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PROTECTING CHILDREN FROM MUSIC LYRICS: SOUND RECORDINGS AND “HARMFUL TO MINORS” STATUTES

*What we're talking about is a sick new strain of rock music glorifying everything from forced sex to bondage to rape**

I. INTRODUCTION

With the above “battle cry,” Tipper Gore and the Parents Music Resource Center (PMRC) launched a war on rock and pop music lyrics in 1985.¹ Long after the PMRC’s campaign faded from the headlines, however, controversy over recorded music lyrics rages on.² The enduring difficulty is the question of how, or if, “dirty lyrics” can be constitutionally regulated at all.³ Music is protected speech under the First Amendment.⁴ Musicians and free speech advocates may predictably cry “censorship” when music regulations are proposed, but there is a real concern that artistic expression will be “chilled” if music is subjected to legislation.⁵

The 1990 trial of 2 Live Crew saw the use of an adult obscenity standard to determine whether a rap recording could be sold in the state of Florida.⁶ Public pressure on Time Warner in

* Robert Love, *Furor Over Rock Lyrics Intensifies*, ROLLING STONE, Sept. 12 1985, at 13, 14 (quoting Tipper Gore, co-founder of the Parents Music Resource Center).

1. See *infra* notes 54-57 and accompanying text.

2. See *infra* notes 58-74 and accompanying text.

3. See generally John W. Holt, Comment, *Protecting America's Youth: Can Rock Music Lyrics Be Constitutionally Regulated?*, 16 J. CONTEMP. L. 53 (1990).

4. U.S. CONST. amend. I; *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

State governments are bound by the prohibitions of the first amendment since they “are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the fourteenth amendment.” *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

5. See Anne L. Clark, Note, *“As Nasty As They Wanna Be”: Popular Music on Trial*, 65 N.Y.U. L. Rev. 1481, 1522-31 (1990) (discussing the chilling effect on musical expression and other ramifications of censoring music).

6. See *infra* notes 58-67 and accompanying text.

1992 led to the removal of *Cop Killer* from Ice-T's heavy metal album after the song's violent lyrics led to controversial headlines.⁷ Also in 1992, the Washington State Legislature tried to add "sound recordings" to the state's existing "harmful to minors" statute, but the statute was found unconstitutional.⁸

The tactic of including sound recordings in "harmful to minors" statutes is perhaps the most promising solution to the resilient problem of explicit music lyrics.⁹ Although the Washington law was found unconstitutional, many states have successfully included sound recordings in their own "harmful to minors" statutes.¹⁰ To appreciate this development, a legal and factual background must be discussed. Part II of this Comment summarizes the development of obscenity standards for minors in U.S. First Amendment law. Part III discusses some historic clashes between obscenity law and music. The Washington "Erotic Lyrics" Amendment and its constitutional problems are the subject of Part IV. Finally, Part V details how other states have codified some "sound recordings" as materials "harmful to minors."

II. THE ISSUE OF OBSCENITY AND MINORS

The right of free speech is not *absolute*.¹¹ Music, along with all other forms of speech, can be restricted for "appropriate reasons."¹² Speech that is obscene or "harmful to minors" can be

7. See *infra* notes 68-71 and accompanying text.

8. *Soundgarden v. Eikenberry*, No. 92-2-14258-9 (Wash. Super. Ct., King County, Nov. 20, 1992) [hereinafter *Soundgarden*] (on file with author); see *infra* notes 87-102 and accompanying text.

9. See *infra* notes 103-137 and accompanying text.

10. *Id.*

11. "[T]he right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

12. *Elrod v. Burns*, 427 U.S. 347, 360 (1976). The *Chaplinsky* Court gave some of the examples of the types of speech that might be suppressed:

[T]he lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky, 315 U.S. at 572.

constitutionally regulated.¹³

A. THE TRADITIONAL APPROACH

Modern obscenity law in the United States has its roots in the British case of *Regina v. Hicklin*.¹⁴ In *Hicklin*, the Court of Queen's Bench heard an appeal on whether certain anti-Church pamphlets were obscene.¹⁵ The court decided that material is obscene if *any* part of it tends "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a [material] of this sort may fall."¹⁶ Under this test, there was no need to distinguish minors from adults because courts could protect everyone from materials harmful to those most susceptible, i.e., minors.¹⁷

American courts widely adopted the *Hicklin* test. The case "came to stand for the double proposition that obscenity was to be measured by its effect on the most susceptible, and that obscenity of the work as a whole was to be judged by the effect of isolated passages."¹⁸

In 1933, federal courts in New York held James Joyce's novel *Ulysses* not obscene.¹⁹ The courts broke with the *Hicklin* test and adopted a new approach based on whether the dominant effect of the work is to promote lust in the average reader.²⁰ Most American courts soon followed this new approach.²¹ The U.S. Supreme Court's 1957 decision in *Roth v. United States*²² gave constitutional significance to the rejection of the *Hicklin* standard.²³

13. See *infra* notes 23-41 and accompanying text.

14. 3 L.R.-Q.B. 360 (1868).

15. *Hicklin*, 3 L.R.-Q.B. at 360-61.

16. *Id.* at 371.

17. FREDERICK A. SCHAUER, *THE LAW OF OBSCENITY* 87 (1976) [hereinafter SCHAUER].

18. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-16, at 906 (2d ed. 1988) [hereinafter TRIBE].

19. *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

20. *Ulysses*, 72 F.2d at 708.

21. TRIBE, *supra* note 18 at 907.

22. 354 U.S. 476 (1957).

23. *Roth*, 354 U.S. at 489. *Roth* defined obscenity in terms of "whether to the average person, applying contemporary community standards, the dominant theme of the

Under *Roth*'s "average person" approach,²⁴ courts faced the problem of what to do with materials not prurient or offensive to the average adult, but potentially harmful or appealing to the prurient interest of minors.²⁵ The Court soon held that states could not "burn the house to roast the pig" by enacting obscenity laws which reduced the adult population to reading only what was fit for children because of the material's supposed effect on minors.²⁶ In dicta, the Court implied that a statute "reasonably restricted to the evil with which it is said to deal" would be constitutional.²⁷

In *Jacobellis v. Ohio*,²⁸ the manager of a motion picture theater was convicted of possessing and exhibiting an allegedly obscene French film, "Les Amants" ("The Lovers").²⁹ In reversing the conviction, Justice Brennan called for state and local authorities to consider enacting "laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination."³⁰ This statement implied the Court was ready to approve the use of "variable obscenity"³¹ in state regulation of obscene materials.

material taken as a whole appeals to prurient interest." *Id.* The decision involved a review of the federal conviction of a New York businessman who mailed obscene materials. *Id.* at 480. After examining the history of the first amendment, the Court assumed that obscene materials were "utterly without redeeming social importance." *Id.* at 484. The Court declared that obscenity is not constitutionally protected speech. *Id.* at 485.

24. *Id.* at 489.

25. SCHAUER, *supra* note 17, at 87.

26. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

27. *Id.* The Court reversed *Butler*'s conviction because he had not been prosecuted under another statute that Michigan had "specifically designed to protect its children against obscene matter." The Court published the statute with the decision, seemingly approving of its language.

28. 378 U.S. 184 (1963).

29. *Id.* at 185-86. The film told the story of "a woman bored with her life and marriage who abandons her husband and family for a young archaeologist with whom she has suddenly fallen in love. There is an explicit love scene in the last reel of the film" *Id.* at 195-96.

30. *Id.* at 195 (footnote omitted).

31. Under the concept of variable obscenity:

[M]aterial is judged by its appeal to and effect upon the audience to which the material is primarily directed. In this view, material is never inherently obscene; instead, its obscenity varies with the circumstances of its dissemination. Material may be obscene when directed to one class of persons, but not when directed to another

William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 77 (1960).

The Court added a new wrinkle to its obscenity doctrine in 1966 when a plurality of the Court incorporated the “utterly without redeeming social value” assumption of *Roth* into the constitutional test for obscenity.³² Then, in 1968, the Court finally confirmed its implicit approval of a variable obscenity approach for minors. The case was *Ginsberg v. New York*.³³

B. THE MODERN FORMULATION

In *Ginsberg*, Sam Ginsberg violated a New York statute by selling two ‘girlie’ magazines to a 16-year-old boy.³⁴ The Court addressed the issue of whether the state could constitutionally prohibit the sale to minors of “material defined to be obscene on the basis of its appeal to [minors] whether or not it would be obscene to adults.”³⁵ The Court stated:

We do not regard New York’s regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors’ constitutionally protected freedoms. Rather [the New York statute] simply *adjusts the definition of obscenity* ‘to social realities by permitting the appeal of this type of material to be assessed in term[s] of the sexual interests . . .’ of such minors.³⁶

The New York statute at issue in *Ginsberg* was found ra-

32. A Book Named “John Cleland’s *Memoirs of a Woman of Pleasure*” v. Massachusetts, 383 U.S. 413, 419 (1966) (plurality opinion). Under the *Memoirs* test, material was obscene if: “(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.” *Id.*

33. 390 U.S. 629 (1968).

34. *Id.* at 631.

35. *Id.* The facts of *Ginsberg* presented an almost perfect case for the Court to present its variable obscenity doctrine. Since the magazines in *Ginsberg* had previously been held not obscene for adults (*Gent v. Arkansas*, 386 U.S. 767 (1967)), the issue of whether they could still be constitutionally kept from children was perfectly formulated. SCHAUER, *supra* note 17, at 88 (citing *Ginsberg*, 390 U.S. at 634).

36. *Id.* at 638 (emphasis added).

The *Ginsberg* Court reasoned that states clearly have the power to adjust the constitutional definition of obscenity for children since state power to control the conduct of children exceeds the scope of state control over adults. *Ginsberg*, 390 U.S. at 638 (citing *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

tionally related to its stated objective of safeguarding minors from the effects of harmful materials.³⁷ Under the *Ginsberg* analysis, if statutorily condemned materials are sold to minors, an assessment of the materials' appeal to minors can replace the "average person" in the obscenity test for adults.³⁸

Ginsberg's variable obscenity approach allows states to restrict the rights of minors "to judge and determine for themselves what sex material they may read or see."³⁹ While such materials may not be obscene for adults,⁴⁰ variable obscenity statutes do not invade "the area of freedom of expression constitutionally secured to minors."⁴¹

III. OBSCENITY AND MUSIC

Courts have been considering the problem of obscene recorded music since at least the 1940's. In *People v. Jaffe*,⁴² the

37. *Id.* at 643.

38. SCHAUER, *supra* note 17 at 89.

39. *Ginsberg*, 390 U.S. at 637.

40. *Miller v. California*, 413 U.S. 15 (1973), modified the obscenity standards for materials exposed to adults. *Miller* spelled out the basic guidelines for the trier of fact in an obscenity case:

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

Id. at 24.

Miller did not expressly alter *Ginsberg's* variable obscenity approach for minors. Justice Powell later observed that the Court has "not had occasion to decide what effect *Miller* [had] on the *Ginsberg* formulation." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 n.10 (1975).

41. *Ginsberg*, 390 U.S. at 637.

Subsequent decisions continue to recognize the broader power of states to regulate otherwise free expression if such regulations serves a state's "interest in the well-being of its youth." *Id.* at 640. See *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978) (holding that the Government's interest in the well-being of its youth justifies special treatment of indecent (not obscene) broadcasting received by adults as well as children); *New York v. Ferber*, 458 U.S. 747 (1982) (holding that child pornography is not entitled to protection under the first amendment); *Sable Communications, Inc. v. F.C.C.*, 492 U.S. 115 (1989) (invalidating a total ban on adult access to indecent telephone messages, but recognizing that a narrowly tailored statute, restricting access through certain means, would be a constitutional way of protecting minors).

42. 35 N.Y.S.2d 104 (N.Y. City Magis. Ct. 1942).

defendant was charged with selling "obscene, lewd, lascivious and indecent phonograph records."⁴³ Although the defense argued the recordings were "comedy . . . not lechery,"⁴⁴ the City Magistrate was sure the lyrics used in the songs had a "double meaning" and were really about sex and acts of degeneracy.⁴⁵ Convinced that the phonograph discs were "intended for an indecent and immoral use or purpose,"⁴⁶ the magistrate denied the defendant's motion to dismiss the complaint.⁴⁷

In the 1960's, a federal court of appeals objected to double meanings on the advertising labels of two "party records" mailed by Joe Davis.⁴⁸ On affirming Davis' conviction, the court commented that, "despite the feeble attempt at double-entendre humor on the mailing label, the sole intended meaning of the label is obvious and far exceeds the permissible level of candor."⁴⁹ The court held that "[e]ach record jacket and record 'taken as a whole' makes abundantly clear the meaning and content of the recording."⁵⁰

On appeal to the U.S. Supreme Court, Davis' petition for writ of certiorari was denied.⁵¹ He may have felt some vindication, however, because, according to Justice Stewart's sarcastic dissent, "[o]ne of the records consists almost entirely of the sounds of percussion instruments. Its title, 'Erotica,' is a gross misnomer. The second record is a transcription of passages from 'Songs of Bilitis,' a book of poems published by Pierre Louys in

43. *Jaffe*, 35 N.Y.S.2d at 105.

44. *Id.* at 106.

45. *Id.* at 105.

46. *Id.*

47. *Id.* at 107. The magistrate admitted his interpretation of the meanings of the song lyrics was influenced by advertising matter which accompanied the recordings. *Id.* at 105. The phonograph discs were described in the ads as "real life-lustful, earthy" and as containing "very naughty songs with full G string dance orchestras." Additional advertising materials bore such statements as "he sings these naughty, naughty songs with a wink, a grin, and a laugh in each note" and "these song records are wicked, witty, naughty but nice." Another advertisement promised "naughty, sophisticated, spicy records with plenty of oomph." The recordings also came with "pictures of scantily attired women in various poses, a bed scene, a description of the various phonograph records and their names."

48. *U.S. v. Davis*, 353 F.2d 614 (2d Cir. 1965).

49. *Id.* at 615.

50. *Id.*

51. 384 U.S. 953 (1966) (Stewart, J., dissenting from denial of cert.).

1894.”⁵²

Although rock music withstood some attacks in its infancy,⁵³ it was the 1985 high-profile message of the Parents Music Resource Center that alerted many Americans to the content of current rock and pop music lyrics.⁵⁴ The PMRC took issue with the “dirty lyrics” that pervaded many of the current rock and pop songs.⁵⁵ Under the leadership of Tipper Gore and other “Washington Wives,” the PMRC’s campaign led to hearings before a Congressional committee⁵⁶ and an eventual compromise with the music industry.⁵⁷

52. *Id.* The works of Monsieur Louys are said to “have inspired several musicians, among whom the most notable is Claude Debussy” Justice Stewart added that if the records were not obscene, the convictions on the advertising counts could not stand. *Id.* at n.1.

53. The birth of rock n’ roll in the 1950’s spawned many censorship attempts. See Trent Hill, *The Enemy Within: Censorship in Rock Music in the 1950’s*, 90 S. ATLANTIC Q. 675 (1991). For a discussion of other attacks on rock music, see Seth Goodchild, *Twisted Sister, Washington Wives and the First Amendment: The Movement to Clamp Down on Music*, 3 ENT. & SPORTS L.J. 131, 132-34 (1986).

54. Robert Love, *Furor Over Rock Lyrics Intensifies*, ROLLING STONE, Sept. 12 1985, at 13. The PMRC pressured the recording industry to voluntarily place a rating on all records, tapes, and videos: an ‘X’ for sexually explicit or profane lyrics; a ‘D/A’ for those lyrics advocating drug or alcohol abuse; an ‘O’ for lyrics with occult references; and a ‘V’ for lyrics glorifying violence. *Id.* At the time, Tipper Gore insisted, “We’re not censors,” explaining that the group wanted a “tool from the industry that is peddling this stuff to children.” *Id.* at 14.

The PMRC’s “filthy fifteen,” a list of songs with objectionable lyrics, included tracks by Madonna, Judas Priest, Prince, Def Leppard, Cyndi Lauper, and Sheena Easton. *Id.* at 13.

55. *Next: R-Rated Record Albums*, NEWSWEEK, Aug. 26, 1985, at 69.

One song with “dirty lyrics” that the PMRC objected to was *Darling Nikki* by Prince and the New Power Generation:

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

PRINCE AND THE NEW POWER GENERATION, *Darling Nikki*, on MUSIC FROM THE MOTION PICTURE PURPLE RAIN (Warner Bros. Records 1984).

56. Attention from the media, and probably the influence of the PMRC’s “Washington Wives” membership, caused the United States Senate Committee on Commerce, Science and Transportation to hold a hearing about the record rating controversy on September 19, 1985. See generally, *Record Labeling: Hearing Before the Senate Comm. on Commerce, Science, and Transp.*, 99th Cong., 1st Sess. (1985).

57. No federal labelling bills were introduced after the 1985 Senate hearing. A compromise was soon reached between the PMRC and the Recording Industry Association of America (RIAA). The RIAA, representing 22 major recording companies, agreed to voluntarily place a warning label on new albums to help parents identify potentially objectionable albums. *Warning: ‘Love’ for Sale*, NEWSWEEK, Nov. 11, 1985, at 39.

Problems with the uniformity of the voluntary industry labelling system caused

The 1989 release of *As Nasty As They Wanna Be*, a rap album by 2 Live Crew, ended up in a federal district court for a determination of whether the recording was constitutionally obscene.⁵⁸ The court noted that it would be difficult to find that mere sound without lyrics is obscene, but stressed that the focus of the *Nasty* recording is its lyrics, not its accentuating strong beat.⁵⁹ After rejecting expert testimony on the social, political, and artistic value of *Nasty*,⁶⁰ the district court held the recording was obscene.⁶¹

This ruling was appealed to the 11th Circuit Court of Appeals.⁶² The court held that Sheriff Navarro failed to carry his burden of proving, even by a preponderance of the evidence, that *Nasty* was obscene.⁶³ Aside from a cassette tape of *Nasty*, no evidence was entered at trial to contradict testimony by 2 Live Crew's experts that the recording had artistic value.⁶⁴ The court rejected the argument of Sheriff Navarro "that simply by listening to this musical work, the judge could determine that it

state legislators to introduce numerous bills. By 1990, no less than 19 mandatory labeling bills were pending in state legislatures. In response, the RIAA adopted a uniformly sized and positioned (but still voluntary) label. The black-and-white label was to read "PARENTAL ADVISORY - EXPLICIT LYRICS." Greg Kot, *Record Label Will Warn of Offensive Lyrics*, CHI. TRIB., May 10, 1990, at 1C.

The PMRC stated that it opposed mandatory labelling bills and helped convince legislators to drop their bills after the RIAA developed its generic warning label. Richard Harrington, *Is Tipper Changing Her Tune?*, WASH. POST, July 22, 1992, at G7; Sally Nevius et al., *PMRC: Censorship is Not the Goal*, BILLBOARD, Oct. 11, 1986, at 13.

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

By 1990, sales of the album totalled 1.7 million copies. Complaints from South Florida residents over the explicit sexual lyrics, however, had reached the Sheriff's office of Broward County, Florida. An investigation of the *Nasty* recording began. *Skywalker Records*, 739 F. Supp. at 582.

59. *Id.* at 591. "The evident goal of this particular recording is to reproduce the sexual act through musical lyrics. It is an appeal directed to 'dirty' thoughts and the loins, not to the intellect and the mind." *Id.*

60. *Id.* at 594-95.

61. *Id.* at 596.

The court examined *Nasty* under the adult standard for obscenity set out by the Supreme Court in *Miller v. California*, see *supra* note 40.

For a critique of *Skywalker Records* and sample 2 Live Crew lyrics, see Emily Campbell, Article, *Obscenity, Music and the First Amendment: Was the Crew 2 Lively?*, 15 NOVA L. REV. 159 (1991).

62. *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992). This was apparently the first time a court of appeals had been asked to apply the *Miller* test to a musical composition containing both instrumental music and lyrics. *Luke Records*, 960 F.2d at 135.

63. *Id.* at 136.

64. *Id.* at 137.

had no serious artistic value.”⁶⁵ Expert testimony is required, since a reviewing court cannot “assume the fact finder’s artistic or literary knowledge or skills to satisfy the last prong of the *Miller* analysis”⁶⁶

While 2 Live Crew’s journey through the federal courts eventually ended,⁶⁷ controversial music appears increasingly in the headlines. *Cop Killer*, a song by Ice-T’s metal band Body Count, outraged police organizations by allegedly encouraging the public to retaliate against incidents of police brutality by killing police officers.⁶⁸ Many of these organizations called for a boycott of Time Warner, parent company of Sire Records, Ice-T’s record label.⁶⁹ The company initially refused to pull the album from the market, insisting that the music was constitutionally protected.⁷⁰ Ice-T, citing bomb threats against executives of Time-Warner, finally announced that the controversial song would be left off future copies of the album.⁷¹

Ice-T’s announcement may have calmed the protesters, but

65. *Id.* at 139.

66. *Id.* at 138.

The last prong of the *Miller* test for obscenity requires the determination of whether a work “lacks serious, artistic, scientific, literary or political value.” *Miller*, 413 U.S. at 24.

67. Sheriff Navarro’s petition for a writ of certiorari to the U.S. Supreme Court was denied. *Navarro v. Luke Records, Inc.*, 113 S.Ct. 659 (1992).

68. In the introduction to *Cop Killer*, Ice-T dedicated the song to the L.A.P.D. and went on to say:

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.

BODY COUNT, *Out in the Parking Lot*, on BODY COUNT (Sire Records 1992).

One lyric from *Cop Killer* goes:

I got this long-assed knife, and your neck looks just right.
My adrenaline’s pumpin’. I got my stereo bumpin’.
I’m about to kill me somethin’. A pig stopped me for nuthin’.
DIE, DIE, DIE PIG, DIE! FUCK THE POLICE!

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

69. Sally B. Donnelly, *The Fire Around the Ice*, TIME, June 22, 1992, at 66.

70. Kathryn Harris, *Time Warner Refuses to Pull Rap Album*, L.A. TIMES, July 17, 1992, at D2.

71. John Leland et al., *The Iceman Concedeth*, NEWSWEEK, Aug. 10, 1992, at 50. Ice-T said that he would still give a copy of the song away free at Body Count’s live shows. *‘Cop Killer’ Album Getting Hard to Find*, SAN JOSE MERCURY, Aug. 1, 1992, at 3D.

it did not stop prosecutors in Washington County, Virginia, from charging a music retailer with violating the state's "harmful to juveniles" statute⁷² for selling the *Body Count* album to a local child.⁷³ A grand jury refused to indict the retailer, however, when it was shown the album had not been in stock at the claimed time of purchase.⁷⁴

IV. THE WASHINGTON "EROTIC LYRICS" AMENDMENT

A 1992 amendment of Washington State's "erotic materials" statute⁷⁵ marked a new chapter in the struggle to regulate popular music.⁷⁶ Instead of a record labelling law, Washington legislators targeted the sale of popular music to minors by amending an existing statute to include the phrase "sound recordings."⁷⁷

Under the amended statute, prosecutors could bring a sus-

72. VA. CODE ANN. § 18.2-391(a)(2) (Michie 1992). This statute maintains that:

It shall be unlawful for any person knowingly to sell, rent or loan to a juvenile, or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse . . . [a]ny book, pamphlet, magazine, printed matter however reproduced, or *sound recording* which contains . . . explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is *harmful to juveniles*.

Id. (emphasis added).

73. Richard Harrington, *Labeling Law Struck Down*, WASH. POST, Nov. 4, 1992, at C7.

74. *Id.*

75. The Washington statute used the phrase "erotic" rather than "harmful to minors" to describe materials that can be regulated as to minors but not necessarily as to adults. See WASH. REV. CODE ANN. §§ 9.68.050-.070 .090 (West 1992). The amendment went into effect on June 11, 1992. H.B. 2554, 52d Leg., Reg. Sess., 1992 Wash. Legis. Serv. 5 (West).

The statute was originally enacted in 1969 to "regulate the sale of erotic material to minors." *State v. White*, 538 P.2d 1235, 1236 (Wash. Ct. App. 1975).

76. The amendment provoked immediate controversy among music fans, the music industry and civil libertarians. Richard Harrington, *Lewd Lyrics, Redux; Washington State Nears Sales Restriction*, WASH. POST, Mar. 11, 1992, at B7; Kevin Drew, *Washington State Targets 'Obscene' Lyrics*, CHRISTIAN SCI. MONITOR, Mar. 24, 1992, at 11.

77. U.S. copyright law defines "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." 17 U.S.C.A. § 101 (West 1992).

The Washington amendment did not define the term "sound recording."

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pect sound recording before a judge to determine if it was "erotic."⁷⁸ Pursuant to the statute, a sound recording would be ruled "erotic" if "[its] dominant theme . . . taken as a whole appeals to the prurient interest of minors in sex; . . . is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sadomasochistic abuse; and is utterly without redeeming social value."⁷⁹

Once a judge ruled that a sound recording was "erotic," the law required that an "adults only" label be affixed to all copies of the recording in Washington State.⁸⁰ Thereafter, any retailer⁸¹ in the state of Washington who sold, distributed, or exhibited the "erotic" recording to a minor would be in violation of the statute.⁸²

78. WASH. REV. CODE ANN. § 9.68.060(1) (West 1992):

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

Id.

79. *Id.* § 9.68.050(2). This section was part of the original 1969 statute and modified the *Memoirs* obscenity test, *Memoirs*, 383 U.S. at 418, to define materials "erotic" as to minors.

In one of the few published cases about the original Washington statute, *City of Tacoma v. Naubert*, 491 P.2d 652 (Wash. Ct. App. 1971), the parties conceded that the statute complied with the constitutional requirements of *Ginsberg. Naubert*, 491 P.2d at 653.

80. WASH. REV. CODE ANN. § 9.68.060(3)(a) (West 1992). The statute did not mandate that it was to be the music retailers who would affix all the "adults only" labels to "erotic" recordings, but it seems that is what the legislature contemplated.

81. The Washington statute imposes duties on "dealers, distributors, and exhibitors," meaning persons engaged in the distribution, sale, or exhibition of . . . sound recordings. *Id.* § 9.68.050(4). The term "retailer" will be used in this Comment to refer to the affected class of "dealers, distributors, and exhibitors."

82. *Id.* § 9.68.060(d).

Penalties for violating the statute included: a fine of up to five hundred dollars or up to six months in the county jail for the first offense. *Id.* § 9.68.060(3)(d)(i); a fine of up to one thousand dollars or up to one year in the county jail for the second offense. *Id.* § 9.68.060(3)(d)(ii); or a maximum fine of five thousand dollars or at least one year in the county jail for more than two offenses. *Id.* § 9.68.060(3)(d)(iii).

A retailer could defend a violation of the statute by showing that, at the time the erotic sound recording was purchased: the minor was accompanied by a parent, guardian or parent's spouse. *Id.* § 9.68.070(1); a person accompanying the minor represented themselves as the minor's parent, guardian or parent's spouse. *Id.* § 9.68.070(3); or, the minor presented a document which showed them to be over eighteen. *Id.* § 9.68.070(2).

A. PURPOSE OF THE WASHINGTON AMENDMENT

The Governor of Washington called the amendment “a warning shot” to alert the music industry that it was time to keep its promise to regulate itself.⁸³ Even the sponsor of the amendment did not contemplate that many music albums would be ruled “erotic,” and instead hoped that music retailers would voluntarily censor themselves by physically segregating objectionable recordings into “Adults Only” sections.⁸⁴ Retailers stopped selling objectionable videos, magazines, and books to minors after the original statute went into effect,⁸⁵ and supporters of the amendment anticipated similar behavior by music retailers.⁸⁶

B. PROBLEMS WITH THE WASHINGTON LAW

When the “erotic lyrics” amendment took effect, a facial challenge was announced by the American Civil Liberties Union, music industry groups, and Seattle-based artists such as Soundgarden, Sir Mix-a-Lot, Nirvana, and Pearl Jam.⁸⁷ In November 1992, the state was permanently enjoined from enforcing the statute.⁸⁸

The state court took issue with a number of infirmities in the Washington statute. The court first held that the statute’s vagueness violated the due process rights of the persons affected by it.⁸⁹ Since the statute contained no provision to notify retailers that a sound recording had been declared “erotic,” retailers

83. Richard Harrington, *Seattle's Ban on Erotic Discs*, WASH. POST, Apr. 1, 1992, at C7.

84. Telephone Interview with Richard King, Washington State Representative, (Sept. 18, 1992).

85. *Id.*

86. *Id.*

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

88. *Soundgarden*, *supra* note 8, at 6.

89. *Id.* “A vagueness challenge seeks to vindicate two principles of due process: The need to define prohibited conduct with sufficient specificity to put citizens on notice of what conduct they must avoid; and the need to prevent arbitrary and discriminatory law enforcement.” Verbatim Report of Proceedings of the Oral Ruling Before the Honorable Mary W. Brucker, *Soundgarden v. Eikenberry*, No. 92-2-14258-9, at 5 (Wash. Super. Ct., King County, Oct. 29, 1992) (on file with author).

would not know that selling a particular sound recording to a minor would violate the law.⁹⁰ This deficiency created the probability that retailers would censor the sale of protected, non-erotic music to avoid criminal prosecution for unknowingly violating the law.⁹¹ Such self-censorship deprives willing listeners of the right to hear protected speech, a violation of the First Amendment to the U.S. Constitution, as well as Article 1, Section 5 of the Washington Constitution.⁹²

The court also held the statute set up an impermissible prior restraint.⁹³ The law imposed certain restraints on sound recordings determined to be "erotic" for minors.⁹⁴ Because "erotic" did not mean "obscene," however, the court found that these "erotic" sound recordings might be protected speech for adults.⁹⁵ Under Washington law, only speech that is not constitutionally protected is subject to prior restraint.⁹⁶ The statute's requirements for retailing erotic materials constituted a prior restraint of speech protected as to adults.⁹⁷

Finally, the court found that the determination of whether some material is "erotic" should be a question decided by a jury.⁹⁸ The statute merely provided for a hearing before a superior court; no jury would consider the question.⁹⁹ Nor would a jury reconsider the "erotic" determination at any subsequent criminal prosecution against a retailer.¹⁰⁰ Under the statute, the determination that some material is "erotic" was not even considered an element of the crime of selling "erotic" materials to minors.¹⁰¹ For these reasons the court held that the statute denied a charged defendant the constitutional right to a jury trial.¹⁰²

90. *Soundgarden*, *supra* note 8, at 6.

91. *Id.*

92. *Id.* at 6-7. "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." WASH. CONST. art. 1, § 5.

93. *Soundgarden*, *supra* note 8, at 7.

94. *Id.*

95. *Id.*

96. *State v. Coe*, 679 P.2d 353, 360 (Wash. 1984).

97. *Soundgarden*, *supra* note 8, at 7.

98. *Id.* at 7.

99. *Id.* at 7-8. See WASH. REV. CODE ANN. § 9.68.060 (West 1992).

100. *Soundgarden*, *supra* note 8, at 8.

101. *Id.*

102. *Id.* A criminal defendant has a constitutional right to a trial by jury. U.S.

V. SOUND RECORDINGS AND "HARMFUL TO MINORS" STATUTES

Provisions regulating the sale and display of sound recordings to minors are included in the "harmful to minors" statutes of many states.¹⁰³ This section examines some of these provisions.

A. SALES PROVISIONS

A typical example of a state law which proscribes the sale of harmful sound recordings to minors is this Pennsylvania statute:

No person shall *knowingly* disseminate by sale, loan or otherwise explicit sexual materials to a minor. "Explicit sexual materials" . . . means . . . any book, pamphlet, magazine, printed matter however reproduced, or *sound recording* which contains . . . explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is *harmful to minors*.¹⁰⁴

Pennsylvania and the other states that proscribe the sale of harmful sound recordings to minors¹⁰⁵ follow the statutory language found constitutional in *Ginsberg v. New York*.¹⁰⁶ Wash-

CONST. amend. VI; WASH. CONST. art. I, § 22.

103. See ARK. CODE ANN. § 5-68-502(a)(2) (Michie 1987); COLO. REV. STAT. ANN. 18-7-502(1)(b) (West 1992); DEL. CODE ANN. tit. 11, § 1365(i)(1) (1991); FLA. STAT. ANN. § 847.012(2)(b) (West 1992); GA. CODE ANN. § 16-12-103(a)(2) (Michie 1992); IDAHO CODE § 18-1515(1)(b) (1992); MINN. STAT. ANN. § 617.293(1)(b) (West 1992); NEB. REV. STAT. § 28-808(1)(b) (1991); NEV. REV. STAT. ANN. § 201.265.2 (Michie 1991); N.H. REV. STAT. ANN. § 571-B:2.I(b) (1991); N.M. STAT. ANN. § 30-37-2(B) (Michie 1992); N.Y. PENAL LAW § 235.21(1)(b) (McKinney 1992); 18 PA. CONS. STAT. ANN. § 5903(c)(2) (1992); TENN. CODE ANN. § 39-17-911(a)(2) (1992); VT. STAT. ANN. tit. 13, § 2802(a)(2) (1991); VA. CODE ANN. § 18.2-391(a)(2) (Michie 1992); WIS. STAT. ANN. § 948.11(1)(a)(2) (West 1990).

104. 18 PA. CONS. STAT. ANN. § 5903(c)(2) (1992) (emphasis added).

105. See *supra* note 103.

106. 390 U.S. 629 (1968). The statute at issue in *Ginsberg* defined "harmful to minors" as:

[T]hat quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it: predominantly appeals to the prurient, shameful or morbid interest of minors, and is pa-

ington departed from the *Ginsberg* formulation by not requiring a retailer to *know* that a particular sound recording was "harmful to minors." By avoiding the problem of proving *scienter*¹⁰⁷ on the part of the retailer, the Washington legislators contemplated that a judge would determine the harmful nature of the material¹⁰⁸ and "adults only" labels would be placed on the materials found to be "erotic."¹⁰⁹ Any copies of the erotic material subsequently sold to a minor would be a violation of the statute.¹¹⁰ No complicated knowledge inquiry was required; the violating retailer would simply be "guilty of violating [Washington Revised Code] §§ 9.68.050 through 9.68.120."¹¹¹

Other state laws followed *Ginsberg* by including a scienter requirement.¹¹² These statutes are not violated unless the person providing¹¹³ the sound recording to the minor had *knowledge* that it was "harmful to minors." The constitutional problem with statutes that don't require scienter is that persons affected

tently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and is utterly without redeeming social importance for minors.

Id. at 646. This language was modified after *Miller v. California*. The current version of the statute is N.Y. PENAL LAW § 235.20(6) (McKinney 1992). A different section of the statute in *Ginsberg* stated:

It shall be unlawful for any person *knowingly* to sell or loan for monetary consideration to a minor . . . any book, pamphlet, magazine, printed matter however reproduced, or *sound recording* which contains . . . explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sado-masochistic abuse and which, taken as a whole, is *harmful to minors*.

Id. at 647 (emphasis added). The current version of this statute is N.Y. PENAL LAW § 235.21(1)(b) (McKinney 1992).

107. The scienter requirement in Pennsylvania's statute defines "knowing" as, "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any material or performance described therein which is reasonably susceptible of examination by the defendant." 18 PA. CONS. STAT. ANN. § 5903(b) (1992).

108. WASH. REV. CODE ANN. § 9.68.060(2) (West 1992).

109. *Id.* § 9.68.060(3)(a).

110. *Id.* § 9.68.060(3)(d).

111. *Id.*

112. *See supra* note 103.

113. Statutory language varies in the ways a person can provide a minor with harmful materials. Delaware's statute is more expansive than most. It states that, "[a]ny person . . . who . . . [e]xhibits for sale, sells, displays, transfers, gives gratis, loans, rents or advertises" harmful materials to minors has violated the statute. DEL. CODE ANN. tit. 11, § 1365(i)(1) (1991).

by the statute must somehow be notified as to which materials are considered "harmful to" or "erotic" for minors.¹¹⁴ As already discussed, this deficiency in Washington's statute was one reason the statute was found unconstitutional.¹¹⁵

B. DISPLAY PROVISIONS

"Harmful to minors" laws sometimes include a provision which also make it a crime to "display" harmful materials to minors.¹¹⁶ There has been some controversy and litigation over these display provisions in jurisdictions besides Washington.¹¹⁷ The display provision in Georgia's "harmful to minors"¹¹⁸ statute was considered by a federal district court¹¹⁹ upon a facial challenge by "various associations of booksellers, publishers, pe-

114. "The constitutional requirement of *scienter*, in the sense of knowledge of the contents of material, rests on the necessity 'to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity . . .'" *Ginsberg*, 390 U.S. at 644.

115. See *supra* notes 87-102 and accompanying text.

116. The display provision in Washington's failed law stated, "[a]ll dealers and distributors are hereby prohibited from displaying erotic publications or sound recordings in their store windows, on outside newsstands on public thoroughfares, or in any other manner so as to make an erotic publication or the contents of an erotic sound recording readily accessible to minors." WASH. REV. CODE ANN. § 9.68.060(3)(a) (West 1992).

117. Some courts have held such provisions overbroad because they infringe on the first amendment rights of adults. See *American Booksellers Ass'n v. Virginia*, 792 F.2d 1261 (4th Cir. 1986), *aff'g*, 617 F.Supp. 699 (E.D. Va. 1985); *Rushia v. Town of Ashburnham*, 582 F.Supp. 900 (D. Mass. 1983); *American Booksellers Ass'n v. McAuliffe*, 533 F.Supp. 50 (N.D. Ga. 1981); *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985). Other courts hold that display provisions impose only an incidental burden on protected speech and are valid time, place, and manner restrictions. *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985), *aff'g*, 602 F.Supp. 1361 (D. Minn. 1985); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983); *American Booksellers Ass'n v. Rendell*, 481 A.2d 919 (Pa. Super. Ct. 1984).

118. Georgia law defines "harmful to minors" as:

[T]hat quality of description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(A) Taken as a whole, predominantly appeals to the prurient, shameful, or morbid interest of minors;

(B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(C) Is, when taken as a whole, lacking in serious literary, artistic, political, or scientific value for minors.

GA. CODE ANN. § 16-12-102(1)(A)-(C) (Michie 1992).

119. *American Booksellers Ass'n v. Webb*, 643 F.Supp. 1546 (N.D. Ga. 1986).

riodical distributors, college stores, retailers, two bookstores, and an author."¹²⁰ The provision at issue stated:

It shall be unlawful for any person knowingly to exhibit, expose, or display in public at newsstands or any other business or commercial establishment or at any other public place frequented by minors or where minors are or may be invited as part of the general public [any materials harmful to minors]¹²¹

The district court held this provision violated the First Amendment by unduly hampering adult access to protected expression.¹²² The court found the provision would cause a "major disruption in the business of bookselling"¹²³ and would "drastically reduce adults' selection of reading material."¹²⁴ The court also found that booksellers would face practical difficulties in complying with the terms of the law.¹²⁵ The court concluded

120. *Id.* at 1547 n.1.

121. GA. CODE ANN. § 16-12-103(e) (Michie 1992).

122. *Webb*, 643 F.Supp. at 1553. The display provision in Georgia's "harmful to minors" law "directly affects access to materials that, although classified as harmful to minors, are protected speech as to adults." *Id.* at 1552. The law "draws into conflict the First Amendment rights of adults and the state's power to supervise the moral development of its youth."

123. *Id.* at 1550. Evidence at trial indicated that "in-store display of books is the cornerstone of the book industry's marketing practices." *Id.* at 1549. Since few books are advertised, most sales are "impulsive selections prompted by a display." *Id.* Without prominent display, a book is unlikely to sell many copies.

124. *Id.* at 1550. Georgia's law would "prohibit the display of a significant percentage of adult reading material." *Id.* The Court noted that such works as *The White Hotel* by D.M. Thomas and *Lady Chatterley's Lover* by D.H. Lawrence, which hold obvious literary value for adults, could not be displayed in a bookstore under the Georgia law because they contain passages of graphic sexual encounters whose literary value are beyond the comprehension of most minors. *Id.* Scientific texts on such a subject as human sexuality, with illustrations and discussions of sexual matters, could not be displayed to minors. *Id.* These books would arouse the prurient interests of many minors, especially the very young. *Id.* They also do not meet "the prevailing community standard with respect to what is suitable reading for most minors." *Id.*

125. *Id.* Aside from the 500,000 books in print at any given time, most of the 50,000 new books published each year are purchased by retailers based on a synopsis provided by a publisher's catalogue. *Id.* These descriptions do not give a retailer sufficient information to determine whether a book is covered by the display provision of Georgia's law. Retailers would be unable to predict the percentage of their incoming inventory that could be displayed. *Id.* Also, since books that cannot be displayed are unlikely to sell well, retailers would find it difficult to decide how many copies to order. *Id.* Many might not order books with suggestive covers or the works of authors known for sexually explicit prose. *Id.*

that the provision's overbreadth outweighed its valid applications.¹²⁶

On appeal, the U.S. Court of Appeals for the 11th Circuit was unconvinced by the district court's reasoning.¹²⁷ In reversing, the court of appeals found that the district court should have "determin[ed] the least burdensome compliance strategy actually mandated by [the statute] and then evaluat[ed] its constitutionality."¹²⁸ The court acknowledged that a regulation can be overly broad if it "indirectly produces an unnecessary or intolerable restriction on protected speech."¹²⁹ The burden on booksellers, however, was far less than the district court suggested because "only a minimal number of works will have serious value for reasonable adults but not for reasonable minors, including older minors"¹³⁰ Also, since booksellers must already screen books to comply with the ban on *sales* of "harmful" books to minors,¹³¹ the display ban will only requires a small increase in the necessary screening.¹³² Finally, the display provision only bans displays made "knowingly" to minors.¹³³

In the court's view, even unadvertised and passive placement of "harmful" materials entirely in open sight would violate the display provision.¹³⁴ Retailers could, however, comply with the provision by placing such material behind 'blinder racks' or shelves which cover at least the lower two-thirds of the material that would otherwise be exposed.¹³⁵ Placing the small amount of

126. *Id.* at 1553.

127. *American Booksellers Ass'n v. Webb*, 919 F.2d 1493 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 2237 (1991).

Before the court made its decision, it waited for the outcome of a U.S. Supreme Court appeal that was eventually remanded to the Fourth Circuit. *American Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1989). The final decision did not provide much guidance. The short opinion decided a vagueness issue, but did not analyze overbreadth or how retailers could comply with the display provisions. *Webb*, 919 F.2d at 1497, n.9.

128. *Webb* 919 F.2d at 1498.

129. *Id.* at 1505.

130. *Id.* at 1506.

131. GA. CODE ANN. § 16-12-103(a) (Michie 1992). The district court found that the burden on booksellers from this sales provision was constitutional under *Ginsberg v. New York*, see *supra* notes 32-38 and accompanying text.

132. *Webb*, 919 F.2d at 1506.

133. *Id.*

134. *Id.* at 1508.

135. *Id.* "Blinder racks do not 'exhibit, expose, or display in public' material subject to section 16-12-103(e) . . . they eliminate the ostentatious and open placement of the

material subject to the statute behind such coverings produces only a slight burden on adults' access to protected material.¹³⁶ Thus, Georgia's statute was a constitutional way for a state to regulate the display of "harmful" materials, including sound recordings,¹³⁷ to minors.

VI. CONCLUSION

Although seventeen states have classified sound recordings as potentially "harmful to minors," no reported state decisions have held that any sound recording is in fact *harmful*.¹³⁸ The remaining question in the debate over "dirty lyrics" is whether recorded music is harmful at all. Admittedly, the lyrics in rap, pop, rock, country, jazz, and all forms of musical composition are words conveying expressive content. Such words can be powerful. They can topple governments, incite violence, and destroy reputations. But they can also bring people together, cross cultural boundaries, and end conflict. In the "marketplace of ideas,"¹³⁹ words, including music lyrics are *speech* that our open society has placed on a pedestal and designated as *free*.

Variable obscenity laws have been around for years and retailers selling magazines, books, and videos to minors have learned to live with them. It is easy to say that retailers of music should get used to them as well. However, this "solution" merely adds music lyrics to the list of things society tries to blame its problems on. Fictional depictions of society's problems are not necessarily the cause of those problems. Music lyrics are no more worthy of the blame than television, comic books or bumper stickers. Although a child can turn on the TV and watch a bikini contest exploit women, society appears more concerned

materials."

136. *Id.* at 1509.

137. GA. CODE ANN. § 16-12-103(a)(2) (Michie 1992).

138. Estimates of the potential harm to children from music lyrics vary according to the expert consulted. The PMRC is convinced that the messages of rock music promote and glorify suicide, rape, and sadomasochism. On the other hand, an expert witness for CBS Records conducted studies showing that most children have no idea what the songs they listen to are about. Peter Alan Block, Note, *Modern-Day Sirens: Rock Lyrics and the First Amendment*, 63 S. CAL. L. REV. 777, 785-86 (1990).

139. *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

with a child buying a CD and listening to a rock band do the same thing. Ultimately, the barrage of sexual and violent images and ideas from television, video, and film renders comparable music lyrics less corrupting to children.

As recent efforts to curb lyrical expression continue and intensify, musicians, industry executives and retailers may begin to censor potentially objectionable music before it ever reaches an audience of adults or children. When record companies bow to pressure over the music of an established artist like Ice-T, how likely is it that they will risk negative publicity and legal problems for new rap artists and metal bands? Such bands will be scrutinized before signing recording deals and many gifted artists may go unheard by the public. Eddie Vedder, lead singer of Pearl Jam, summed it up this way: "The scary thing, is how in the future, things will be censored and you won't even know it."¹⁴⁰

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140. John Leland et al., *The Iceman Concedeth*, NEWSWEEK, Aug. 10, 1992, at 50, 51.

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