrics that promoted drug use gained not only the attention of religious activists but also the military, Congress, and President Nixon.[44] But what

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want to kill you/Mother I want to fuck you," and other sexually overt material from the Rolling Stones' discography).

39. Francis Kelly, Rock's War of Words, MACLEAN'S, Oct. 14, 1985, at 95.

40. See K.J. Greene, "Copynorms": Black Cultural Production, and the Debate over African-American Reparations, 25 CARDOZO ARTS & ENT. L.J. 1179, 1190 (2008). The racial protests went so far as to encourage circulation of a scathing poster distributed by the white supremacist Citizen's Council of Greater New Orleans in the 1950s stating:

> STOP: Help save the youth of America: Don't buy Negro records. If you don't want to serve Negroes in your place of business, then do not have Negro records on your jukebox or listen to Negro records on the radio. The screaming, idiotic words, and savage music of these records are undermining the morals of our white youth in America. Call the advertisers of the radio stations that play this type of music and complain to them! Don't let your children buy, or listen to these Negro records.

Palmer, supra note 29, at 51-52.

41. John W. Holt, Comment, Protecting America's Youth: Can Rock Lyrics Be Constitutionally Regulated?, 16 J. CONTEMP. L. 53, 54-55 (1990).

42. Id.; see also Lili Levi, The Hard Case of Broadcast Indecency, 20 N.Y.U. REV. L. & SOC. CHANGE 49, 78 (1992/1993) (noting that the fear of "race mixing" was clearly underlying the complaints received about the content of rhythm and blues and rock 'n' roll).

43. McDonald, supra note 27, at 298-99. In order to appear on the Ed Sullivan Show, the Rolling Stones were forced to change the title and lyrics to their song to "Let's Spend Some Time Together." See Elizabeth F. Brown & William R. Hendee, Adolescents and Their Music: Insights into the Health of Adolescents, 262 JAMA 1659, 1660 (1989).

44. The following are examples of the growing concern in various governmental bodies over the influence of rock 'n' roll in the 1960s and 1970s:

> The military became involved when a representative of the Armed Forces Office of Information complained that songs involving drugs were encouraging soldiers to use them. A senate investigation was ordered in 1973 by Senator James Buckley (R-NY) who was concerned with "drugola," or the apparent relationship between drug use and rock 'n' roll.

those who were attempting to censor did not appreciate was that a bulk of the music from these decades was truly "art music" that was specifically designed by musicians such as the Beatles and Bob Dylan "for listening and thinking rather than dancing and romancing."[45] During this period, musicians were starting to "seize control of their own artistic direction" by writing their own songs with personal messages and arranging and producing their own recordings.[46] The music began to incorporate positive and meaningful messages that reflected the bands' ideas of life and humanity and encouraged reform and social change.[47]

The 1980s witnessed increasingly violent and comparatively less philosophical and positive lyrics, and with this came a national campaign that threatened to censor rock 'n' roll.[48] Heavy-metal lyrics were specifically targeted.[49] Heavy metal attained large-scale commercial success in the 1980s, but the origin of heavy metal can be traced back to the 1960s and British super-band Led Zeppelin.[50] Due to its wild guitar riffs, thrashing drums, and largely unintelligible lyrics, some critics did not consider heavy metal to be "music" but

Frustrated by anti-war campaigns, President Nixon in his first term ordered Vice-President Spiro Agnew to be tough in his stance on anti-war protestors and rock lyrics.

McDonald, supra note 27, at 299-300. For a discussion of the symbiotic relation between music and the Vietnam anti-war movement, see Lazarus, supra note 25, at 429-30.

45. See Palmer, supra note 29, at 110.

46. Id.

47. For example, when Pink Floyd was wrapping up the final recording of its album The Dark Side of the Moon in the early 1970s, bass player Roger Waters suggested the idea of incorporating spoken words about "madness, violence, and mortality" throughout the various tracks. NICK MASON, INSIDE OUT: A PERSONAL STORY OF PINK FLOYD 171 (2004). The band members invited people into the studio and "interviewed" them, and snippets of their responses were strategically placed on the album, the meaning of which has since been contemplated by millions of Pink Floyd fans worldwide. See id.

48. See Matthew Savare, Comment, Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements, 11 UCLA ENT. L. REV. 331, 338 (2004).

49. Holt, supra note 41, at 55-60. Heavy-metal music has been defined as "loud, angry music, often filled with violent lyrical content and instrumental arrangements that alone could serve as a soundtrack to the apocalypse." See Sampar, supra note 17, at 175.

50. By the end of the 1960s, "the raw, back-breaking music of Led Zeppelin elevated the rock revolution to an absolutely manic pitch." RICHARD COLE WITH RICHARD TRUBO, STAIRWAY TO HEAVEN: LED ZEPPELIN UNCENSORED xiii (1992). When Ahmet Ertegun—"the finest record man of all time"—signed Led Zeppelin to Atlantic Records in 1968, the band's manager, Peter Grant, summarily commanded the highest advance ever paid to a new band at the time: $200,000. CHRIS WELCH, PETER GRANT: THE MAN WHO LED ZEPPELIN 68 (2001) (noting how Grant's heavy-handed management of the band, including clashes with bootleggers and unprecedented negotiations with merchandisers, record distributors, and venue owners, revolutionized the music industry).

rather distortion and downright "noise."[51] Metal bands in the 1970s and 1980s began to introduce lyrical themes of Satanism, suicide, violence, drugs, and sexuality.[52] Furthermore, these images were not just portrayed in the lyrics; they were also supported by the bands' album art, stage sets, clothing, and make-up.[53] Perhaps the best example of the cultural transition from a peace-and-love "hippie" generation of music fans to a generation of "metalheads"—in other words, openly dedicated fans of the heavy-metal genre—occurred in 1969. As the first melodies of Woodstock were heard wafting through upper New York, a similar festival in Northern California headlined by the Rolling Stones ended in violence and death when a security guard killed a fan in the audience.[54]

C. Popular Music Gone Extreme: The Rise of Death Metal and Gangsta Rap

The heavy-metal scene grew even more outrageous when "death metal" or "black metal" bands such as Cannibal Corpse broke the Billboard's Top 200 album chart with albums that contained "Entrails Ripped From a Virgin's Cunt," "Stripped, Raped and Strangled," and other songs with "lyrical images of decaying corpses and catastrophic horrors."[55] The death-metal sub-genre "took [heavy] metal to new extremes" as it became darker and more morbid sounding with vocals that were deep, guttural, and quite often completely unintelligible, even to avid listeners.[56] In fact, lead vocalists in some death-metal bands, such as Obituary, did not even sing actual words, but instead growled and roared "like the Cookie Monster on a binge."[57]

51. Sampar, supra note 17, at 175. For a cultural and historical overview about how patterns of "noise" relate to the composition of music from ancient to modern traditions, see generally PAUL HEGARDY, NOISE/MUSIC: A HISTORY (2007).

52. Alexis A. Lury, Time to Surrender: A Call for Understanding and the Re-Evaluation of Heavy Metal Music Within the Contexts of Legal Liability and Women, 9 S. CAL. REV. L. & WOMEN'S STUD. 155, 159-60 (1999) (defining the various sub-genres of heavy-metal music that emerged in the 1980s, including death metal, glam metal, Christian metal, and classic metal, each of which incorporated one or more of these themes).

53. David Zucchino, Big Brother Meets Twisted Sister, ROLLING STONE, Nov. 7, 1985, at 9 (discussing objections to the images portrayed in modern heavy-metal bands). `

54. See DAVID KONOW, BANG YOUR HEAD: THE RISE AND FALL OF HEAVY METAL 3 (2002).

55. Sampar, supra note 17, at 177-78.

56. Konow, supra note 54, at 228.

57. Id.

In 1985 Tipper Gore, wife of then-Senator Albert Gore, co-founded the Parents' Music Resource Center (PMRC) and launched a nationwide attack on the lyrics of rock 'n' roll music.[58] The goals and philosophies of the PMRC members made the formal protests of music in the 1960s and 1970s seem "fairly mild."[59] With the power of politics on its side, the PMRC waged a war mostly against heavy-metal lyrics. In a 1985 press release, the PMRC complained that rock 'n' roll music had taken a "radical turn" since many of the lyrics were blatantly obscene and violent.[60] Susan Baker, co-founder of the PMRC and wife of then-Treasury Secretary James Baker, claimed that there was a new element of violence and vulgarity in music toward women that was unprecedented; according to Baker, lyrics like Cole Porter's "the birds do it, the bees do it" that had been admonished in earlier decades "can hardly be compared" to modern lyrics like W.A.S.P.'s "I f-u-c-k like a beast."[61] Tipper Gore similarly admonished modern music as a "sick new strain of rock music glorifying everything from forced sex to bondage to rape."[62]

Just as the music market vastly increased in the 1950s with the evolution of rock 'n' roll music, booming sales of compact discs (CDs) kept the music industry healthy in the 1980s.[63] The creation of the CD, a more durable (not to mention, digital) medium for music production, heightened national sales of recordings.[64] The PMRC was naturally concerned that the large amount of music that they opposed was rapidly flowing into the market and, undoubtedly, into the ears of an ever-growing child audience.

The burgeoning popularity of rap, also referred to as hip-hop, added yet another genre of music to the PMRC's regulatory hit list in

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58. Discussion of the PMRC in this section of the Article is to supplement the historical analysis of an increased concern over lyrical content. See infra Section IV for an in-depth treatment of the PMRC.

59. McDonald, supra note 27, at 302.

60. Id.

61. Peter Alan Block, Note, Modern Day Sirens: Rock Lyrics and the First Amendment, 63 S. CAL. L. REV. 777, 785 (1990) (offering reprinted lyrics of several objectionable heavy metal and pop songs); see also Jay Cocks, Rock is a Four-Letter Word, TIME, Sept. 30, 1985 (stating that even record-company owners and liberal politicians who were initially extremely opposed to the efforts of the PMRC had begun to express public concern over explicit lyrics).

62. Robert Love, Furor Over Rock Lyrics Intensifies, ROLLING STONE, Sept. 12, 1985, at 14.

63. CDs Boost Record Biz, ROLLING STONE, June 4, 1987, at 15.

64. A report from the Record Industry Association of America revealed a 134% increase in the dollar amount of compact disc shipments in 1986, as 53 million discs were shipped in that year compared to only 22.6 million in 1985. See id.

the 1990s.[65] Rap music has been defined as an "urban, often urbane, mélange of politics, rock 'n' roll, rhythm and blues, African vocal traditions, and modern technology" whose lyrics "reflect the outlook of a generation of black youth."[66] Since the origin of rap music in African American dance clubs in New York in the 1970s,[67] its popularity in all forms of media quickly grew and its lyrics morphed into messages that were "acutely political and at times graphically violent."[68] Early 1990s rap songs such as "Trigga Happy Nigga" and "Let a Ho Be a Ho" by the Geto Boys depicted an "unrelenting blast of rage" aimed at alleged acts of police brutality and manipulative women."[69]

While early artists who emerged from the East Coast tradition and culture of rap music were mostly famous for lyrically benign (and even positive) songs such as Sugarhill Gang's "Rapper's Delight,"[70] the

65. By the late 1990s, sales of hip-hop music were increasing at three times the rate of music industry sales as a whole; 35 percent of such sales were made by people in the ten- to twenty-year-old demographic. See Rutherford, supra note 11, at 322.

66. Kahan, supra note 35, at 66. Hip-hop is "the stylized rhythmic music that commonly accompanies rap" and generally refers to "a subculture especially of inner-city youths who are typically devotees of rap music." Merrian-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/hip-hop (last visited July 8, 2008).

67. For an informative discussion of the history of the evolution of the hip-hop culture in the Bronx, see Akilah N. Folami, From Habermas to "Get Rich or Die Tryin'": Hip Hop, the Telecommunications Act of 1996, and the Black Public Sphere, 12 MICH. J. RACE & L. 235, 253-60 (2007) (tracing the social and political roots of hip-hop to failed urban renewal plans from 1930 to 1960 which led to the steady closing of businesses, the rise of "slum lords," and ultimately contributed to the community becoming the poorest and toughest in all of New York).

68. Kahan, supra note 35, at 2583.

69. Greg Kot, No Sale: Citing Explicit Lyrics, Distributor Backs Away From Geto Boys Album, CHI. TRIB., Sept. 13, 1990, at Tempo 9. The 1992 song "Cop Killer" by rapper Ice-T with his band Bodycount also portrays images of violence in its opening dedication to the Los Angeles Police Department:

> For every cop that has ever taken advantage of somebody, beat 'em down or hurt 'em because they got long hair, listen to the wrong kind of music; wrong color, whatever they thought was the reason to do it. For every one of those fuckin' police, I'd like to take a pig out here in this parking lot and shoot them in their mother fuckin' face.

BODYCOUNT, Cop Killer, on BODYCOUNT, (Sire/Warner Bros. 1992). The lyrics of the song go on to say, "I'm about to kill me somethin'/A pig stopped me for nuthin'/DIE, DIE, DIE PIG, DIE! FUCK THE POLICE!" See Jim McCormick, Protecting Children From Music Lyrics: Sound Recordings and "Harmful to Minors" Statutes, 23 GOLDEN GATE U. L. REV. 679, 688 n.68 (1993).

70. The lyrics to "Rapper's Delight" include the following:

> Now what you hear is not a test—I'm rappin' to the beat/And me, the groove, and my friends are gonna try to move your feet/See I am Wonder Mike and I like to say hello/To the black, to the white, the red and the brown, the purple and yellow/But first I gotta bang bang the boggie to the boggie/Let's rock, you don't stop/Rock the riddle that will make your body rock.

THE SUGARHILL GANG, Rapper's Delight, on SUGARHILL GANG (DBK Works 1980).

late 1980s witnessed the emergence of a sub-genre of rap music in Los Angeles called "gangsta rap" that has largely influenced the "criminal image" of today's modern rappers.[71] West Coast gangsta-rap acts such as Niggas With Attitude (more popularly known as NWA) portrayed an image of "police brutality, gang violence, crack, and pure seething rage" that was "filled with [lyrical] references to black women as hos and bitches and black men as gangstas and 'niggas.'"[72] One author notes that while gangsta-rap was originally considered a sub-genre of rap and hip-hop, now "rappers who espouse violent messages also sell the most records, grace the most magazine covers, and rule the charts."[73] Perhaps the reason why rap lyrics became so blatantly violent was due to the nationwide competition among rappers who had to do as much as they could to shock audiences in order to sell their first album.[74] In many ways, the 1990s marked the end of the loyal popular music fan, particularly in the genre of heavy metal.[75] The commercialization of the music industry created a creature akin to the fashion industry, where "this year's big deal is almost certain to become next year's has-been."[76]

As extensively discussed in Part II, popular music has always had the ability to shock parents who worry not only about the debasement of society but also about the influence of lyrics on their children. But there is a marked difference between the music of earlier decades and the music that is obtainable on the radio, Internet,

71. Andrea L. Dennis, Poetic (In)justice? Rap Music Lyrics as Art, Life, and Criminal Evidence, 31 Colum. J.L. & Arts 1, 18-20 (2007).

72. Folami, supra note 67, at 261.

73. Rutherford, supra note 11, at 322 (claiming that rap artists find that a tough, gangsta stance must be maintained in order to gain and keep popularity among fans and that "violent-themed artists receive the most industry support").

74. See Palmer, supra note 29, at 290.

75. John Pareles, Heavy Metal: Weighty Words, N.Y. TIMES, July 10, 1988, available at http://query.nytimes.com/gst/fullpage.html?res=940DE2DB113DF933A25754C0A96E948260&sec=&spon=&pagewanted=all (noting that in the 1980s heavy-metal bands routinely drew loyal concert audiences and sold a million copies of their record in a matter of weeks). However, through the early 1990s, the same heavy-metal bands' CDs were only to be found in the discount bins in music stores, as the loyal fan base was fading. See Andrew C. Revkin, A Metal-Head Becomes a Metal-God. Heavy, N.Y. TIMES, July 27, 1997, available at http://query.nytimes.com/gst/fullpage.html?res=9901E0D8133BF934A15754C0A961958260&sec=&spon=&pagewanted=2.

76. Palmer, supra note 29, at 290; see also MORRIS BERMAN, DARK AGES AMERICA: THE FINAL PHASE OF EMPIRE 15 (2006) (claiming that contemporary American society is characterized by speed, transience, and obsessive change, and, "at bottom, each person knows he or she must continually 'reinvent themselves'" and have a constantly shifting identity).

and in stores today.[77] For example, in earlier decades heavy-metal lyrics might have spoken of suicide and sexual acts.[78] But death-metal and gangsta-rap songs of today openly speak of group violence and seek to prepare groups for violent behavior.[79] Rap lyricist Ice Cube has unabashedly identified certain individuals within songs that he believes should be killed; for example, in his song "Black Korea" he has commanded his listeners to burn down Korean-owned grocery stores in retaliation for the murder of a young woman who was killed by a Korean store owner.[80]

Regardless of one's opinion about the subject matter and lyrics of contemporary music, one thing is clear: the courtroom has proven to be an unfriendly forum for plaintiffs challenging musicians, record companies, and other affiliates on this basis, even when there is the potential for popular songs to cause listeners to wreak harm upon both themselves and others.[81]

II. THE LEGAL OBSTACLES TO MUSIC CENSORSHIP FACED BY PLAINTIFFS

A. Protection of Lyrics Under the First Amendment

The First Amendment prohibits the government from restricting citizens' rights to express their viewpoints, no matter how distasteful or morally reprehensible those viewpoints are.[82] It provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."[83] The Supreme Court's First Amendment

77. See, e.g., Robert Firester & Kendall T. Jones, Catchin' the Heat of the Beat: First Amendment Analysis of Music Claimed to Incite Violent Behavior, 20 LOY. L.A. ENT. L. REV. 1, 20-23 (2000). The authors note the argument that there is a difference between the motive behind the lyrics of more classic rock music and those of contemporary gangsta-rap music. Id.

78. David Crump, Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test, 29 GA. L. REV. 1, 29 n.150 (1994).

79. See supra note 77.

80. See supra note 77.

81. Robert N. Houser, Alleged Inciteful Rock Lyrics—A Look at Legal Censorship and Inapplicability of First Amendment Standards,17 OHIO N.U. L. REV. 323, 337 (1990).

82. Njeri Mathis Rutledge, A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing, 67 MD. L. REV. 295, 327 (2008) (noting that "[t]he First Amendment was meant to protect unpopular speech").

83. U.S. CONST. amend. I.

jurisprudence has, throughout the years, become increasingly more protective of speech.[84]

In a famous dissenting opinion, Justice Oliver W. Holmes articulated a policy that described the essential function of free speech in society—one that is still adhered to today.[85] Holmes's "marketplace of ideas" theory provides that society benefits from free trade of ideas in the marketplace.[86] The theory is that every undesirable idea articulated in the marketplace will be effectively counteracted by speech condemning such ideas, and an ultimate truth will advance through this competition.[87] Even loathsome ideas should not be suppressed unless they imminently threaten or immediately interfere with the law.[88] This is especially true when ideas are expressed within artistic endeavors "which at best have an attenuated connection to politics."[89] In order to enjoy the constitutional right to free speech, dissidents and other radical voices need not improve society generally; in fact, their speech "may be socially worthless in the minds of almost everyone except the speaker."[90]

Since its inception, Holmes theory has been directly or indirectly utilized in many lawsuits upholding the constitutionality of various forms of popular music.[91] Violent speech and obscene speech—the two areas that advocates of popular music regulation mainly focus on—have a separate but similar history in the Supreme Court.

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84. The treatment of the evolution of the First Amendment in this Article is a general overview to explain why turning to the courts for protection against offensive lyrical content is not a viable option. For an exhaustive review of the early development of First Amendment law, see generally Block, supra note 61; Steven C. Schechter, Extra-Governmental Censorship in the Advertising Age, 12 LOY. L.A. ENT. L.J. 367 (1992).

85. In Abrams v. United States, the Supreme Court upheld convictions of defendants for undermining the war effort by distributing anti-war leaflets and, thus, violating various provisions of the Sedition Act. 250 U.S. 616, 624 (1919).

86. See Bill D. Herman, Breaking and Entering My Own Computer: The Contest of Copyright Metaphors, 13 COMM. L. & POL'Y 231, 239-40 (2008).

87. Stewart Jay, The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century, 34 WM. MITCHELL L. REV. 773, 776-78 (2008) (explaining various interpretations of the marketplace of ideas, as well as other applications of free expression which invariably "involve tradeoffs between the social utility of restricting expression and the corresponding burdens on the individual and society from allowing it").

88. Id.

89. Id. at 776.

90. Id. at 777.

91. John Charles Kunich, Natural Born Copycat Killers and the Law of Shock Torts, 78 WASH. U. L.Q. 1157, 1200 n.232 (2000).

1. History of the Regulation of Violent Speech

In the area of violent speech, the Supreme Court has attempted to distinguish between both political dissent and advocacy of abstract ideas (areas protected by the First Amendment) and speech that incites illegal acts (a constitutionally unprotected area).[92] Throughout the years, the Court has dramatically changed its position as to where the line should be drawn between these two types of speech.

In 1919, the Supreme Court upheld the convictions of defendants who sent leaflets advocating noncompliance with the World War I draft procedure to military draftees.[93] The leaflets did not specifically recommend taking violent measures in opposing the draft, yet the Court upheld the convictions under the 1917 Espionage Act, which made it a crime to obstruct the war effort, despite defendants' contention that the leaflets were protected forms of speech under the First Amendment.[94] That same year the Court upheld a similar conviction of a well-known politician who publicly opposed the war by delivering an anti-war speech to a public assembly of people.[95] The Court held that as long as the defendant had the intent to actively obstruct recruitment and his words had the natural tendency and reasonably probable effect of obstruction, conviction under the Espionage Act was warranted. Additionally, the primary defense upon which the defendant relied—that his speech was protected by the First Amendment—had been "dealt with" and disposed of in Schenck.[96]

As recently as 1951, the Supreme Court, in Dennis v. United States, upheld a conviction under the Smith Act, which punished willful advocacy and teaching of methods to overthrow the government by force.[97] The defendants in Dennis were punished for conspiring to reorganize the Communist Party.[98] The Court held that a clear and present danger of an actual attempt at immediate overthrow of the government was not necessary for conviction; the government can

92. See, e.g., Stephen Penaro, Note, Reconciling Morse with Brandenberg, 77 FORDHAM L. REV. 251, 260-61 (2008).

93. Schenck v. United States, 249 U.S. 47, 49-50 (1919).

94. Id. at 51-52. The Court noted that although the words the defendants had used in the circulars would have been "within their constitutional rights" during a time when the country was not at war, "the character of every act depends upon the circumstances in which it is done." Id. at 52.

95. Debs v. United States, 249 U.S. 211, 216-17 (1919).

96. Id. at 215-16.

97. Dennis v. United States, 341 U.S. 494, 494 (1951).

98. Id. at 495.

punish an individual advocating violent overthrow even if it is not certain to occur in the immediate future.[99]

The tide began to turn in the 1960s, however, when the Court in Yates v. United States held that there could be no conviction of the defendants for their mere advocacy in the realm of ideas.[100] While the Dennis Court held that the indoctrination of a group for future violent action is not constitutionally protected speech when a group is of sufficient size and power, Yates held that only the counseling of illegal and "forcible" acts, not the mere advocacy of abstract doctrine, can be prohibited.[101] In Yates, the Court set forth the basis of modern free-speech rationale that would be similarly applied by lower courts in future cases regarding the subject matter of musical lyrics when it held that "however much one may abhor even the abstract preaching of forcible overthrow of government, or believe that forcible overthrow is the ultimate purpose to which the Communist Party is dedicated, it is upon the evidence in the record that the [defendants] must be judged in this case."[102]

In 1969 the Court, in Brandenburg v. Ohio,[103] announced the modern standard for advocacy of illegal action that is currently in force. The defendant in Brandenburg was a Klu Klux Klan leader convicted under the Ohio Criminal Syndicalism Act[104] after he and other Klan members publicly communicated with a reporter on film wearing hooded robes and carrying items such as guns, ammunition

99. Id. at 508-09. Compare this majority holding with the dissenting opinions of Justice Black and Justice Douglas that emphasized that that the defendants were not prosecuted for an overt attempt to overthrow the government, but merely to assemble, talk, and publish ideas at a later date. Id. at 579-91. Justice Douglas stated that "[f]ree speech—the glory of our system of government—should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent." Id. at 590.

100. Yates v. United States, 354 U.S. 298, 331 (1961) (holding that, apart from the inadequacy of the evidence to show more than the abstract advocacy and teaching of forcible overthrow by the Communist Party, the requisite specific intent to accomplish this overthrow could not be shown by mere membership or even the holding of office in the Communist Party).

101. Id. at 329-30 (finding that the record showed merely "scattered incidents" of a call to forcible action that were not connected to any of the defendants and which were not sufficient to justify viewing the Communist Party as the nexus between the defendants and the conspiracy charged).

102. Id. at 330.

103. 395 U.S. 444 (1969).

104. The Ohio Criminal Syndicalism Act was enacted in 1919 to punish persons who openly advocated violence as a means of achieving political reform or who published or circulated any written materials encouraging such acts. See DONALD P. KOMMERS, JOHN E. FINN & GARY J. JACOBSOHN, AMERICAN CONSTITUTIONAL LAW: ESSAYS, CASES, AND COMPARATIVE NOTES 718 (2004).

and a Bible while gathered around a large wooden burning cross.[105] While most of the words uttered during the scene were incomprehensible, scattered phrases could be understood that were openly derogatory of African Americans and Jews.[106] The Court overturned the conviction and administered new requirements for the future drafting of any statute that proscribed speech, holding that Constitutional guarantees of free speech do not permit a state to forbid advocacy of the use of force or violation of law except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[107]

2. Violent Speech and Music Lyrics

The Brandenburg standard was put to the test in the late 1990s in the area of gangsta-rap lyrics when Ronald Ray Howard shot and killed Texas State Trooper Bill Davidson after Davidson pulled over Howard, who was driving a stolen car, and attempted to issue him a ticket.[108] At the time Howard shot Davidson with a nine millimeter Glock handgun, he was listening to a pirated cassette of 2Pacalypse Now, an album performed by defendant gangsta-rap artist Tupac Shakur and produced, manufactured and distributed by co-defendants Interscope Records and Atlantic Records.[109] During Howard's trial for murder, he had unsuccessfully attempted to avoid the death penalty by claiming that listening to 2Pacalypse Now caused him to shoot Davidson.[110] The family of Davidson subsequently filed a civil suit claiming, among other things, that the music of Tupac Shakur tends to incite imminent illegal conduct on the part of individuals like Howard.[111]

The court agreed with the Davidsons that "2Pacalypse Now is both insulting and outrageous," but nonetheless found that Shakur did not intend to incite imminent illegal conduct when he recorded the album.[112] Moreover, even assuming Shakur did intend his music to incite imminent and lawless action, the court opined that the mere

105. 395 U.S. at 446.
106. Id. at 445-46.
107. Id. at 447-48.
108. See Davidson v. Time Warner, Inc., No. Civ.A. V-94-006, 1997 WL 405907, *1 (S.D. Tex. Mar. 31, 1997).
109. Id.
110. Id.
111. Id.
112. Id. at *20. The court was persuaded by past cases that addressed similar issues and refused to find that the broadcast of a music recording incited certain conduct merely because violent acts occurred after the speech. Id.

broadcast of the album three years after it had been produced and sold over 400,000 copies is not likely to incite or produce illegal or violent action.[113] The court, therefore, placed the blame and responsibility for the murder where it belonged—on the murderer.[114]

As evidenced by the Davidson holding, it is practically impossible for plaintiffs to meet the Brandenburg standard required for a finding that violent music lyrics are not constitutionally protected.[115] Regardless of how irreverent lyrics have become and what that means on a philosophical, moral or greater societal scale, it is not for any court of law to judge the immorality of speech that falls short of being defined as imminent illegal conduct and/or the appropriateness of such speech for a particular audience, especially when a remote third-party musician is being accused of aiding in the causation of a crime that essentially has no relation to that artist or his record company.

3. History of the Regulation of Obscene Speech

Just as the Supreme Court has struggled to define what types of violent speech are constitutionally protected, the Court has also struggled to provide specific guidelines for what kind of materials may, taking into account First Amendment principles, be either punished or protected under obscenity laws. Obscenity was traditionally thought to be an unprotected type of speech under the First Amendment.[116] Before 1957, states were free to define obscenity as they so desired and the constitutionality of such laws was consistently upheld in the Supreme Court.[117]

In 1957 the Supreme Court, in Roth v. United States, confirmed the traditional belief that obscenity was unprotected speech within the

113. Id. (citing DeFilippo v. Nat. Broadcasting Co., 446 A.2d 1036, 1041 (R.I. 1982), for the proposition that since only one child was known to have emulated violent and macabre actions portrayed in a broadcast viewed by several thousands of people, the broadcast cannot legally constitute incitement).

114. The court looked at the facts of the case and determined that it was "far more likely that Howard, a gang member driving a stolen automobile, feared his arrest and shot officer Davidson to avoid capture." Id. Under such circumstances, the court was unwilling to place responsibility for such remote acts with Shakur. Id.

115. See Sampar, supra note 17, at 182; see also Rutherford, supra note 11, at 335 (observing that since hip-hop lyrics rarely advocate violence in such a direct manner as required by Brandenburg, the right of this cultural expression will remain protected).

116. See Jonathan P. Wentz, Ashcroft v. ACLU: The Context and Economic Implications of Burdened Access to Online Sexual Speech, 17 GEO. MASON U. CIV. RTS. L.J. 477, 479 (2007).

117. Schechter, supra note 84, at 374.

meaning of the Constitution.[118] However, the court reformed the definition of obscenity in a way that would revolutionize First Amendment obscenity jurisprudence. The Court defined the term "obscene" to mean whether, to the average person applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest.[119] Prurient interest was defined by the Court as "a shameful or morbid interest in nudity, sex, or excretion" that goes "substantially beyond customary limits of candor in description or representation of such matters," yet is not meant to include merely lustful material or the mere portrayal of sex in art, literature or scientific works.[120] After Roth, lower courts were required to apply the standard of the average adult person to the material as a whole.[121] If the entire work did not reinforce the obscene message, it was protected under the Roth test.[122] As a result of the opinion, many works that previously were banned as offensive at once became freely distributable in the marketplace.[123]

Less than two decades after the Roth decision, the Supreme Court enacted an even stricter test for finding a work of art to be obscene in Miller v. California.[124] The Miller test, which remains the current legal test for obscenity, requires the following three prongs to be met before a work is deemed to be obscene: (1) the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts, 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.[125] In another decision, Ginsberg v. New York,[126] the Court elaborated on the Roth test by "recognizing the legal theory of variable obscenity," or the need to impose a different standard for minors when addressing the issue of

118. 354 U.S. 476, 480-93 (1957). The defendant published and sold books, photographs and magazines at his place of business in New York. Id. He was convicted by a jury in the District Court for the Southern District of New York on four counts of a twenty-six-count indictment that charged him with mailing obscene circulars and advertising in violation of the federal obscenity statute. Id.

119. Id. at 488-90.

120. Id.

121. Schechter, supra note 84, at 375.

122. Id.

123. Id. at 374-75.

124. 413 U.S. 15, 16 (1973) (the defendant conducted a mass-mailing campaign to advertise the sale of "adult" illustrated books and was convicted of violating California Penal Code § 311.2(a), a misdemeanor, by knowingly distributing obscene matter).

125. Id. at 24.

126. 390 U.S. 629 (1968).

erotic expressions of speech, when it affirmed the constitutionality of a New York statute that defined obscenity as having a direct appeal to the prurient interests of minors.[127] The "variable obscenity" doctrine added yet another layer to the contextual analysis of the Roth decision. After Roth, material that was merely indecent for adults became obscene when viewed by children and, thus, unprotected by the First Amendment.[128]

4. Obscene Speech and Music Lyrics

It was not until 1992 that a litigant invoked the Miller standard in claiming that the lyrical content of certain songs was obscene and not protected by the Constitution. In Luke Records, Inc. v. Navarro, the Court of Appeals for the Eleventh Circuit was asked to apply the Miller test to a rap album.[129] The appellee in Luke Records, a Florida sheriff, took actions to discourage sales of As Nasty As They Wanna Be,[130] a rap recording by 2 Live Crew.[131] The district court enjoined the appellee from further interference with sales, claiming that such acts were unconstitutional prior restraints on free speech; however, the court also declared that the song met the definition of obscenity under the Miller test.[132]

On appeal, the sheriff conceded that since music possesses inherent artistic value, no work standing alone may be declared obscene.[133] The sheriff, however, argued that the work was not protected by the First Amendment because the lyrics alone, not the music, were obscene.[134] The sheriff denied vehement allegations that he was putting the entire genre of rap music to the test, but admitted that it was the lyrical content alone which makes As Nasty As They Wanna Be an obscene work.[135]

The court disagreed, holding that as long as the music is not simply a "sham to protect obscene material," the Miller test should be applied to both the lyrics and the music of any given song as a whole.[136] The court deferred to the appellant's expert witness opinion

127. Sampar, supra note 17, at 188.
128. See Wentz, supra note 116, at 479-80.
129. 960 F.2d 134 (11th Cir. 1992).
130. 2 LIVE CREW, AS NASTY AS THEY WANNA BE (Lil Joe Records, 1989).
131. Luke Records, 960 F.2d at 135.
132. Id.
133. Id.
134. Id. at 135-36.
135. Id.
136. Id.

that the song in question contained statements of political significance and cultural experiences.[137] Since the sheriff was unable to proffer any expert evidence to the contrary, the court struck down the finding of obscenity.[138] Ironically, after the ruling, the success of 2 Live Crew escalated and the Nasty album sold many more copies, taking 2 Live Crew from a moderately successful group to a super-group.[139]

Since the Miller test appears to protect all sexually explicit material except "'hard core' pornography,"[140] a finding that song lyrics advocating sexual activity rise to the level of obscenity is virtually unachievable in any court of law today.[141] After Luke Records, it was clear that, under the Miller test, a band's entire album must be found to lack artistic value, which would be nearly impossible "considering the very process involved in writing songs and producing an album."[142] In fact, it is commonly said that the lyrics accompanying a song are secondary to the musical melodies that characterize the recording; therefore, a song's musical component will always have some independent artistic value under the Miller test.[143]

B. Negligence and Intentional Tort Theories

In the past few decades, creative attorneys advocating the rights of clients who believe that musical content is responsible for a sustained physical injury have attempted to circumvent First Amendment jurisprudence by filing claims under various other legal theories. In the famous McCollum case, for example, the plaintiffs sued heavy-metal artist Ozzy Osbourne and his label, CBS Records, alleging that Osbourne's music was the proximate cause of the suicide of their nineteen-year-old son, who shot himself in the head after

137. Id. at 137.

138. Id. Even though 2 Live Crew prevailed in the end, the surrounding controversy showed musicians that many people disagreed with the decision, and thus the band's victory was not absolute. See Joyce Lok See Fu, The Potential Decline of Artistic Creativity in the Wake Of The Patriot Act: The Case Surrounding Steven Kurtz and the Critical Art Ensemble, 29 COLUM. J.L. & ARTS 83, 91 (2005) The fact that the lower court did not initially recognize the artistic merit of the recording evidences how certain laws have blocked artists' abilities to use certain language in artistic expression. Id.

139. 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, 830 (1992).

140. Schechter, supra note 84, at 376.

141. Lury, supra note 52, at 180-82.

142. Id.

143. Brian O'Gallagher & David P. Gaertner, Note, 2 Live Crew and Judge Gonzalez Too – 2 Live Crew and the Miller Obscenity Test, 18 J. LEGIS. 105, 116 (1991).

listening to several of Osbourne's albums.[144] The plaintiffs sought recovery on separate theories that the defendants: (1) were negligent in the dissemination of Osbourne's recorded music; (2) intentionally disseminated the music with knowledge that it would produce an uncontrollable self-destructive impulse in persons similarly situated to their son; and (3) intentionally aided, advised, or encouraged their son's suicide in violation of New York Penal Code 401.[145]

In support of their theories of negligence and intentional dissemination, the plaintiffs argued that the defendants were aware that Osbourne's kinship with his fans was so strong that fans would feel that Osbourne was talking directly to them as they listened to the music.[146] They argued that Osborne's music had a "cumulative impact" on its audience—in other words, the manner in which the songs progressed on the album led their son down the inevitable path of suicide.[147]

The McCollum court acknowledged the plaintiffs' "novel attempt" at seeking post-publication damages for dissemination of music, but held that the theories of recovery were not reconcilable with the overriding principles of the First Amendment.[148] Predictably, the court deferred to the traditional Brandenburg test and held that since Osbourne's speech was directed towards action at some indefinite time in the future, it did not meet the requirement of inciting imminent lawless action as necessary under Brandenburg.[149]

144. McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 994 (1988).

145. Id. at 998.

146. Id. at 996. Other critics have lamented that heavy metal is presented to young children as a religion. Columnist Bob Greene described the heavy-metal subculture by reporting on a radio station contest to win concert tickets for a performance of heavy-metal band Mötley Crüe. See Holt, supra note 41, at 58-59 n.37. When listeners were asked what they would do to meet the members of the band, they responded with comments like:

- To get backstage to Mötley Crüe I think I'd give them every piece of action they wanted. I'd give them my body, money, or whatever they wanted. (Thirteen-year-old girl)
- I'd spread whipped cream all over my body. Then I'd let [lead singer] Vince Neil lick it all off! (Fourteen-year-old girl)
- I would give them my mother. (Fourteen-year-old boy)

Id.

147. McCollum, 202 Cal. App. 3d at 997. The plaintiff's theory was that the subject album, Osbourne's Blizzard of Oz, begins with the song, "I Don't Know," reflecting confusion in life, and ends with songs like "Goodbye to Romance" and "Suicide Solution," which preach that suicide is the only way out. Id.

148. Id. at 998.

149. The court commented that no reasonable person would understand musical lyrics as commands or directives to immediate action. Id. at 1000-02.

The court cautioned the plaintiffs that several problems could occur when litigants attempt to "cast judges in the role of censor."[150]

With respect to the plaintiffs' third theory, the McCollum court applied a similar analysis stating that "[e]very person who deliberately aids, or advises, or encourages another person to commit suicide, is guilty of a felony."[151] Since the plaintiffs did not successfully prove that the defendants specifically intended the boy's suicide or had a direct participation in bringing it about, the plaintiffs failed to recover on this theory.[152] In essence, the court reiterated the well-settled principle of First Amendment jurisprudence that applies to censorship of the mass media: "Absent an incitement, which meets the standards of Brandenburg v. Ohio, the courts have been universally reluctant to impose tort liability upon any public media for self-destructive or tortious acts alleged to have resulted from a publication or broadcast."[153]

The genre of heavy metal was again put to the test when another group of plaintiffs filed a wrongful death suit against the band Judas Priest that was primarily founded upon theories of intentional misconduct and invasion of privacy.[154] The plaintiffs claimed that the artists strategically placed subliminal commands in their album Stained Class[155] that proximately caused the suicide of a young boy and the attempted suicide of his friend in December 1985.[156] After hearing conflicting testimony from plaintiffs' and defendants' experts regarding the presence and effects of subliminal communication in all forms of media, including rock music, the court held that because the full extent to which subliminal messaging is used today in music and other forms of media is not known, the defendants were not liable for intentionally placing subliminal commands within their music.[157]

At virtually the same time as the McCollum and Vance lawsuits, Osbourne's album and song "Suicide Solution" was also on

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150. Id. at 1001.

151. Id. at 1007 n.13 (quoting CAL. PENAL CODE § 401).

152. Id at 1007.

153. Id. (citation omitted).

154. Vance v. Judas Priest, Nos. 86-5844, 86-3939, 1990 WL 130920 (Dist. Ct. Nev. Aug. 24, 1990).

155. JUDAS PRIEST, STAINED CLASS (Sony 1978).

156. Vance, 1990 WL 130920, at *1-2.

157. Id. at *7-10. For an excellent summary of the conflicting expert witness testimony in the Vance trial and a discussion of the difference between unreliable scientific "opinion" versus reliable scientific "evidence" used in modern-day music liability suits, see Timothy E. Moore, Scientific Consensus and Expert Testimony: Lessons From the Judas Priest Trial, SKEPTICAL INQUIRER, Nov./Dec. 1996, available at http://www.csicop.org/si/9611/judas_priest.html.

trial in Georgia due to the fact that the plaintiffs' admittedly "troubled adolescent" son, Michael Waller, shot and killed himself in 1986 after listening to the song.[158] While the Waller suit seems to be less known and cited than McCollum in music-censorship articles, the case, if studied carefully, demonstrates a masterful attempt by the plaintiffs' lawyers to amend the claims filed in the original complaint to be in accordance with the holdings of similar suits that were being filed against musicians nationwide in the late 1980s. Although the plaintiffs' complaint initially charged that the audible and perceptible lyrics of "Suicide Solution" incited their son to commit suicide, the plaintiffs modified the complaint and discarded the claim that would likely be struck down on First Amendment grounds, instead alleging that the defendants engaged in fraud, invasion of privacy, and nuisance because those very same lyrics contained a "subliminal message" that, according to the plaintiffs, was not consciously intelligible unless the music was electronically adjusted.[159]

Citing Vance, the court determined that it must initially resolve the issue of whether, as a matter of law, the song "Suicide Solution" contained subliminal messages before deciding whether to grant the defendants' motion for summary judgment.[160] The court found this step necessary because it was "convinced that the presence of a subliminal message, whose surreptitious nature makes it more akin to false and misleading commercial speech and other forms of speech extremely limited in their social value, would relegate the music containing such to a class worthy of little, if any, First Amendment constitutional protection."[161] Because the plaintiffs presented no evidence from which a reasonable fact finder could infer that subliminal communications were present, it granted summary judgment for the defendants.[162]

C. Unfair Competition Theories and Artist-Affiliate Liability

The creativity of music censorship lawyers reached a peak in 2001, when parents of children involved in the murder of another child brought a lawsuit alleging a nexus between the child's death and the lyrics of the heavy-metal group Slayer.[163] Slayer, a death-metal band,

158. Waller v. Osbourne, 763 F. Supp. 1144, 1145-47 (M.D. Ga. 1991).
159. Id. at 1146.
160. Id. at 1148.
161. Id.
162. Id. at 1153.
163. Pahler v. Slayer, No. CV 79356, 2001 WL 1736476 (Cal. Super. Ct. Oct. 29, 2001).

composes and performs music that is profane and glorifies "grisly violence against women," with lyrics claiming that the band members derive pleasure from stalking, kidnapping, beating, torture, rape, ritual sacrifice, cannibalism, murder, sex acts, and even necrophilia.[164] Although this suit was similar to the cases discussed above, the twist was that the plaintiffs not only sued the band but also the companies that recorded, promoted, and distributed Slayer products, arguing that these companies marketed harmful products to minors, proximately causing the death of the victim.[165]

In 1996, the victim, fifteen-year-old Elyse Pahler, was choked, stabbed, and murdered by three boys who lured her from her home.[166] The trio of teenage killers, all self-professed Slayer fans, told authorities they were committing a Satanic sacrifice so that their own death-metal band would have the "craziness" to "go professional."[167] One of the boys admitted that Elyse's murder was inspired by a Slayer song entitled "Alter of Sacrifice" that extols the Satanic sacrifice of a virgin.[168] After employing the standard Brandenburg analysis, the court employed the now-routine First Amendment analysis of music lyrics and prudently found that regardless of their morbid nature, Slayer (let alone its affiliates) could not be deemed to have imminently incited the violent acts of the defendants.[169] But the court still had to

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164. Id. at *1. In the event that the reader were to question the outrageous extent to which these lyrics portray such themes, I would ask him or her to contemplate the following:

> Relentless lust of rotting flesh/To thrash the tomb she lies/Heathen whore of Satan's wrath/I spit at your demise/Virgin child now drained of life/Your soul cannot be free/Not given the chance to rot in hell/Satan's cross points to hell/The earth I must uncover/A passion grows to feast upon/The frozen blood inside her/I feel the urge the growing need/To fuck this sinful corpse/My tasks complete the bitch's soul/Lies raped in demonic lust.

SLAYER, Necrophiliac, on HELL AWAITS (Metal Blade 1985). Slayer has not seemed to mature lyrically throughout the years and the twenty or so albums it has recorded. Consider the following lyrics from a 2006 Slayer song:

> Terrified you find that you push me too far/Your repulsiveness reminds me of dead flesh/Rotting corpse the smell of your putrid fucking soul/Petrified that I decide the moment of your death/Belongs to me the taste is sweet it's so unreal...Destroy the empty shell/Smash away the haunting fear/I hate your endless stare/Watching as I fuck your corpse.

SLAYER, Black Serenade, on CHRIST ILLUSION (Sony 2006).

165. Pahler, 2001 WL 1736476, at *1.

166. Id.

167. Jaan Uhelszki, Slayer Sued for Teen's Death, ROLLING STONE, Jan. 24, 2001, available at http://www.rollingstone.com/artists/slayer/articles/story/5931653/slayer_sued_for_teens_death (noting that the murderers received long prison sentences, from twenty-six years to life).

168. See Sampar, supra note 17, at 187.

169. Pahler, 2001 WL 1736476 at *4.

address the plaintiffs' contentions that the business practices of Slayer and its affiliates should be enjoined as unfair "because children should not be exposed to the profanity, graphic violence and sexual conduct contained in Slayer products" and that restrictions should be placed on the distribution of such products because "the state has a compelling interest in shielding children from such indecent material."[170]

The court noted the broad scope of California's applicable unfair competition law and the possibility that it was available for application in a case such as this; however, the court correctly declined to impose on the defendants the tenuous liability requested by the plaintiffs, stating that "courts are neither empowered nor equipped to do so in cases where the issues would require them to address and to manage complex areas of social or economic policy."[171] While the court was reticent to respond judicially to the plaintiffs' grievances, it seemed almost to request legislative action when it instructed the forlorn plaintiffs to "await" legislation that restricts the distribution of music to minors, such as that created by Slayer, assuring the plaintiffs that "[i]f the legislature enacts such restrictions, the courts then can judge whether the enacted limits on protected speech meet the strict constitutional scrutiny required by the First Amendment."[172]

Davidson, Luke Records, McCollum, Vance, Waller, and Pahler all represent fairly recent cases where litigants have unsuccessfully, albeit creatively, attempted to circumvent well-settled First Amendment principles in order to indirectly censor musical lyrics. Though some commentators suggest that creative lawyering can be a solution to overcome the First Amendment hurdle in this area,[173] no cases to date have been successful in holding a musician or a music

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170. Id. at *5.

171. Id.

172. Id. at *6. Public outcry for increased retailer responsibility seems to be more and more common even in the legal field, as scholars increasingly call for stricter enforcement of various forms of media self-regulation measures that currently exist and decry the fact that there are no penalties for retailers who make scant efforts to restrict the sale of violent products to minors. See Emily R. Caron, Blood, Guts & the First Amendment: Regulating Violence in the Entertainment Media, 11 KAN. J.L. & PUB. POL'Y 89, 95 (2001).

173. See, e.g., Sampar, supra note 17, at 193-95 (noting various theories for holding heavy-metal artists responsible for the violent acts of third parties, such as aiding and abetting and "modified reckless indifference," a yet undeveloped theory that plaintiffs' lawyers are exploring that alleges that the defendant musician directed his music specifically toward minors with reckless indifference to their lives). But see Lury, supra note 52, at 190 (claiming that courts should hold that any claim filed in tort that alleges music as the proximate cause of harm is per se invalid).

label responsible for the crimes of others.[174] Indeed, the Supreme Court has affirmatively ruled that "[m]usic, as a form of expression and communication, is protected under the First Amendment" and it appears that such protection remains practically absolute.[175] Regardless of their personal views of contemporary musical content, most legal scholars agree with the consistent holdings in music and other media cases that the threshold requirement for incitement to violence had not been met and that the courts' holdings "are the natural consequence of proper constitutional analysis and should be viewed as the proper precedent for future adjudication of teen media violence suits."[176]

While the First Amendment largely prevents the regulation of lyrics, some commentators have cautioned that allowing the jury to consider the negative impact of the media on a criminal defendant's behavior may eventually chip away at the longstanding principle that one who commits a crime is legally responsible for the consequences of that crime.[177] Though historically courts have found no "special relationship" or duty to protect between an entertainment entity and the customers that it entertains that would allow the imposition of traditional negligence liability, if the-media-made-me-do-it defense continues to be raised in high publicity cases such as Davidson, "there

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174. The same generally holds true for other non-music media defendants who disseminate violent messages. See, e.g., Watters v. TSR, Inc., 904 F.2d 378, 382 (6th Cir. 1990) (defendant manufacturer of Dungeons and Dragons game not liable for suicide of plaintiff's son because it was not reasonably foreseeable that players of the game would become more susceptible to suicide than non-players); James v. Meow Media, Inc., 90 F. Supp.2d 798, 803 (W.D. Ky. 2000) (motions to dismiss filed by media defendant manufacturers and distributors of the movie The Basketball Diaries granted based on failure to state a claim that defendants could foresee the violence of a child murderer who viewed the movie prior to his shooting spree); see also Patrick M. Garry, The Right to Reject: The First Amendment in a Media-Drenched Society, 42 SAN DIEGO L. REV. 129, 150 (2005). Courts have stridently protected the control of the individual to place most forms of speech into public circulation. Id. First Amendment jurisprudence is rooted in notions of human liberty and individual control of one's "communicative process." Id. For a speaker, this means the freedom to state an opinion without government influence or punishment. Id. But see Richard C. Ausness, Tort Liability for the Sale of Non-Defective Products: An Analysis and Critique of the Concept of Negligent Marketing, 53 S.C. L. REV. 907, 962-64 (2002) (exploring the emergence of the tort of negligent marketing, which rests on an "elitist" notion that certain groups of people are not capable of responsible decisions about the products they consume and the emergence of lawsuits filed against product manufacturers for targeting certain groups of consumers, including children).

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

176. Amanda Harmon Cooley, They Fought the Law and the Law (Rightfully) Won: The Unsuccessful Battle to Impose Tort Liability upon Media Defendants for Violent Acts of Mimicry Committed by Teenage Viewers, 5 TEX. REV. ENT. & SPORTS L. 203, 210 (2004).

177. See April M. Perry, Guilt by Saturation: Media Liability for Third-Party Violence and the Availability Heuristic, 97 NW. U. L. REV. 1045, 1068 (2003).

will be serious repercussions for media liability in future negligence cases."[178]

III. THE OBSTACLES TO MUSIC CENSORSHIP FACED BY SOCIAL AND POLITICAL GROUPS

A. Moral Activists and Public Awareness Groups

Throughout history, public-awareness groups, often led by moral activists, have implemented change in public policy without relying on legal institutions.[179] Moral activists are community members who campaign against speech that they find ethically reprehensible and incompatible with the moral fabric that the majority of the nation supposedly follows.[180] By organizing economic or advertiser boycotts of the products they believe to be reprehensible, they are the "self-proclaimed moral champions of the country."[181]

Since the primary goal of advertising is to promote a positive image of the advertised product and the corporation creating the product, advertisers are well aware of the negative publicity that can be stirred up by moral activists and go to extremes in order to avoid it.[182] In fact, it is far easier today than ever before for moral activists to get their censorship demands met. While in the past, entertainment companies and other powerful media groups had tremendous publicity "machines" that were able to keep bad news out of the press, today such news items are "instantly flashed across

178. Id. The author notes that in the Davidson case, the defendant murderer's attorney described the defendant as a "rap addict" and cited actual lyrics from Tupac Shakur's album, 2Pacalypse Now, as an "explanation" for the defendant's actions during the sentencing phase of the trial. Id. at 1066-67. Perry describes an informative theory called the "availability heuristic," which says that a few highly publicized (and thus "available") cases that depart from traditional negligence standards will eventually result in a shift toward increased media liability for third-party acts. Id.

179. See generally Schechter, supra note 84, at 368.

180. SUSAN BURGERMAN, MORAL VICTORIES: HOW ACTIVISTS PROVOKE MULTILATERAL ACTION 1-2 (2001).

181. Schechter, supra note 84, at 368.

182. Id. at 378. But see generally Jan Wouters & Leen Chanet, Corporate Human Rights Responsibility: A European Perspective, 6 NW. U. J. INT'L HUM. RTS. 262 (2008) (noting that research has shown that although consumers purport to take a corporation's human rights record into account and claim to be willing to pay more for ethically produced goods, there is a discrepancy between what consumers say and what they actually do since only a small minority of consumers have been found to take social considerations into account when actually purchasing goods).

celebrity-oriented Web sites and 24-hour cable channels."[183] Furthermore, the Supreme Court has held that non-violent boycotts are legal and that the boycotters will not be held liable for any economic injury sustained by their targets as a result of the boycott.[184] The fear of boycotts has prompted advertisers to halt sponsorship of several television programs that moral activists have found offensive.[185]

1. Growth of Moral Activism in the Media

In the early days of the colonization of the United States, moral activists were families and religious groups who worked within the confines of existing law and the early censorship power of the courts.[186] Centuries later, concerned private citizens created formal organizations to address material that they deemed to be morally offensive. In the 1930s a powerful Catholic lobbying group called the Legion of Decency began a drive to create boycotts of films they found

183. Merissa Marr, When a Star Implodes, Studio Execs May Recall Good Old 'Morals Clause,' WALL ST. J., Aug. 5, 2006, available at http://www.naplesnews.com/news/2006/aug/05/when_star_implodes_studio_execs_may_recall_good_ol/ (last visited July 27, 2008).

184. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 887 (1982). After a boycott by the National Association for the Advancement of Colored People (the "NAACP") of the respondents—white merchants in Mississippi—by the NAACP for the purpose of obtaining their compliance with a long list of demands for equality and racial justice, the trial court held the NAACP jointly and severally liable for all of the respondents' lost earnings from 1966 to the end of 1972 on three separate conspiracy theories, including the tort of malicious interference with the respondents' businesses. Id. The Mississippi Supreme Court rejected two theories of liability but upheld liability of the NAACP on the basis of the common-law tort theory. Id. at 886. The U.S. Supreme Court held that the award for damages "resulting from the boycott" could be upheld because the record disclosed no conclusive proof that the respondents' business losses were proximately caused by violence or threats of violence. Id. at 887. For an interesting perspective on television-advertising boycotts, see Matthew S. Schneider, Silenced: The Search for a Legally Accountable Censor and Why Sanitization of the Broadcast Airwaves is Monopolization, 29 CARDOZO L. REV. 891, 898 (2007) (claiming that because the content airing on network television is dependent solely on what advertisers will support financially, the boycotting by corporations of "controversial" programs in order to gain an economic advantage with public-awareness groups is an anticompetitive restraint of trade in the market for broadcast-television content, and thus commands regulation).

185. See Schechter, supra note 84,at 381 (maintaining that, due to fear of a consumer boycott in the 1990s, ABC lost $780,000 of advertising revenues on one episode of China Beach because it contained an abortion scene).

186. Id. at 367-69. Early moral activists worked with the federal government by researching material that was "offensive" and filing complaints regarding such material. Id. During this period, anti-vice organizations were created by the local police and film censorship boards developed across the entire nation. Id.

morally objectionable.[187] The Legion of Decency believed that the "Hollywood Jews" who produced films were so far outside of the dictates of what the Catholics deemed moral American culture that they had to be monitored and, when necessary, boycotted.[188] In 1936 George Bernard Shaw's film about Joan of Arc, St. Joan, was subject to censorship when it was banned in theatres due to its perceived anti-Catholic sentiments, with the net result being that a "single person . . . essentially dictated the morality and sensibility of the entire nation" with respect to this film.[189] During McCarthyism and the Communist or "Red" scare of the 1950s and lasting into the Cold War, "Communists became the prime targets for government at all levels and for civilian vigilantes" and, "[a]s usual in times of increased conservatism, many Americans became attracted to campaigns to clean up literature and motion pictures."[190]

Today, the American Family Association (AFA), founded in 1977 by Reverend Donald Wildmon in Mississippi, remains one of the largest and most influential advertiser-boycott groups in existence.[191] At its inception, Wildmon's group received aid from groups such as the National Parents & Teachers Association and the National Federation for Decency to organize a program entitled "Turn Off TV Week" to protest sex, violence, and profanity on television.[192] After gaining success by organizing groups to picket Sears & Roebuck for sponsoring

187. Jon M. Garon, Entertainment Law, 76 TUL. L. REV. 559, 650 (2002).

188. Id.

189. See id. at 651-52.

190. Blanchard, supra note 139, at 788. During this decade, the nationwide attack on the conjectural connection between comic books and juvenile delinquency reached its peak. See id. For an exhaustive review of the history of self-regulation and congressional pressure in the comic book industry that began as early as 1941 when New York passed one of the first laws intended to control content in comic books, see Kenneth A. Paulson, Regulation Through Intimidation: Congressional Hearings and Political Pressure on America's Entertainment Media, 7 VAND. J. ENT. L. & PRAC. 61, 68-74 (2004).

191. See Schechter, supra note 84, at 384. By 1989, the AFA had received over $5.2 million in donations. See Bruce Selgraig, Reverend Wildmon's War on the Arts, N.Y. TIMES, Sept. 2, 1990, at Magazine 22. The AFA recently requested its two million supporters to boycott fast food chain McDonald's for its promotion of the "homosexual agenda," including same-sex marriage, after McDonald's joined as a corporate partner of the National Gay & Lesbian Chamber of Commerce (NGLCC). Id. McDonalds has refused to honor requests by the AFA to drop its endorsement of the NGLCC. Id. Only months earlier, the AFA dropped a similar boycott against the Ford Motor Company after it met most of their demands, including ending donations to groups supportive of same-sex marriage. See Lawrence Jones, Boycott Launched Against McDonald's Over Ties to Homosexual Group, THE CHRISTIAN POST, July 8, 2008, available at http://www.christianpost.com/article/20080705/boycott-launched-against-mcdonald-s-over-ties-to-homosexual-group.htm (last visited July 10, 2008).

192. See McDonald, supra note 27, at 384.

Charlie's Angels and Three's Company, shows that were deemed sexually degrading to women by the AFA, Wildmon directly appealed to Proctor & Gamble executives and successfully convinced them to withdraw advertising from fifty additional programs.[193]

Even individual moral activists have been able to organize campaigns that resulted in decreased funds for media advertising that sponsored ill-favored television programs.[194] In 1989, housewife Terry Rakolta wrote twenty letters to corporations that sponsored the then-popular TV show Married With Children, expressing distaste for the program's content.[195] After Rakolta successfully convinced several advertisers to end sponsorship of the show, she even received a personal letter of apology from the president of Coca-Cola.[196] As a result of her efforts, Rakolta became an overnight celebrity and was even asked to debate several television-industry directors.[197] In addition to advertiser boycotts, several other moral-activist groups initiated by individuals have been astoundingly effective in banning offensive material by petitioning local and state legislatures.[198]

One of the most influential public-interest groups, Action for Children's Television (ACT), was founded in 1968 by Massachusetts housewife and mother, Peggy Charren, in response to a growing number of studies reflecting concerns about the negative impact that television viewing may have on children.[199] In the early days of television, there was little concern over its regulation since hardly any research was performed on the impact of the new medium on its viewers.[200] Concern arose in the 1960s as more studies documented the harmful effects of children's exposure to violent television

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193. Id. at 385.

194. Id. at 379.

195. Id. at 390. See also Brian Lowry, Media Maid Terry Rakolta a Hit on the Crix Tour, Faced with Harsh Questioning, VARIETY, July 26-Aug. 1, 1989, at 40.

196. See Schechter, supra note 84, at 379.

197. Id. at 391.

198. For example, housewife Marilyn Leeffel established Family Life America Responsible Education Under God, Inc. (FLARE), a group comprising 300 families nationwide. Id. In 1990, FLARE successfully pressured Tennessee to amend its obscenity law to prohibit topless dancers in bars from coming closer than twelve inches from patrons. Id. In that same year, FLARE pressured the Memphis City Council to pass an ordinance banning concerts that predominantly appealed to prurient, morbid interests of minors and prescribing that all concerts be patrolled by at least two police officers. Id.

199. See Action For Children's Television, Sparked by its Founder Charren, Keeps Kids' Needs Before Public, VARIETY, Apr. 27, 1992, at 122.

200. See Dale Kunkel, Crafting Media Policy, 35 AM. BEHAV. SCI. 181, 182 (1991) [hereinafter Kunkel, Media Policy].

programs.[201] Moreover, similar studies that examined the effects of television advertising on children attained scientific legitimacy for the first time, revealing that apprehension over such advertising was no longer "simply a matter of parents complaining about being nagged by their kids."[202]

As a result of these studies, Charren initiated a group of teachers, housewives, and pediatricians for a meeting at her Boston home to discuss the issue of television violence and its effects on children.[203] ACT's first strategy was to subscribe to and research all television industry journals and magazines.[204] It then focused on two areas that would become the goals of the organization: (1) promoting programming that serves the diverse needs of children for information, entertainment, aesthetic appreciation, and knowledge about the world; and (2) protecting children from television content and advertising practices that exploit their special vulnerability.[205] Although fully aware that her actions would directly alter the course of children's programming, Charren nonetheless repeatedly stated that the goals of ACT were not aimed at censorship but were instead aimed at promoting quality programming on television.[206] As such, the tenuous line between public-group influence and acts of censorship continued to remain blurred.

The next step for ACT was to decide on a strategy for implementing its goals. It turned to the Federal Communications Commission (FCC), an organization created in 1934 to devise policies ensuring that all television broadcasters serve the public convenience, interest, and necessity.[207] Since the FCC is, by its nature, a reactive

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201. Various studies, such as a corporate-funded study from1980 that found significantly heightened violence in cartoons aimed specifically at child audiences, sparked even further research in the area. Id. at 183.

202. See Dale Kunkel, From a Raised Eyebrow to a Turned Back: The FCC and Children's Product Related Programming, 38 J. COMM. 90, 103 (1988).

203. Id. at 122.

204. Id.

205. See Aletha C. Huston, et al., Public Policy and Children's Television, 44 AM. PSYCHOL. 424, 424 (1989).

206. Charren strongly believed that censorship is worse than any kind of bad programming on television and, thus, she refused to ally with any group aimed at fighting sex and violence on television. See William Tynan, Mrs. Kidvid Calls it Quits, TIME, Jan. 20, 1992, at 52; see also Action for Children's Television, supra note 199, at 122 (stating that when a public-interest group campaigned to influence advertising companies to back away from offending shows, Charren directly opposed their efforts and actively collected 150,000 signatures in opposition).

207. See Kunkel, Media Policy, supra note 200, at 183. For an informative account of the history and purpose of the FCC, including an analysis of recent developments in obscenity law and the FCC's enforcement of regulations in response to the same, see

body, it generally does not attack issues without being prompted by outside groups.[208] The FCC also has the power to unconditionally reject any proposal before it, with or without cause.[209]

Fully aware of the possibility of having its agenda rejected by the FCC, ACT members nonetheless attended congressional confirmation hearings for President Nixon's nominee for FCC chairman, Dean Burch.[210] At the hearings, ACT members demanded that Burch pronounce his concern for the needs of children before being elected since the Communication Act obligates its media licensees to serve the public interest.[211] After the hearings, Charren and Birch established a close working relationship; in 1970 Burch invited Charren to attend a meeting with FCC commissioners and the public.[212] Soon thereafter the FCC, through Burch, issued notice of proposed rules based on ACT's stated goals.[213]

The FCC issued its decision on ACT's petition, entitled the 1974 Children's Television Report and Policy Statement (the Report), which reprimanded broadcasters for failing to consider children's educational needs on television and warned them that license renewal would depend partly on increased efforts for beneficial programming for children.[214] Due to the strong objections of broadcasters to any form of regulation in this area, the FCC partially conceded by writing the Report in vague terms that set broad standards for the broadcasters' compliance with the report.[215] Since there were no strict standards in the Report for broadcasters to follow, several years passed with no significant changes in educational broadcasting for children.[216]

ACT again petitioned the FCC to enforce more specific compliance with the report and the FCC responded in 1980 by advancing another rulemaking process; however, these efforts were thwarted by President Reagan's "marketplace" approach to

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generally Patricia Daza, FCC Regulation: Indecency by Interest Groups, 2008 DUKE L. & TECH. REV. 3 (2008).

208. Kunkel, Media Policy, supra note 200, at 182.

209. Id. at 184.

210. See Action For Children's Television, supra note 199, at 122.

211. Id. (noting that ACT petitioned the FCC at the hearing to require that licensees must provide at least fourteen hours of educational programming to children per week).

212. Id.

213. Id.

214. See Kunkel, Media Policy, supra note 200, at 184.

215. Id. at 184-85.

216. Id. at 185.

government regulation.[217] After such changes in the policy of government regulation of children's television, there was a significant decline in children's educational programming and an increase in advertising directed at children.[218] Moreover, ACT's inability to prove specific harm to children from television viewing of questionable material served as a "complete justification for the FCC to approve of the practice."[219]

When the FCC expressed its intention to deregulate in the area of television broadcasting, legislators began to express their own interest in children's television policy and implemented proposals of their own.[220] ACT changed its focus from the FCC to Congress, and in 1990, after extensive lobbying efforts, the group witnessed the congressional passage of the Children's Television Act (CTA).[221] Commonly referred to as the "three-hour rule," the CTA mandates that, in order for broadcasters to meet their public-interest obligations, they must air at least three hours of material that meets the definition of children's programming.[222] Children's programming, under the CTA, needed to: (1) serve the educational and informational needs of children as a significant purpose, (2) be regularly scheduled, (3) be at least thirty minutes long, and (4) air between 7:00 a.m. and 10:00 p.m.[223]

217. Adam Candebub, Media Ownership Regulation, the First Amendment, and Democracy's Future, 41 U.C. DAVIS L. REV. 1547, 1559 (2008). One author describes President Reagan's brand of "marketplace" economics as based on the premise that the public will ultimately benefit from decreased government regulation due to the increased competition of ideas and the ultimate surfacing of "the truth" after open and free expression of all opinions. See Gia B. Lee, The President's Secrets, 76 GEO. WASH. L. REV. 197, 234 (2008).

218. See Kunkel, Media Policy, supra note 200, at 187; see also Tynan, supra note 206, at 52 (stating that afterschool specials and news-magazine shows aimed at kids were scaled back or canceled due to the deregulation policy of the Regan administration).

219. In FCC decisions on the topic, lack of direct evidence of harm has been the primary rationale of the FCC to refuse to regulate such content. See Kunkel, Media Policy, supra note 200, at 104.

220. In 1988, Congressman Edward Markey of Massachusetts attempted to break the television industry opposition to regulation by conducting meetings with ACT members and industry leaders to reach a compromise. Id. at 188.

221. See Jacob Chapman, Content on the Fly: The Growing Need for Regulation of Video Content Delivered Via Cellular Telephony, 9 TEX. REV. ENT. & SPORTS L. 67, 71 (2007).

222. Id.

223. Id. (adding that, if broadcasters aired three hours of core children's programming, they would get a check next to the children's educational programming box on their FCC license-renewal application and, if not, they would be placed under FCC investigation).

In 1992 Charren announced that ACT would disband due to the passage of the CTA and her belief that Congress had finally sided with people who want better programming for children.[224] Charren openly claimed that the Reagan Administration was to blame for the negative impact of children's television, but believed that the tide had begun to turn in Washington D.C. due to the fact that the entire nation was now more aware of how television affected children's needs in society.[225] New developments in digital technology allowed broadcasters to transmit up to six channels of programming with the same bandwidth previously devoted to one channel of analog transmission, so in 2004 the FCC had to apply rules to adapt its children's educational television rules to the evolving digital landscape.[226] Despite implementation of these rules, the effectiveness of the CTA in implementing and properly policing quality programming for children continues to be questioned.[227]

2. The Parents Music Resource Center: A Modern Assault On Popular Music

Because the focus of ACT was aimed at improving media directed at children, its main goals can be compared to those of advocates for regulation of music lyrics that affect children. Other groups undoubtedly have studied the effectiveness of the ACT's actions and had similar success in boycotting television media; however, the closest any group has come to obtaining effective regulation over music lyrics is the Parents Music Resource Center (PMRC) in the 1980s.

The first PMRC members included the wives of ten U.S. senators, as well as the wives of then-Secretary of State James Baker

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224. See Andy Levinsky, Unintended Consequences—Children's Television Act Has Unintended Side Effects, HUMANIST, Nov. 1999, available at http://findarticles.com/p/articles/mi_m1374/is_6_59/ai_57800239 (last visited July 13, 2008). The author notes that, ironically, once broadcasters were assured of meeting the terms of the CTA simply by running three hours of educational programs from any source, they began to "dump" their own local shows that used to offer teen news programs, academic quiz shows, adventure-oriented magazines for younger children, and other community-oriented series. Id. Since there were no benefits for exceeding the minimum three hours, there was no incentive for broadcaster to continue to provide these local shows. Id.

225. See Harry F. Waters, The Ms. Fixit of Kidvid, NEWSWEEK, May 30, 1988, at 69.

226. Lili Levi, In Search of Regulatory Equilibrium, 35 HOFSTRA L. REV. 1321, 1341 (2007).

227. See About 28% of TV Stations – Are Not Complying With Children's TV Act Restrictions on Commercial Time, TELEVISION DIG. WITH CONSUMER ELECTRONICS, Mar. 2, 1998, available at http://findarticles.com/p/articles/mi_m3169/is_n9_v38/ai_20456778?tag=rbxcra.2.a.1 (last visited July 13, 2008).

and then-Senator Al Gore.[228] These women believed that the increase in violent and sexual themes in music lyrics were connected to the epidemic rise in teen pregnancies, suicides, and rapes in America.[229] The PMRC began with a $5,000 donation from Mike Love of the Beach Boys and office space donated by the Adolph Coors Foundation.[230] The politically influential PMRC members sent letters to several of their Washington D.C. friends and associates, explaining the efforts of the group and inviting them to attend their initial meeting at St. Columbia's Episcopal Church.[231]

Quickly after its inception, PMRC co-founding member Tipper Gore focused on public awareness of the group's efforts by attending radio interviews and television talk shows all over the country.[232] According to one commentator, the "wives became media-wise" by offering off-the-record comments about the problem of music lyrics to press members.[233] The press coverage increased and newspaper columnists from William Raspberry to Bob Greene began to report the "horrors" of irreverent lyrics.[234] Rock music was about to suffer from an effective form of indirect censorship that it had never witnessed in the past.

Whereas ACT had historically focused on the FCC in its attacks against broadcasters, the PMRC singled out the Recording Industry of America (RIAA) as its main area of attack.[235] The PMRC undoubtedly chose to focus on the RIAA because record companies belonging to that association at the time produced over 90 percent of all recordings sold in the United States.[236] The PMRC's first letter to the RIAA on May 31, 1985, requested that the association advise its

228. See Paulson, supra note 190, at 74.

229. Interestingly, the group offered no documentation supporting such claims. See id. at 75.

230. See Anne L. Clark, "As Nasty As They Wanna Be": Popular Music on Trial, 65 N.Y.U. L. REV. 1481, 1484 (1990).

231. See Zucchino, supra note 53, at 17.

232. Eventually, Gore was host to over one hundred such shows, including CBS Morning News, Today, and The Phil Donahue Show. Id.

233. Id. at 62.

234. Id.

235. In one early case in which the FCC, however, received a complaint regarding music lyrics that are broadcast over the public airwaves the court upheld the FCC's notice reminding broadcasters that they have a duty to broadcast in the "public interest" and to reasonably ascertain the meaning of songs with possible pro-drug messages before broadcasting such songs. See Yale Broadcasting Co. v. Fed. Commc'ns Comm'n, 478 F.2d 594, 595 (D.C. Cir. 1973).

236. See Clark, supra note 230, at 1488.

member companies to place warning stickers on sexually or violently explicit albums.[237]

Due undoubtedly to the political power of the PMRC and immense public exposure of its goals, the RIAA in August 1985 announced that it would advise its member companies to attach a sticker to certain records reading, "PARENTAL GUIDANCE—EXPLICIT LYRICS."[238] By the end of 1985, only nineteen record companies had agreed to the labeling system, and the PMRC was dissatisfied since it fell short of its goal to establish industry-wide compliance.[239] Gore stated that if there were no further compromise from the industry, the PMRC would proceed with its second plan, which would promote the state-by-state formation of a national organization in coalition with the Parent Teachers Association and the National Education Association and organized labor.[240]

Another important target for the PMRC was the U.S. Senate. Some members of the Senate were invited to and attended several of the PMRC's meetings,[241] and in 1985 the Senate agreed to hold hearings on the record labeling system.[242] Likely due to the fact that the PMRC had not offered proof that the lyrics it objected to caused demonstrable harm,[243] the hearings did not result in federal

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237. The letter contained the signatures of the "Washington wives" with their politically influential husbands' names underneath. Id. at 1486-87 & n.51.

238. Id. at 1487-88.

239. Bob Love, Battle Over Rock Lyrics Heads For Round Two, ROLLING STONE, Sept. 26, 1985, at 22.

240. The then-President of the RIAA, Stanley Gortikov, remarked that he would look fearfully upon such a drastic step taken by the PMRC since it would represent a step in the direction of "pre-censorship." Id.

241. Zucchino, supra note 53, at 17.

242. See Record Labeling: Contents of Music and the Lyrics of Records: Hearings Before the S. Comm. on Commerce, Science, and Transportation, 99th Cong., 1st Sess. (1985).

243. See Clark, supra note 230, at 1486. Several commentators during the time the PMRC was at its peak noted the existence of conflicting studies in the area of the effects of music lyrics on listeners, and generally concluded that evidence of possible effects of explicit music is circumstantial. See Brown & Hendee, supra note 43, at 1662. Some of these authors suggested that since the effects of lyrics on teens was so cumulative and subtle, conclusive results would only be obtainable in a carefully controlled and longitudinal study. Id. Some studies showed that heavy metal was associated with destructive behavior. For example, one study noted that 60 percent of chemically dependent adolescents named heavy metal as their first choice of music. Id. However, the study also noted that such evidence was circumstantial and anecdotal. Id. Controlled studies of the effects of music videos on adolescents also exist. See Larry E. Greeson & Rose Ann Williams, Social Implications of Music Videos For Youth: An Analysis of the Content and Effects of MTV, 18 YOUTH & SOC'Y 177, 180-85 (1986). In one study, seventh-grade children were exposed to music video clips on a regular basis and then asked to complete an "attitude" questionnaire. Id. Results showed a high tendency to respond to the video

regulation; however, they did spark the attention of several congressmen and prompted a flood of lawsuits based on the premise that violent music lyrics have the power to incite listeners to kill themselves or others.[244]

Although the PMRC swiftly swept onto the popular music scene in the 1980s, the group's efforts decreased substantially over the next ten years. Unlike ACT, the PMRC never formally announced its demise, but after the infamous congressional hearings, scant information could be found on the group.[245] While commentators have expressed their opinion that the PMRC's goals were slight and short-lived, not even PMRC's members foresaw the wave of change created by the efforts.[246] By capturing the attention of America, the PMRC pushed other public-interest groups into action.[247] Highly recognized and influential public figures joined in the fight against music lyrics. In 1986 right-wing preacher Jimmy Swaggart's television sermon directly criticized large department stores for carrying merchandise that may have a negative impact on children.[248] Wal-Mart, reportedly responding to Swaggart's pressure, stopped sales of approximately ten different rock and comedy acts and nearly three dozen rock and pop

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content in an abnormally violent manner. Id. On the other hand, a study of 770 high-school students revealed that only 10 to 30 percent of them could explain the words to four current popular songs. Id. A similar study revealed that, when asked what the themes of their favorite songs were, 34 percent of the girls and 16 percent of the boys stated "love." See Lorraine E. Prinsky & Jill Leslie Rosenbaum, "Leer-ics" or Lyrics: Teenage Impression of Rock 'n' Roll, 18 YOUTH & SOC'Y 384, 385-87 (1987). Students were also unable to discuss the meaning of 37 percent of the songs that they chose as their favorites. Id.

244. Alex B. Long, [Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing, 64 WASH. & LEE L. REV. 531, 560 (2007). But see Sampar, supra note 17, at 194 (noting that plaintiffs who have alleged a nexus between music lyrics and violence have "failed on several counts," including the inability to satisfy the Brandenburg test and failing to establish intent or causation).

245. Some have opined that Al Gore's acceptance as the 1992 candidate for vice-president swiftly prompted a kibosh on the efforts of the PMRC, as there was a constituency of the "Tipper-hating left" who never forgave Mrs. Gore for forming the group and supporting warning labels on rock albums. See Posting of Chris Suellentrop to The Opinionator, http://opinionator.blogs.nytimes.com/ (May 23, 2006, 16:34 EST).

246. See Paulson, supra note 190, at 77 (claiming that the PMRC labeling strategy had some widespread and unexpected consequences including record-label releases of "clean" versions of CDs with profane lyrics deleted and negotiations with retailers on acceptable album art); see also Clark, supra note 230, at 1490-91.

247. For example, the Parents Television Council, an advocacy group dedicated to fighting perceived violence, sex, and profanity in TV and the movies, was responsible for filing literally 99.86% of all indecency complaints received by the FCC in 2003 and 99.9% of the same such complaints in 2004. See Calvert, First Amendment, supra note 20, at 330.

248. See Michael Goldberg, Wal-Mart Bans LPs, ROLLING STONE, Sept. 11, 1986.

magazines.[249] While "the PMRC women," like Charren, stated ad nauseam that their goal was never to outlaw or even change rock music, it was obvious that the practice of self-censorship had taken hold throughout the nation and that groups were now focusing on the arena of popular music lyrics.[250]

The flame started by Wal-Mart rapidly began to spread as other chains reacted similarly and essentially became private censors of the musical content that American consumers—adults and children alike—were purchasing. Both Sears & Roebuck and J.C. Penney announced that they would not carry albums containing the PMRC warning sticker and the Hastings chain—comprised of 130 stores—stopped selling rap and heavy metal records to minors.[251] Several chain music stores, when faced with the choice between being picketed or removing certain records from their shelves, opted for the latter.[252]

Even the record labels that vehemently opposed the early efforts of the PMRC slowly became more cautious and eventually gave in to censorship. For example, Digital Audio Disc Corporation, a CD manufacturer from Indiana, refused to press the debut CD of rap group Geto Boys due to its offensive lyrics.[253] Larger companies like CBS Records and RCA openly encouraged their artists to alter their lyrics in order to preserve sales in stores that were banning records and warned their artists about the consequences that they may face when attempting to sell albums containing objectionable lyrics.[254] The biggest surprise, however, came when David Geffen, owner of Geffen Records, agreed to put the label on a Slayer album and later denied distribution of the controversial Geto Boys album.[255] The move was

249. At the time, a public-relations coordinator of Wal-Mart denied that Swaggart's sermon was the reason for such a ban, and insisted that the decision stemmed from internal decisions about what Wal-Mart believes is the "family image." Id. Others maintained that Wal-Mart was directly responding from outside pressure groups. Id. While these public-awareness groups are a small minority nationwide, there is no doubt their message is strong and that they use militant tactics to enforce it. Id.

250. See Zucchino, supra note 53, at 15.

251. Clark, supra note 230, at 1490.

252. See Renée Michelle Moore, "Justice Isn't Deaf": A Behind the Scenes Look at How Bijoux Records Executives Discuss the Potential Liability for Violence "Inspired" by Song Lyrics and How They Will Fare in the Face of the First Amendment, 6 VAND. J. ENT. L. & PRAC. 222, 237 (2004) (observing that a record album can lose as much as 10 percent of its projected sales if it is not carried by a major chain store).

253. See Edna Gundersen, Firm Presses the Issue by Not Pressing Rap CD, USA TODAY, July 23, 1990, at 1D.

254. Clark, supra note 230, at 1490-91.

255. Moore, supra note 252, at 238 (noting that, as a private company, Geffen Records had the right to decide whether it wanted to be associated with certain lyrics, and in the case of the Geto Boys, chose not to). Record companies can also engage in more

such a surprise because Geffen had previously been a staunch voice of opposition towards any PMRC-endorsed record labeling.[256]

However, despite all of the attempts by public-awareness groups to curtail raucous lyrics, they have been largely unsuccessful when it comes to keeping kids away from the music they enjoy. Although the availability of certain albums decreased because of efforts by the PMRC, the effectiveness of ratings systems in achieving their overall objective is "increasingly doubtful."[257] The increased distribution of recorded music over the Internet via services such as iTunes has diminished the meaning of content labels for a generation of young people who are accustomed to downloading music.[258] Moreover, new empirical studies examining self-regulation of the music industry and voluntary-labeling systems have found that (1) the rating system fails to provide sufficient information about the nature of the lyrics for parents to make intelligible decisions about whether their children should be listening to the music, and (2) there has been a practically "complete absence of enforcement of these ratings at the retail level."[259] For example, the portion of the study examining

indirect and less public methods that may lead to self-censorship and, ultimately, a silencing of the voices of their artists. While traditionally utilized in talent sponsorship and endorsement agreements, the "morals clause" has increasingly become a mechanism of control for all types of entertainment agreements, including athlete, modeling, and even sports-coaching agreements. See Noah B. Kressler, Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide, 29 COLUM. J.L. & ARTS 235, 235 (2005). In a morals clause, the employee—such as a musician who signs a recording agreement with a record label—agrees to conduct himself with "due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society." Id. If the morals clause is breached, the record company can terminate the recording agreement.

256. See Clark, supra note 230, at 1488, n.64 (noting Geffen's initial criticisms of the PMRC's plan as indirect censorship and claiming his label would not comply with the PMRC sticker system unless compelled by law to do so).

257. Patrick M. Garry & Candice J. Spurlin, The Effectiveness of Media Rating Systems in Preventing Children's Exposure to Violent and Sexually Explicit Media Content: An Empirical Study, 32 OKLA. CITY U. L. REV. 215, 222 (2007).

258. See Paulson, supra note 190, at 84. Moreover, legislation that applies to radio, TV, and cable programming—like the controversial Telecommunications Act of 1996 that requires cable operators to fully block any programming a customer does not want to receive—is not similarly available to aid parents in limiting children's exposure on the Internet because the Internet is not a traditional broadcast medium. See Germaine, supra note 17, at 108-11.

259. See Garry & Spurlin, supra note 257, at 224. The goal of the reported study was to determine whether current media rating systems are effective. Id. Students of various ages were questioned with surveys not only about music, but also movies and computer games that had been rated by the entertainment industry as "appropriate" for their age bracket. Id.; see also Dalal, supra note 24, at 382 (concluding that the encouragement of voluntary guidelines by the entertainment industry has not reduced the amount of violence among children). For a counter-discussion on the perceived benefits of music self-

children's ease of access to music, video games, and movies that were rated for mature audiences indicated that 72 percent of children had listened to music CDs despite the fact they had parental-advisory stickers affixed to them.[260]

B. The Involvement of Government

While lack of money, resources, and political influence—as well as the pesky First Amendment—has likely underscored the efforts of smaller advocacy groups, recently taxpayer funds have been put to work to study and prove the nexus between child violence and the media.[261] While the PMRC may be defunct as a viable organization today, its influence has led even local governments to become involved in attempts to censor popular music.

One of the first examples of governmental attempts to censor music was a San Antonio, Texas ordinance aimed at rock 'n' roll concerts that went into effect in November 1985.[262] The ordinance was designed to prohibit unaccompanied children under the age of fourteen from attending musical presentations that "constitute obscene performances."[263] While the ordinance appeared to be constitutional on its face since its test for obscenity tracked that of the Miller and Ginsburg standards,[264] rock promoters in the area opined that the statute was so narrow in scope (defining obscene concerts as those appealing to prurient interest in children and lacking literary or artistic merit) that few, if any, concerts would actually be subject to the ordinance. However, substantial front-page publicity about the ordinance incidentally led to increased attendance at some of the controversial concerts which, ironically, the ordinance was targeted against.[265]

On March 20, 1992, Washington Governor Booth Gardner signed the "Erotic Music Statute," which became effective on June 11,

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regulation, see James W. Rose, Do It Yourself: The Music Industry Guide to Regulation of Violent Content, 19 CARDOZO ARTS & ENT. L.J. 235, 240-41 (2001) (opining that such regulations would protect—not restrict—artistic freedom).

260. Garry & Spurlin, supra note 257, at 228.

261. Calvert, First Amendment, supra note 20, at 334-35.

262. Michael Goldberg, Crackdown on Obscene Shows, ROLLING STONE, Jan. 30, 1986, at 9.

263. Id.

264. See Cazan, supra note 38, at 179.

265. Negative publicity was considered as the reason for the dramatic decrease in attendance of rock 'n' roll shows in the area. For example, a KISS concert that was expected to gross 8,000 to 10,000 people had an actual attendance of only 5,000. See Goldberg, supra note 248, at 9.

1992, but was ultimately held unconstitutional after popular rock bands, including Soundgarden, and music industry executives filed a lawsuit to have it overturned.[266] The drafters of the ill-fated legislation had attempted to revise Washington law to include "sound recordings" in the list of materials that could be considered erotic if they otherwise met the test for obscenity adjusted to apply to minors.[267] According to the statute, when it appeared to a state prosecutor that material "that may be deemed erotic" was being sold, distributed, or exhibited in the state, the state prosecutor could apply to the superior court for a hearing to determine the character of the material with respect to whether it was erotic and potentially proscribe various curative measures, including requiring a label.[268] The law also prohibited distributors from displaying erotic publications or sound recordings in store windows, on public thoroughfares, or in any other manner that would make the contents of an erotic sound recording readily accessible to minors.[269]

Especially egregious were the attempts by Texas, Maryland, and California to pass legislation that essentially aimed to prohibit state investment in any company that recorded or produced music considered "objectionable" (Texas) or that "glamorize[d]" various listed acts of violence (Maryland and California).[270] Although each state's legislation ultimately failed due to findings of unconstitutionality,[271] these laws not only represent the fears of current legislators but also viable, real threats to the First Amendment and the chilling of speech for children and adults alike.[272]

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266. See Lury, supra note 52, at 184. But see McCormick, supra note 69, at 680 (opining that the "tactic" of including sound recordings in harmful-to-minors statutes remains a promising solution for dealing with children's exposure to explicit lyrics).

267. Soundgarden v. Eikenberry, 871 P.2d 1050, 1054 (Wash. 1994).

268. Id. at 1056.

269. Id. Similar concert-rating legislation has appeared in other states including Michigan, which was at the forefront of this trend. Cazan, supra note 38, at 172. For an analysis of other problems inherent in harmful-to-minors statutes as applied to music, see generally McCormick, supra note 69.

270. See Lury, supra note 52, at 185-89.

271. Appellate courts are finally beginning to strike down similar local laws that attempt to bar minors' access to violent video games in restaurants, arcades, and other public places. See, e.g., Am. Amusement Mach. Assoc. v. Kendrick, 244 F.3d 572, 579 (7th Cir. 2001) (finding an Indianapolis ordinance unconstitutional due to the fact that there was not a compelling government interest in restricting video-game content from children); Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 958-60 (8th Cir. 2003) (holding that video games are a type of speech protected by the First Amendment and that, therefore, a St. Louis ordinance restricting access to children was presumptively invalid because the high burden of showing that it was necessary to serve a compelling state interest was not met).

272. Lury, supra note 52, at 189.

Even though the federal courts relentlessly—and rightly—continue to strike down state and local laws that seek to regulate the sale of media products to minors based on their content, "politicians, despite the wall of precedent facing them, simply will not relent."[273] In December 2004, in order to politically position himself as a "defender of family values" and despite the "solid weight of judicial precedent across the country," Illinois Governor Rod Blagojevich proposed a law that made the selling of violent and sexual games to minors a misdemeanor punishable by fines or a prison sentence.[274] The following year, Senators Hillary Clinton and Joe Lieberman proposed federal legislation entitled the Family Entertainment Protection Act (FEPA) that sought to prohibit the sale of "mature" video games to anyone younger than eighteen years old.[275] Clinton reportedly stated that parents should be able to have confidence that "their kids can't walk into a store and buy a video game that has graphic, violent, and pornographic content."[276]

To no one's surprise, a federal court found Blagojevich's legislation to be unconstitutional after a lengthy and expensive lawsuit,[277] and FEPA died before it ever even reached debate in Congress.[278] However, the political attempts to control media content continue to rage at federal, state, and local levels and will likely continue "as long as politicians seek to divert attention away from real-world criminal activity."[279] Children, therefore, are being used as a tool by politicians whose central focus is to mobilize constituencies and gain votes by evoking fear about the socialization of children.[280]

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273. See Clay Calvert & Robert D. Richards, Precedent Be Damned—It's All About Good Politics & Sensational Soundbites: The Video Game Censorship Saga of 2005, 6 TEX. REV. ENT. & SPORTS L. 79, 83 (2005) [hereinafter Calvert & Richards, Censorship Saga].

274. See Calvert, First Amendment, supra note 20, at 335-36.

275. See Declan McCullagh, Senators Target 'Graphic' Video Games, CNET NEWS, Nov. 29, 2005, available at http://news.cnet.com/Senators-target-graphic-video-games/2100-1043_3-5975913.html?hhTest=1 (last visited Aug. 20, 2008).

276. Id.

277. Entm't Software Ass'n v. Blagojevich, 404 F.Supp.2d 1051, 1083 (N.D. Ill. 2005). The court held that the vagueness of the definition of "violent video games" makes it highly probable that game manufacturers and sellers "will self-censor or otherwise restrict access to games that have any hint of violence, thus impairing the First Amendment rights of both adults and minors." Id. at 1076.

278. See Overview of S. 2126 [109th]: Family Entertainment Protection Act, http://www.govtrack.us/congress/bill.xpd?bill=s109-2126 (last visited Nov. 14, 2008).

279. Calvert & Richards, Censorship Saga, supra note 273, at 86.

280. Calvert & Richards, Images of Violence, supra note 14, at 114-15.

C. "It Takes a Village" to Stop Shifting the Blame

An alarming social trend that both buttresses and feeds upon the incessant, ill-fated efforts of legislatures to regulate musical content is the "it takes a village" approach.[281] This approach has been proscribed by parents and emulated by media talking heads and modern-day politicians seeking election by pulling on the heartstrings of concerned parents and using the condemnation of music lyrics as an easy scapegoat for the cause of street violence. It is widely believed that a community should have the authority to protect children from exposure to violent media content because its widespread availability makes it practically impossible for parents to effectively act on their own.[282] This prevalent social attitude is essentially one of blame-shifting and quick fixes—shift the blame onto "society" and require a fix from the government.

1. The Changing Cultural Roles of Parent and Child

As parents today find themselves less able to sustain their family on a single income,[283] they often find that their children are left to the guidance and control of third-party caretakers for much of the workday. Not only are today's children left without direct exposure to familial guardians for long periods of time, but the everyday violence they are exposed to is much more virulent than it was in the past, when "juveniles would settle disputes by punching, kicking, and shoving."[284] An important difference between the kids of today and those of past generations is that today's kids are being raised in non-cohesive families marked by a lack of positive adult role models.[285]

It-takes-a-village advocates believe that since very few parents "have the time" to supervise their children's exposure to media content, and since parental monitoring is not a real alternative for

281. See, e.g., HILLARY RODHAM CLINTON, IT TAKES A VILLAGE AND OTHER LESSONS CHILDREN TEACH US 75-91 (1996) (advocating a myriad of government-controlled and tax-funded programs for parents from the moment they leave the hospital delivery room and claiming that the village as a whole owes expectant parents the various resources they will need to achieve the "task" of raising a child).

282. See Garry & Spurlin, supra note 257, at 217-18 (offering studies that show a majority of parents strongly support the efforts of Congress to legislate for the protection of children from offensive entertainment speech).

283. Without doubt, even some double-income families have difficulty meeting the finances necessary for bringing home a newborn. See Heather D. Koerner, Feeling the Pinch of a Double Income, BOUNDLESS WEBZINE, May 12, 2005, http://www.boundless.org/2005/articles/a0001084.cfm.

284. See Martinez, supra note 11, at 256.

285. Id. at 260.

working or single parents, they need some help performing their parental duties from the legislature.[286] However, in a world where the child now reigns supreme in every arena—where kids are not only to be seen and heard, but also coddled and succumbed to in every venture and never punished or even reprimanded for their errant behavior—allowing the rights of an adult (or a mature, socially responsible child, for that matter) to be legally suppressed "for the sake of the child" will eventually result in mass indirect censorship and a major decrease in non-mainstream idea production—exactly what the First Amendment was designed to prevent.[287] For every teenage fan of rap or heavy metal that commits a horrible act of violence, there are literally millions of other fans of the same music who listen to the identical lyrics and yet somehow manage not to shoot, murder, maim, or physically or mentally abuse themselves or the other teenagers they came into contact with throughout the course of the day.[288]

While the realities of raising a modern family are undoubtedly more burdensome than in days past, "the right of parents to control their children's upbringing does not necessarily imply a right to state censorship."[289] Even organized religious groups, such as the Catholics, essentially believe that a just society cannot be achieved by the suppression or elimination of unjust structures created and regulated by the law and that, standing alone, the law cannot coercively effect true change of the "internal dispositions and attitudes of the human person."[290] In fact, when the law attempts to force humans to act with genuine charity and justice toward one another or believe something that their conscience refuses to accept as true, "the law becomes a cruel caricature of itself" since the government "cannot reach into the recesses of the human heart."[291]

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286. Garry, supra note 174, at 148-54.

287. For an interesting commentary on the current debate over the proper disciplinary tactics of parents, see Victoria Clayton, Discipline Debate: Spanking Gets a Time Out, MSNBC.COM, Feb. 12, 2007, available at http://www.msnbc.msn.com /id/16929303/ (last visited Oct. 8, 2008).

288. See Clay Calvert, Framing and Blaming In the Culture Wars: Marketing Murder or Selling Speech?, 3 VAND. J. ENT. L. & PRAC. 128, 139 (2001) [hereinafter Calvert, Framing and Blaming] (questioning whether the right to purchase and listen to death-metal music should be limited due to the unfortunate and aberrational actions of a handful of troubled teens).

289. See Alan E. Garfield, Protecting Children From Speech, 57 FLA. L. REV. 565, 616-17 (2005).

290. Breen, supra note 6, at 332.

291. Id. at 338. For an interesting analysis of why legal moralism is nearly always counterproductive and can never be fully enforced, even according to Christian law and

2. The Village Monster: The Silencing of Speech by Advocacy Groups and Government Controls

By supporting the seemingly benevolent and humanitarian it-takes-a-village attitude, many parents fail to realize the extent to which the public-interest group and government intervention has inevitably allowed a minority of conservative-minded Americans and (ironically) liberal-minded politicians to intrude into their private lives and affairs.[292] Undoubtedly, the instances of self-censorship provoked by powerful advocacy groups, politicians, and irresponsible parents seeking to blame the acts of their children on "society" or other indefinable concepts[293] represent a minority of the country's viewpoints. The open marketplace of ideas will, thus, tend to suffer because competing forms of dissent will be removed from exposure and society will be unable to test such ideas for their value or veracity.[294] One author contends that the story of First Amendment jurisprudence in the United States is one of "organized efforts to make leisure time expressive activities acceptable to groups that may be the most easily affronted within society."[295] Moreover, well-organized and well-funded public-advocacy groups provide the FCC and the courts hearing music-liability lawsuits with the appearance of massive public support for a crackdown on indecent media material when in fact statistics report that the vast majority of Americans are not as offended as these groups suggest.[296] In fact, even those commentators who have noted the violent nature of the content contained in death metal and

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doctrine, see generally David A. Skeel, Jr. & William J. Stuntz, Christianity and the (Modest) Rule of Law, 8 U. PA. J. CONST. L. 809 (2006).

292. Blanchard, supra note 139, at 848-49 (cautioning that once the government is afforded an opportunity to reach into the private decision-making of its citizens, it will be impossible to tell when the intrusion will stop).

293. In truth, "there is no such entity as 'society,' since society is only a number of individual men." AYN RAND, THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM 15 (1961). Therefore, the majority of any "gang" that claims to be the spokesman of society considers itself entitled to pursue any whims it desires while the remainder of men are obliged to spend their lives in the service of that gang's desires. Id.; see also Breen, supra note 6, at 334 (noting that religious leaders like the Pope also negate a similar concept of "social sin" by recognizing that methods of a collective societal behavior pattern are always rooted in personal sin and cannot be divorced from the concrete acts of individuals).

294. Firester & Jones, supra note 77, at 27.

295. Blanchard, supra note 139, at 846. Professor Blanchard notes that Christian fundamentalists and other ultra-conservative sects of society believe that since they abhor the lifestyles and art of a nation that is continuing to grow more diverse, then such material is similarly unacceptable to a majority of Americans. Id.

296. Such a phenomenon leads to the frightening situation where a small group of ultra-conservative and reactionary watchdogs set the media agenda for the rest of the nation. See Calvert, First Amendment, supra note 20, at 332-33.

gangsta-rap nonetheless acknowledge that not all heavy metal and rap artists espouse criminal and lewd behavior.[297]

Perhaps the most disturbing aspect of the it-takes-a-village attitude is that, even when laws are passed to support its position—often to the detriment of responsible adults and mature children—an overwhelming majority of irresponsible parents choose not to avail themselves of the government-provided, tax-funded legal support they have available to them. For example, after much public discussion about heightened on-screen violence on television, legislators passed the Telecommunications Act of 1996 which required every television set sold in the United States to include an electronic chip that enabled parents to block out programming based on an encoded rating system.[298] More than a decade has passed since the "V-Chip" mandate has been in place, yet mere awareness of the technology and knowledge about how to use it is "staggeringly low," even though the cable industry spends a considerable amount of resources attempting to educate the general public on the existence of the blocking technology that parents now have available at their fingertips.[299]

Many have stated that forced self-regulatory efforts in the entertainment industry, such as the V-Chip law and the PMRC record-label ratings system, are ineffective. The regulatory mandates themselves, however, are not ineffective; they just require a certain amount of parental action, responsibility, and assistance in order to be effective. Regardless of record labeling and other efforts by public awareness groups and government intervention, parents continue to be primarily responsible for the content their children see and hear.[300]

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297. See, e.g., Rutherford, supra note 11, at 322 (pointing out that rap artists like Common, Talib Kweli, and the Roots record positive and non-violent material, and lamenting that these artists are not as well-known as violent-themed, platinum-selling artists like 50 Cent who record the bulk of anti-social content); see also Lury, supra note 52, at 165-66 (discussing lyrics of slower, melodic heavy-metal songs that appeal to female audiences because they incorporate positive themes of love and relationships).

298. Paulson, supra note 190, at 82.

299. Ron Whitworth, IP Video: Putting Control in the Hands of the Consumers, 14 COMMLAW CONSPECTUS 207, 237-38 (2005).

300. See, e.g., Colleen Carey, The Blame Game: Analyzing Constitutional Limitations Imposed on Legislation Restricting Violent Video Game Sales to Minors After St. Louis, 25 PACE L. REV. 127, 146-47 (2004). A study commissioned by President Clinton reported that parents are involved in 83 percent of the purchases of video games by their children and 84 percent of the people under age 18 who purchase video games obtain parental permission before the purchase. Id. Based on these numbers, "it is clear that if minors are playing violent video games, it is not a result of their purchase of the game without parental knowledge." Id. at 147. For a more thorough analysis of the effects of violent video games on children, see generally Kevin E. Barton, Game Over! Legal Responses to Video Game Violence, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 133 (2002).

Parents maintain that they can no longer "avert their eyes" from unwanted or offensive speech in the marketplace,[301] yet they fail to be conscious observers of what their children purchase, which ironically leads to more offensive material from which their children's eyes must be averted.[302] Parents cannot rationally shift blame to the music industry for producing more offensive music if they are unwilling to keep their children from purchasing it and they must be primarily charged with their "original decision . . . to bring a child into this world."[303]

D. Conflicting Research on Children's Reactions to Musical Content

The single most significant problem that public awareness groups, bureaucrats, and it-takes-a-village adherents face is the difficulty of proving conclusively that the harm complained of stems from exposure to the music lyrics themselves.[304] Studies performed in the area of media violence continue to provide "evidence" supporting both sides of the debate,[305] leading to a "chicken-and-egg" type of analysis that asks the seemingly unanswerable question of whether the woes of children's acts in today's society are caused by the music, or whether the musicians are merely "reflecting what they see in the world around them" when writing their lyrics.[306] For every researcher

301. Garry & Spurlin, supra note 257, at 218.

302. See Caron, supra note 172, at 104-05 (opining that it is the prerogative of parents to decide what they do and do not want their kids to experience, yet there are "lazy" parents who would rather avoid "active parenting" altogether by putting primary responsibility on the government for these choices).

303. See Germaine, supra note 17, at 128-29.

304. See Dalal, supra note 24, at 364.

305. Id. While conflicting evidence on the subject continues to exist, the FCC's 2007 report on regulating broadcast violence entitled In the Matter of Violent Television Programming and Its Impact on Children concludes that the research that has been conducted to date on balance provides "strong evidence" that when kids are exposed to media violence, their aggressive behavior (at least in the short term) can increase. Faith M. Sparr, The FCC's Report on Regulating Broadcast Violence: Is the Medium the Message?, 28 LOY. L.A. ENT. L. REV. 1, 4 (2007-08). But see Carey, supra note 300, at 145 (opining that it is not likely that continued research will result in proof of a causal link required to find the requisite compelling government interest to justify restricting speech in this area).

306. Firester & Jones, supra note 77, at 23. The authors argue that the state of society portrayed in rap songs is not caused by rap music, but rather rap songs are merely "descriptions of inner city life" and that most rap artists would claim that "peace and unification is their ultimate goal." Id. However, the authors themselves even admit the difficulty in reconciling such a goal with the fact that many rappers participate in the very crimes and lewd activities they claim to be merely mirroring and attempting to remedy. Id. at 20. Another author has maintained a similar argument in the context of heavy metal, claiming that the music genre is not dangerous material marketed to minors; instead, the

who denies a connection between licentious and vehement lyrics and similar resulting behavior in children, there are others who note that there exists a rapidly accumulating body of scientific research that validates a causal link between music and both short- and long-term aggressive behavior.[307] Even though some studies do link violent child behavior to certain music genres, many commentators have focused on the fact that a multitude of other factors are ultimately responsible for influencing the violent acts of children who listen to violent-themed music, including unstable and unsupportive backgrounds, divorced parents, violence experienced at home, drugs, and arrest records.[308] Although it remains unknown what the exact effects are of music on its listeners,[309] there is little doubt that music remains a powerful source of communication in society and, when coupled with lyrical content, it becomes a "message with a strong emotional impact."[310]

The solution, however, is most certainly not to keep spinning our scientific wheels, spending our taxpayers' money, and continuing to perform the same studies over and over again in an attempt to finally be able to hold third-parties liable for the violent acts of children—especially when the vast majority of people who listen to rap

antisocial behavior set forth in death-metal lyrics is a "commentary on what the lyricist sees in the world around him." See Sampar, supra note 17, at 189.

307. Rutherford, supra note 11, at 317-19 (identifying a 2003 study published in the American Journal of Public Health claiming that teens who spend a significant amount of time watching violent and sex-themed content depicted in rap-music videos are more likely to practice those same behaviors in their own lives).

308. Sampar, supra note 17, at 195 (focusing attention on the various societal forces that have contributed to violent acts of children whose parents or guardians have been plaintiffs in lawsuits alleging a nexus between music and such acts). Others have observed that blaming a child's aggressive behavior on the playing of video games is as problematic as blaming a child's exposure to music lyrics "because it is impossible to isolate that factor from other variables, such as poor upbringing, mental illness, hormonal imbalance, socio-economic status and lack of supervision—just to name a few." Calvert & Richards, Images of Violence, supra note 14, at 103. For a thorough summary of research that has been conducted to determine the effects of video game playing on child violence, see Carey, supra note 300, at 141-50.

309. In fact, some believe that the current increase in attention to media content is due to society's acceptance of the fact that being exposed to violent acts harms children and a "common misconception that researchers have proven that exposure to violent entertainment causes violent behavior in children." Carey, supra note 300, at 128. But see Caron, supra note 172, at 91 (claiming that by 2000, after thirty years of studies conducted in the area, the public-health community had essentially concluded that there is an overwhelming causal connection between media violence and an increase in the aggressive attitudes and behavior of kids); Dalal, supra note 24, at 381 (surmising that the Columbine High School tragedy and subsequent fatal school shootings that have occurred in the past few years are deemed by social scientists to show that the amount and type of violence displayed in forms of entertainment "have dramatically affected children").

310. Holt, supra note 41, at 54.

and heavy metal, the two current genres of attack, "do not take what they hear literally."[311] Because music is an abstract form of human expression, any attempt to rate it or control its dissemination invariably becomes a highly subjective process whereby the censor—whether a public-awareness group or legislature—has much room to interpret the meaning of songs.[312] This is particularly true in lyrical music since it is a unique form of art that combines not only the original arrangement of sounds and melody but also the element of speech.

IV. THE CURRENT REALITY: POPULAR MUSIC HAS LOST ITS SPIRIT OF ADOLESCENT DISSENT

Regardless of the fact that regulation of music in any form will send society down the ever-foreboding slippery slope of government censorship, a compelling argument can be made that music today is not so much about sending a social message regarding a minority viewpoint or allowing the free expression of the traumas and angst that coincides with adolescence as it is about market manipulation and making money via emulation and pure shock. For example, many authors generally supportive of the historic beginnings of hip-hop as a valid and meaningful form of expression for disgruntled and politically abandoned urban African American and Latino American youth shun contemporary rappers such as 50 Cent who have "masterfully taken advantage of the corporate-created and glorified 'gangsta image' by taking on the very racialized and stereotyped images that have contributed significantly to their exclusion and repression in the dominant public sphere in the first place."[313] Jay-Z, a multi-platinum

311. Sampar, supra note 17, at 196 ("[M]ost listeners are fans of the art form itself, comparing the complexity, musicianship and even occult references found in heavy metal music to the complexity and musicianship of 1960s free-jazz artists who referenced eastern religions").

312. Holt, supra note 41, at 65-66; see also Adam L. Fernandez, Let It Be: A Comparative Study of the Content Regulation of Recorded Music in the United States and the United Kingdom, 21 PENN. ST. INT'L L. REV. 227, 227-28 (2002) (noting the subjectivity inherent in lyrical content by studying the reactions to and interpretations of the Beatles' songs "Lucy in the Sky With Diamonds" and "With a Little Help From My Friends," and noting that the interpretations given by U.S. citizens were extremely different that interpretations given by citizens of the United Kingdom).

313. Folami, supra note 67, at 240 (stating that this generation of African American musicians and artists has reaped more monetary reward than any other generation of musicians and artists before it and questioning how rap could still represent a "voice of the voiceless or the marginalized given its mass production" and commodification); see also Dennis, supra note 71, at 16-17 (observing that rap music "has moved from its street roots and into the corporate boardroom" as much present-day rap is highly commercialized);

rapper, has openly admitted that while he "could" create records with positive messages (and, indeed, a few such songs do intermittently appear on his records), he chooses to reinforce a violent gangsta image for the admitted purpose of reaping financial reward.[314] Death-metal artists also openly express their knowledge that the overt messages they are sending to child audiences is not about cultural transformation or opening their minds to societal problems, but is simply about entertainment.[315]

The hypocrisy of many modern musicians is perhaps best seen by comparing their lyrics with their actual behavior. While urging America's youth to aspire to success and greatness on one track of an album, rapper Nasir Jones (a.k.a. "Nas") on that very same album, lauds doing and dealing drugs, killing, and carrying a gun.[316] Similarly, rapper Fabolous, who publicly announced that his second arrest for unlawful gun possession was unwarranted and that it "tarnished" his image as an icon and great influence on children, nonetheless has an arsenal (pun intended) of songs with titles such as "Click and Spark," "Keeping it Gangsta," and "Keeping it Thug," all containing lyrics touting the use of guns by kids for violent and criminal purposes.[317]

While it has been posited that rap artists are "fiction writers" whose lyrics consist largely of "metaphor, braggadocio, or exaggerated storylines,"[318] some rappers' lives are, sadly, muddled with the exact

O'Gallagher & Gaertner, supra note 143, at 120 (stating that most major recording companies that have traditionally signed rap bands are controlled by Caucasian Americans and would only sign African American artists if they could "cross over" into the white audience, resulting in the downplay of their racial identity); Rutherford, supra note 11, at 332 ("[V]ery few rappers actually live the lives they detail in their lyrics."); Andre L. Smith, Other People's Property: Hip-Hop's Inherent Clashes with Property Laws and Its Ascendance As a Global Counter Culture, 7 VA. SPORTS & ENT. L.J. 59, 67-68 (2007) (claiming that as early as 1996 "corporate forces" began to use hip-hop as a marketing tool to promote products associated with a hip-hop fan base in commercials, TV shows, and movies).

314. See Rutherford, supra note 11, at 333.

315. Deicide is an American death-metal band led by Glen Benton, who is a self-professed Satanist and has an upside-down cross branded into his forehead. See Sam Bagnall, Investigating the 'Death Metal' Murders, BBC.COM, http://news.bbc.co.uk/1/hi/programmes/this_world/4446342.stm (last visited Sept. 4, 2008). When questioned about his lyrics, he responded: "I say don't blame people like me and [death-metal band leader Marilyn] Manson, because we never said: 'Hey, we're going to be role models for all your kids.' That ain't what this is about. It's about entertainment." Id.

316. Rutherford, supra note 11, at 330-31.

317. Id. at 331-32.

318. Dennis, supra note 71, at 25. Note that the popular 1980s rap group RUN-DMC, while providing a gangsta image of two rappers "struggling to make it in the ghetto," in reality consisted of two middle-class kids—one born of college-educated parents and the

type of violence and horrific circumstances that they portray in their songs. For example, Eminem, a "violent and vile performer and artist" who has sold millions of albums, has lived both a controversial and tumultuous life, as he has stood trial for assault with a dangerous weapon, been sued by his mother, and had an ex-wife who was hospitalized for attempting suicide.[319] Tupac Shakur, the rapper who had been sued in connection with the death of a Texas state trooper,[320] performed raw lyrics that "seemed a blueprint of his own violent life," which tragically ended in 1996 at the age of twenty-five in a drive-by shooting in Las Vegas.[321] Prior to his death, he had been found guilty of several different criminal charges, including assault and battery and sexual harassment.[322] Despite his infamous gangsta-style lyrics that had made him known as one of the most violent, racist, misogynistic, and homophobic of musicians,[323] he declared in a 2005 interview, after a recent release from jail, that he was not then and had never been a "gangsta."[324]

The most disturbing aspect of this phenomenon is that the events of the lives of these artists are being told through the music and other outlets of media, not to tell a story with a lesson or happy outcome, but instead merely to increase record sales and openly encourage similar behavior.[325] Some scholars have duly noted the "current dangers of the hip-hop dynamic" and have been able to see through the farcical idea that the genre remains an authentic African American medium of expression.[326] One author candidly observes that, "[i]n its present form, [hip-hop] can be most accurately characterized as an exaggerated form of some of the most negative

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other a "mama's boy" who had been raised with a Catholic-school background. Sean-Patrick Wilson, Rap Sheets: The Constitutional and Societal Complications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials, 12 UCLA ENT. L. REV. 345, 350 (2005).

319. See Germaine, supra note 17, at 83-85. See also, Stage Set for Eminem,BBC NEWS, Feb. 7, 2001, available at http://news.bbc.co.uk/1/hi/entertainment/1156233.stm (last visited Jan. 30, 2009) (noting that Eminem is "heavily criticized for his violent lyrics").

320. See supra notes 108-114 and accompanying text.

321. Michelle Dearmond, Rap Star Tupac Shakur Dies of Wounds, CHI. SUN-TIMES, Sept. 14, 1996.

322. Id.

323. Germaine, supra note 17, at 83-84.

324. Chuck Phillips, Tupac Shakur: 'I Am Not a Gangster', CHI. TRIB., Oct. 25, 1985, available at http://www.chicagotribune.com/news/nationworld/la-me-tupac-qa,0, 2956216.story (last visited Aug. 3, 2008).

325. See Dalal, supra note 24, at 365 (explaining the clear distinction between "gratuitous violence" that exists merely to titillate the audience, as present in films such as Clear and Present Danger, and "violence that tells a story" and drives home a positive meaning to the audience, exhibited by pieces such as Macbeth and Braveheart).

326. Rutherford, supra note 11, at 334.

aspects of black reality framed to turn profit."[327] Another scholar laments that hardcore gangsta-rap lyrics do not call for civil disobedience or serve as a means to challenge the social order, but, instead, they are being used today to "paint stereotypical pictures" to justify the subordination of poor people.[328] One commentator has coined the new commercialized form of rap as "reality rap," or the violent and sexual gangsta images that record companies demand from their artists, all of which have distinctively changed the genre of rap music from its humble beginnings as a non-violent medium for inner-city minorities to express themselves and their social conditions.[329] Gone is the day that hip-hop was used as a mechanism to "celebrate and facilitate social gatherings of the lower classes."[330]

While the gangsta-rap and death-metal genres rightly get a majority of the bad rap for this phenomenon, the same frightening trend of selling shock material is present even among the more traditional heavy-metal bands whose messages in the 1980s, at least contained some semblance of neutrally-interpretive or even positive messages. For example, Nikki Sixx, bassist for super-group Mötley Crüe, recently published The Heroin Diaries: A Year In The Life Of A Shattered Rock Star, his memoir account of being a member of the band in the 1980s.[331] While Sixx could have chosen to reflect on how he slowly and painfully overcame his depression and drug addition which led to a near-fatal overdose, he instead provides the following

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327. Id. at 333; see also Smith, supra note 313, at 60-66 (observing that activities "indispensable to hip-hop culture," such as block parties, house parties, sampling, bootlegs, and mix-tapes, "tend to violate the prevailing constructions of several federal copyright statutes and certain laws" protecting ownership of property). Others have noted that the musical technique of digital sampling, or taking a portion of a well-known piece of prior-recorded music and using it in a musician's own new recording, is often the signature of rap music. See Regina Austin, "The Black Community," Its Lawbreakers, and a Politics of Identification, 65 S. CAL. L. REV. 1769, 1813 (1992). Many rappers are known throughout the industry to engage in open and defiant non-payment of royalties to the original artists from whom they take sampled material. Id. While the sampling technique is properly recognized as an art form in and of itself, unethical and unlawful use of a certain kind and/or a certain amount of a sampled musician's prior work amounts to copyright infringement if the owner of the sound recording that has been sampled has not consented to such use. See Tracy L. Reilly, Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court's Attempt to Afford "Sound" Copyright Protection to Sound Recordings, 31 COLUM. J.L. & ARTS 355 (2008).

328. See Smith, supra note 313, at 94-95.

329. See Wilson, supra note 318, at 347-51 (claiming that, in signing the image-geared rappers, the record companies are actually attempting to forge an image "that would bring criminality and fear into white suburban homes").

330. Smith, supra note 313, at 95.

331. NIKKI SIXX, THE HEROIN DIARIES: A YEAR IN THE LIFE OF A SHATTERED ROCK STAR (2007).

lesson for his readers: "[y]ou can totally date more strippers when you're sober."[332]

Others have noted that while determining the lyrics of rock and early heavy-metal songs is usually a difficult task, the same is not true for rap songs, which are spoken in cadence and designed to be heard.[333] While rock 'n' roll has historically been an outlet for teenage rebellion and frustration, it has rapidly morphed from being a platform to express themes of rejection of traditional values to those of mean-spiritedness and downright hatred.[334] While classic rock 'n' roll—and even early forms of heavy metal and rap—encouraged kids to express their individuality and find themselves by breaking free of societal molds, the messages in today's formulaic popular music are often specific calls to the nonsensical expression of materialism, entertainment, violence toward others, and self-deprecation.[335] Children are not being taught to march to the music of their own drummer; they are being encouraged to pay good money to emulate the herd of criminals they blindly follow straight into the crack houses and jail cells where the music is literally being created. Unfortunately, when it comes to popular music, the majority of purchasers of such music that condone, emulate, and admire the vulgar work of death-metal and hate-rap artists still pervade and rule the marketplace today.

V. THE SOLUTION: THREE STEPS TO REGAINING THE SPIRIT OF POPULAR MUSIC IN AMERICAN CULTURE

The question to ask about the rapidly declining state of popular death-metal and gangsta-rap lyrical content is not what can be done to get this material out of the marketplace, but rather why are members of our society creating it in the first place? When music has lost its language and spirit of variance from the norm and becomes merely a marketing tool or get-rich scheme, parents and concerned members of

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332. See Sean Daly, Get a Fix on Nikki Sixx, ST. PETERSBURG TIMES, Oct. 7, 2007, at 10L, available at http://www.sptimes.com/2007/10/07/Books/_Get_a_fix_on_Nikki_S.shtml (last visited Aug. 6, 2008). The reporter refers to the book as "bleak, violent, mind-blowingly profane" and states how it details "every drop of blood, every trashed hotel room, every naked groupie crawling through [Sixx's] window." Id. Sixx was eventually abandoned by his family, manipulated by drug dealers, and shunned by the music business. Id.

333. Blanchard, supra note 139, at 828-29.

334. Holt, supra note 41, at 58.

335. See POSTMAN, supra note 4, at 92-93. The author claims that, thanks to television and other forms of technology, Americans no longer talk to each other and exchange ideas or argue with propositions; they merely "entertain each other" and focus on "good looks, celebrities, and commercials." Id.

society should be worried about the eventual consequences. While past efforts of public-interest groups and politicians were aimed at regulation and censorship, at least their motives and intentions were benign. Today, it seems that acceptance and lethargy regarding musical content has replaced such efforts. It seems that nothing by way of violence or lewdness shocks or even makes children (or their parents) blush anymore. More alarmingly, some critics suggest that, as lyrics have become more raucous, they have almost had a numbing effect on society.[336] One such author claims that the "initial shock expressed by critics in rap music's earliest stages has morphed into an eerie silence and indifference."[337] Although such observers paint a gloomy picture of the present and future state of the social content of music lyrics, there are three steps that can be taken to tackle the problem and reinstate popular music as a platform for both adolescents and adults to effectuate genuine growth and positive change in today's culture.

A. Step One: Honesty and Promotion of Counter-Speech

The first step in reinstituting the spirit of adolescent dissentience previously found in musical lyrics is for parents, politicians, educators, and other leaders of our country to be entirely honest about the current state of popular music. Refreshingly, legal scholars are beginning to become more responsible in their interpretations of modern media material.[338] Instead of excusing, castigating, and pointing fingers at the non-existent entity of "society," the jail system, and other nameless and faceless institutions, they are looking directly at the phenomenon and calling it what it is: "an unsavory reality but a serious problem."[339] Yet instead of dangerously attempting to use First Amendment jurisprudence as a tool for shifting blame to others, responsible citizens are exposing the fact that First Amendment freedoms are undeniably abused by some citizens,

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336. See BERMAN, supra note 76, at 15-27. The author describes how modern technology has brought about a change to American life that he calls "liquid modernity," or the condition of a society that lacks a clear sense of orientation that can only be sustained by well-established tradition and a set of norms. Id. Popular forms of culture in America make "the whole notion of right and wrong seem ridiculous" and replace democracy "with a safe, comfortable nihilism." Id.

337. See Rutherford, supra note 11, at 305.

338. See, e.g., Rutherford, supra note 11.

339. Id at 334. In his article, Rutherford sets forth a challenge to persons who are "disenchanted with hip-hop music and its accompanying sham corporate political movement, to re-engage the music and search out and support artists whose values and message are in tandem with their own . . . ." Id. at 339.

and that such abuses must be publicly identified and not socially condoned or pardoned.[340]

Finally, rational-minded groups are beginning to tackle the morass of hateful lyrics present in popular songs, not by imposing their own set of values or seeking to keep certain music from the marketplace, but simply by showing what certain lyrics represent on a philosophical and moral level and how these lyrics can be interpreted by impressionable audiences.[341] The marketplace approach to the First Amendment supports such actions and actually dictates that counter-speech is the best remedy for ameliorating offensive speech.[342] The counter-speech movement is a call for citizens to think about and interpret lyrics that are presented to them by modern artists, not to follow them mindlessly with the blind eye of convention or lethargy. This new trend embraces the stark realization that, sometimes artists are merely vile, unrespectable members of society who are using the medium of music to get rich through the proliferation of pure hate speech, while others have a valid (though possibly vile) and truthful message to send about society. If we are to receive any positive benefit from such speech, we need to learn to appreciate the distinction between offensive yet interpretable lyrics and lyrics that have no redeeming social value. Then we can conform our purchasing and listening habits accordingly.

We are increasingly witnessing the banding together of unlikely groups, not for the ambition of directly or indirectly censoring music, but with an aim of vociferously and publicly condemning musicians who have gone too far not only in their deplorable lyrics but also in their lifestyles that are depicted in their lyrics. For example, rapper Eminem, with a portfolio of popular lyrics such as, "I told the doc I need a change in sickness/And gave a girl herpes in exchange for syphilis/Put my LP on your Christmas gift list/You wanna get high,

340. Id. at 335.

341. For example, Abolish the 'N' Word is a grassroots organization created by Jill Flowers to promote the education of the negative effects of rampant and mindless use of the "N" word throughout history. See posting of Christina Maldonado to City Room Blog, http://cityroom.blogs.nytimes.com/2007/08/07/words-of-protest-challenging-musics-lyrical-standards/ (Aug. 7, 2007, 3:25 PM). The home page of the organization's website contains a sobering video clip of past acts of racial violence accompanied by a narrative of the derogatory social uses of the "N" word. See Abolish the "N" Word, http://www.abolishthenword.com/educatecards.htm (last visited Oct. 30, 2008). Viewers are encouraged to purchase "Debate and Educate" cards, which are wallet-size cards containing historical facts about the "N" word that can be used to educate teenagers and adults or simply passed out to people who use the word "without confronting them on an already inflammatory subject." See id.

342. Caron, supra note 172, at 104.

here bitch just sniff this,"[343] has come under fire by an odd teaming of activists—from likely players such as the unstoppable Lynne Cheney and right-wing groups like James Dobson's Focus on the Family to not-so-likely players such as the Gay and Lesbian Alliance Against Defamation that asserts that Eminem's music encourages anti-gay violence and the performance of hate crimes.[344] In 2005, Essence magazine sponsored a movement for young female students called "Take Back the Music," in which members pushed men and women alike at college parties to think about how their support of the hip-hop industry served to perpetuate images that hurt the African American community.[345] What is different about these campaigns is that their goals are not focused on an agenda to sway society to succumb to a certain sacrosanct set of morals adhered to by a minority of Americans with big pocketbooks but rather on an agenda of honesty and the power of counter-speech.

B. Step Two: Education and the Return to a Philosophical Mindset

The second step in taking back the music from mindless demoralization is for parents, educators, and lawmakers alike to realize that "legal solutions to social problems will always be merely partial solutions."[346] It is only through an acceptance of individual responsibility and mass education regarding the realities of modern media content that true reform can be achieved. In addition, there must be a return to the classical philosophical mindset of the role of music and its ability to provoke thought and action instead of shock and knee-jerk, meaningless re-action. Children must be taught at an early age how to decipher messages they receive from all entertainment media; in particular, they must be aware of the vast differences between reality (and the morals they are being taught by their parents and educators) and the "fantasy worlds" that are emulated on TV and in music.[347]

Most importantly, it should not be the prerogative of the government to create an overarching program that will accomplish these educational needs on a nationwide, or even local, basis. Because

343. Eminem, Cum on Everybody, on THE SLIM SHADY LP (Interscope 1999).

344. Richard Kim, Eminem—Bad Rap?, THE NATION, Feb. 23, 2001, available at http://www.thenation.com/doc/20010305/kim (last visited July 28, 2008).

345. Rose Arce, Hip-Hop Portrayal of Women Protested, CNN.COM, Mar. 4, 2005, available at http://www.cnn.com/2005/SHOWBIZ/Music/03/03/hip.hop/index.html (last visited Sept. 4, 2008).

346. Breen, supra note 6, at 348.

347. Calvert, Framing and Blaming, supra note 288, at 139.

not all parents think alike on the issue of how and when to introduce their children to these delicate issues—especially sexuality—any intrusion about such decisions "is patronizing and cynical at best."[348] Indeed, we can all likely agree that it is one thing to create a complete legal ban of certain acts, such as cannibalism, for the betterment of society; however, prohibiting the naming of such taboo acts makes no sense.[349] In order to diminish the occurrence of such taboo behaviors, promoting silence and a veneer of pretence that they do not exist in our society is not the answer.[350] On the other hand, it is the affirmative responsibility of parents and educators to teach children the ability to discriminate between the actual practice of the taboo behavior while at the same time recognizing that lyrical discourse of such behaviors has a legitimate place in forms of speech and social commentary.[351] What children must be able to learn to discern the difference between those who are mentioning lewd behaviors and violent activities for the purpose of comment and criticism, on the one hand, and those who are irresponsibly invoking those words with the purpose of having their listeners emulate such behavior to be "in" with the crowd and and a part of what the media is currently telling them is "hip."

C. Step Three: Artists, Take Back Your Lyrics!

The third and, arguably most important, step in regenerating a platform of meaningful speech via music lyrics is for contemporary musicians themselves to insist on the return to an artistic environment where they are the ones who determine the nature and direction of the music they create and perform, not the record companies.[352] Undoubtedly, it is tempting for a musician who is struggling to make a living to accept a record contract offering high advances and promises of stardom for succumbing to the proffered shock-metal or gangsta-rap image required by the labels, or otherwise

348. See Hammond, supra note 23, at 292.

349. Christopher M. Fairman, Fuck, 28 CARDOZO L. REV. 1711, 1727 (2007).

350. See id.

351. Id.; see also NEIL POSTMAN, CONSCIENTIOUS OBJECTIONS: STIRRING UP TROUBLE ABOUT LANGUAGE, TECHNOLOGY, AND EDUCATION 30 (1988) (asserting that all forms of human discourse are "metaphor-laden" and that our children must be taught precisely how metaphors shape arguments and control feelings before they can accurately learn to decipher the words of another and apply them properly to their own lives).

352. Wilson, supra note 318, at 350.

"sell out" their own values and reasons for creating their art in the first place.[353]

While it seems that the entire nation is caught up in an unstoppable cyclone of immorality, sex, commercialism, and materialism—portrayed and proliferated primarily by the media and entertainers—the tide is beginning to turn. Even popular teenage musicians, such as American Idol-winner Jordan Sparks and Hannah Montana-star Miley Cyrus are seeing through the bad-natured messages of mainstream media and attempting to fight back and push for a portrayal of more healthy and didactic messages not only in their lyrics, but also in the manner in which they guide their very public lives.[354] Once this cycle begins with the artists themselves, the moral and positive messages that parents and educators attempt to instill in children will be reinforced, and the marketplace will dictate that the record companies ditch the dirty content that currently earns them wild profits.

VI. CONCLUSION

As ancient philosophers like Plato taught us, music affects our lives very deeply and should therefore be taken seriously by members of any given society.[355] It is common knowledge of lawyers and legal scholars that words have meaning. Modern psychologists similarly advise that a close examination of our patterns of speech—our conversations, jokes, curses, and legal disputes—can give us insight as to who we are.[356] Regardless of studies that show arguably dubious

353. Id. at 349 (noting that, once signed to a label, many rap artists are forced to follow a strict set of formulaic guidelines set forth by the label and required to rap about certain subjects, talk "bad English," and emulate acts of sex and violence—a phenomenon that essentially turns commercially successful rappers into "social misfits").

354. See, e.g., Linda Cook, Hannah Montana and Miley Cyrus: Best of Both Worlds Concert, QUAD CITY TIMES, Feb. 6, 2008, available at http://www.qctimes.com/articles/2008/02/08/entertainment/movies/doc47a9e888026a2360329651.txt (last visited Sept. 11, 2008) (lauding the teen musician's "bouncy pop tunes that carry positive, encouraging messages for girls," such as "If We Were a Movie," containing lyrics such as, "You'd be the right guy and I'd be the best friend that you'd fall in love with," and other songs that provide support and encouragement to teens when things go wrong); Jocelyn Vena, Jordan Sparks: 'I Don't Regret' Promise-Ring Outburst at VMAs, MTV.COM, Sept. 10, 2008, available at http://www.mtv.com/news/articles/1594549/20080910/jordin_sparks.jhtml (last visited Sept. 11, 2008) (discussing Jordan Sparks's choice to defend fellow musicians the Jonas Brothers' decisions to wear jewelry symbolizing their decision to remain virgins until marriage, despite being mocked and made fun of by other members of the entertainment community).

355. BLOOM, supra note 2, at 70.

356. STEVEN PINKER, THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE vii (2007) (claiming that much can be learned about the "moral, emotional,

links between media content and child behavior, there can be little argument that when children listen repeatedly to the lyrics of negative songs, the themes they hear are reinforced—on some level, however minute or tenuous—and children are encouraged to emulate such negativity in the ordering of their own lives.

Due to the fact that music acts as a powerful and emotional vehicle by which young adults—particularly members of afflicted and outcast groups—have historically expressed messages of angst and calls for social change, there have always been attempts to censor such music, either through the legal process or by way of social public interest groups. While such attempts may have benign intentions, the results of their labors—direct or indirect censorship of content for adults and children alike—is entirely outside the scope of the spirit of the marketplace theory of ideas that guides our First Amendment jurisprudence.

Regardless of the raucous nature of certain sub-genres of popular music that exist in the marketplace today, the societal solution is not to bury this music, but to study the reasons why the prevalence of such content is growing at an alarming rate. By utilizing the methods of counter-speech, education, and sending a message to modern artists that members of the marketplace demand substitute material for the enrichment and betterment of our children, it is possible to take back the music.

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and political colorings" of a society from the way that its members put their thoughts and feelings into words, particularly swear-words).