

5-1-2014

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## Recommended Citation

Bailey, Tameeka J., "Sex Is So Overrated: How Sexual Content Continues to Get a Bad Rap, While Violence Is All the Rage" (2014).  
*Law School Student Scholarship*. 436.  
[https://scholarship.shu.edu/student\\_scholarship/436](https://scholarship.shu.edu/student_scholarship/436)

**Sex Is So Overrated: How Sexual Content  
Continues to Get a Bad Rap, While Violence Is All the Rage**

by Tameeka J. Bailey

**I. Introduction**

A common phrase and sentiment that has been engrained in most households is that “parents know best.” “The parent is the first and most important teacher. No one can take [their] place.”<sup>1</sup> This idea is, more or less, universally believed by parents and rebelled against by many children, teens and young adults. However, a more accurate representation of where parent’s knowledge stems from would include the legal system and organizations that choose what is more easily accessible to children, and society as a whole.<sup>2</sup>

According to the Oxford Dictionary, art is “the expression or application of human creative skill and imagination . . . producing works to be appreciated primarily for their beauty or emotional power.”<sup>3</sup> Paintings and sculptures have always been considered art over the centuries; however, music, movies and literature have arguably surpassed these traditional forms of art, in popularity. With the growth in popularity of these latter forms of art, the public and private sectors have attempted to limit the exposure of art they deem to be inconsistent to family and community values.<sup>4</sup> “Censors now assume the guise of capitalist retailers and distributors, special-interest groups, and less influential but still passionate religious and government authorities.”<sup>5</sup>

The First Amendment allows for freedom of speech with few exceptions.<sup>6</sup> Obscenity, which deals purely with certain forms of sexual content, is a form of speech that is not given First Amendment protection.<sup>7</sup> Sexual content “appealing to prurient interest,” in all art forms, can be legally regulated.<sup>8</sup> However, there are no laws pertaining to the policing of violence in any form of art, which has been explicitly stated by Justice Scalia, “[a]rguing that ‘violence is not part of the obscenity that the Constitution permits to be regulated.’”<sup>9</sup> Given the private entities, such as the Motion Pictures Association of America (MPAA), the Record Industry Association of America (RIAA), and the Parents’ Music Resource Center (PMRC), among others, heavily influencing how art and entertainment is distributed to the American public, obscenity laws should no longer exist in allowing courts to construe when artistic value is outweighed by a community standard.

The first part of this paper addresses the history of obscenity laws, dealing with the “prurient interest” test stated in Roth v. California. The second part demonstrates how cases have been decided since the “prurient interest” test, which was later more clearly defined in Miller v. California. The third section compares the imbalanced approach the United States legal system uses when analyzing violence and sex in cases concerning controversial content. The fourth section examines what, and how, private entities regulate and rate different forms of art in the entertainment industry.

## **II. History of U.S. Obscenity Laws**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to the Government for a redress of grievances.<sup>10</sup>

-U.S. Constitution, 1<sup>st</sup> Amendment

In Roth v. U.S., Justice Brennan stated in the majority opinion that “it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance.”<sup>11</sup> Although, Roth was the first case where the Supreme Court squarely dealt with the issue of whether obscenity was protected under the right of freedom of speech, several cases in state courts had previously deemed that obscenity was not protected.<sup>12</sup> “As early as 1712, Massachusetts made it criminal to publish ‘any filthy, obscene, or profane song, pamphlet, libel or mock sermon’ in imitation or mimicking religious services.”<sup>13</sup>

Laws governing obscenity existed long before the United States became a nation, dating back to Plato’s *Republic*.<sup>14</sup> In 1815, the American founders’ puritan beliefs led to the first obscenity conviction, when three Pennsylvania men were arrested for privately showing “a lewd painting, representing a man in an obscene, impudent and indecent posture with a woman.”<sup>15</sup> The Pennsylvania Supreme Court reasoned that “[a] picture tends to excite lust, as strong as a writing,” and since, “[t]he courts are guardians of the public morals . . . an offence may be punishable, if in its nature and by its example, it tends to the corruption of morals.”<sup>16</sup> The Pennsylvania court based its decision on a 1727 London case, which convicted Edmund Curl of publishing “an indecent book” based on the premise that “[w]hat tended to corrupt society was held to be a breach of the peace and punishable by indictment.”<sup>17</sup> Six years later, Massachusetts “held John Cleland’s Memoirs of a Woman of Pleasure, popularly known as Fanny Hill, to be obscene.”<sup>18</sup>

The popular test for obscenity in American courts, prior to the current “prurient test,” derived from an 1868 English case, Regina v. Hicklin.<sup>19</sup> In Hicklin, the Lord Chief Justice stated that, “I think the test of obscenity is this, whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose

hands a publication of this sort may fall.”<sup>20</sup> Not until 1933 did the federal courts start to break away from Hicklin’s “corruptible minds” focus to a “reasonable person”; although, judges in prior cases had expressed disapproval of using the test to judge obscenity in works.<sup>21</sup> In U.S. v. One Book Called “Ulysses”, District Judge Woolsey stated:

It is only with the normal person that the law is concerned. Such a test . . . is the only proper test of obscenity in the case of a book like ‘Ulysses’ which is a sincere and serious attempt to devise a new literary method for the observation and description of mankind.<sup>22</sup>

Judge Woolsey also uses the courts definition of ‘obscene’ to go to the work “in its entirety,” as opposed to centering on specific excerpts.<sup>23</sup> This was later affirmed, and restated by the Second Circuit, by Circuit Judges, Augustus N. Hand and Learned Hand.<sup>24</sup>

Not until 1957 did the ‘prurient interest’ test, which is used in the United States court system today, replace the test for judging obscenity.<sup>25</sup> In the United States Supreme Court case Roth v. United States, the Court consolidated a California case and a New York case, both dealing with publication and selling of “obscene” material through the mail.<sup>26</sup> The California defendant was charged, and convicted, of having violated California’s obscenity law, as enacted in that state’s penal code.<sup>27</sup> In the majority opinion, Justice Brennan clarified that “obscenity is not within the area of constitutionally protected speech or press.”<sup>28</sup> Justice Brennan further defined what is considered obscene by stating that “sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.”<sup>29</sup> In Footnote 20 of the opinion, the Court uses the Webster’s Dictionary definition of ‘prurient,’ and defines ‘obscene material’ as “material having a tendency to excite lustful

thoughts.”<sup>30</sup> The Majority, also, rejected the Hicklin standard of judging obscene material on particular passages.<sup>31</sup>

The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community . . . The test in each case is the effect of the [works] considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. . . . The [works] must be judged as a whole, in their entire context . . . . by present-day standards of the community. [The jury] may ask [them]selves does it offend the common conscience of the community by present-day standards.<sup>32</sup>

The dissent in Roth by Justice Douglas and Justice Black feared that a “community conscience” standard of what is ‘obscene material’ was “too loose” and “too destructive of freedom of expression.”<sup>33</sup> Justice Douglas wrote, “[t]he First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence.”<sup>34</sup>

### **III. Post “Prurient Interest” Test**

Despite concerns of limiting freedom of speech, almost every state has enacted a statute in their penal code criminalizing the publication of “obscene material.” And since the judging of obscene material is based on a community standard of what is obscene, what is banned from one state might be viewed and purchased freely in another, due to varying community standards.<sup>35</sup>

As stated in the concurrence in Roth:

That there is a social problem presented by obscenity is attested by the expression of the legislatures of the forty-eight States as well as the Congress. . . . Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community reached.<sup>36</sup>

Since each state has its own obscenity law, the Supreme Court must decide whether the law is narrow enough to not infringe on the First Amendment’s guarantee of freedom of speech; followed by whether the work is “obscene” given the evidence and the law at question.<sup>37</sup>

In Jacobellis v. State of Ohio, the Supreme Court found that the Ohio obscenity criminal statute, and the guilty verdict of Jacobelli for showing the film, ‘The Lovers,’ in a movie theater he operated, was not appropriately tailored to be valid under the First Amendment and the “prurient interest” test.<sup>38</sup> The Court used the test set out in Roth – “whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole[,] appeals to prurient interest.”<sup>39</sup> ‘The Lovers,’ is about “a woman bored with her life and marriage,” who falls in love with another man.<sup>40</sup> The Court finds that “[t]here is one explicit love scene in the last reel of the film, and the State’s objections are based almost entirely upon that scene.”<sup>41</sup> In his opinion, Justice Brennan reaffirms Roth, however, he states that the community standard “of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding.”<sup>42</sup>

Although, majority of the Court agreed that ‘The Lovers’ was not obscene, and Ohio could not legally ban the movie or criminalize its exhibition, the reasoning of the judges differed.<sup>43</sup> Justice Black, with Justice Douglas concurring, did not believe that courts are in the position of censoring.<sup>44</sup> Using language from a previous case, Justice Black stated, “. . . this Court is about the most inappropriate Supreme Board of Censors that could be found.’ . . . the conviction of appellant or anyone else for exhibiting a motion picture abridges freedom of the press as safeguarded by the First Amendment, which is made obligatory on the States by the Fourteenth.”<sup>45</sup> Differing slightly from the other justices, Justice Stewart believed “. . . that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography.”<sup>46</sup> Justice Stewart did not define what he considered to fall into that category, but infamously wrote, “I know it when I see it . . . .”<sup>47</sup> Justice Goldberg agreed with Justice Brennan’s opinion, but wanted to assert that it is not appropriate to bring a criminal suit

against a person purely exhibiting obscene material, like the Ohio courts attempted, “for by any arguable standard the exhibitors of this motion picture may not be criminally prosecuted unless the exaggerated character of the advertising[,] rather than the obscenity of the film[,] is to be the constitutional criterion.”<sup>48</sup>

The dissenting justices would rather leave the difficult role of deciding what is considered obscene to the States, upholding Ohio’s ruling as long as there is evidence permitting so.<sup>49</sup> Both dissenting opinions mention the increasing amount of obscenity cases brought to the Court, with the Chief Justice acknowledging that obscenity cases “are coming to us in ever-increasing numbers . . . .”<sup>50</sup> The Chief Justice, with Justice Clark joining, endorsed following the Roth test and its “community standard” as defined as meaning a given locality, not a “national standard.”<sup>51</sup> Still, he noted that the test is flawed, stating “[f]or all the sound and fury that the Roth test has generated, it has not been unsound, and I believe that we should try to live with it – at least until a more satisfactory definition is evolved.”<sup>52</sup> The Chief Justice goes on to state his belief of the best way for the Court to handle obscenity cases:

I would commit the enforcement of this rule to the appropriate state and federal courts, and I would accept their judgment made pursuant to the Roth rule, limiting myself to a consideration only of whether there is sufficient evidence in the record upon which such a finding of obscenity could be made. . . . [P]rotection of society’s right to maintain its moral fiber and the effective administration of justice require that this Court not establish itself as an ultimate censor . . . .”<sup>53</sup>

Similarly, in Justice Harlan’s dissent, the justice agreed with the Chief Justice that, “[t]he more I see of these obscenity cases the more convinced I become that in permitting the States wide, but not federally unrestricted, scope in this field . . . lies the best promise for achieving a sensible accommodation between the public interest . . . and protection of genuine rights of free expression.”<sup>54</sup> However, Justice Harlan recommended that the States make the Roth test “one of rationality.”<sup>55</sup>

There is an innate difference upon which to judge potentially obscene material that is being exhibited to someone seeking to gain access to the work, and “a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials.”<sup>56</sup> In the facts of Miller v. California, Miller was a man who was criminally tried under the California Penal Code for knowingly mailing sexually explicit images to non-consenting residents, in violation of California’s criminal obscenity statute.<sup>57</sup> The Supreme Court acknowledges “that the States have legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.”<sup>58</sup> The Court determined that it must “define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment.”<sup>59</sup>

Justice Burger, writing the opinion of the Court, describes how the States are to identify “obscene material” by asserting that the works in question must depict sexual conduct “specifically defined by the applicable state law, as written or authoritatively construed. . . . which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious . . . value.”<sup>60</sup> The Court disagrees with Justice Brennan’s use, in Jacobelli, of a “national standard,” instead, upholding the lower courts’ instruction to trier of facts “to apply ‘contemporary community standards of the State of California.’”<sup>61</sup> Justice Burger clarifies that “[n]othing in the First Amendment requires that a jury must consider hypothetical and unascertainable ‘national standards’ when attempting to determine whether certain materials are obscene as a matter of fact.”<sup>62</sup> The test that the Court clarifies for the trier of fact contains three parts:

(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>63</sup>

In Miller, the majority reaffirms Roth, designates how and what the States can regulate under criminal obscenity statutes, and clarifies that the standard is a “contemporary community standard,” as opposed to a national standard.<sup>64</sup>

It should be noted that the decision in Miller was a 5-4 decision vacating and remanding the case to the lower courts to follow the Supreme Court’s instructions. In Jacobelli, the decision was 5-4, as well, with the majority finding that the Ohio courts were incorrect in their findings that the film, ‘The Lovers,’ was obscene. In Justice Douglas’ dissent in Miller, he distinguishes his reasoning for not finding obscenity by pointing out the inconsistent opinions of the Court in its past decisions, when faced with States’ obscenity laws and alleged “obscene material.”<sup>65</sup> The Justice recognizes that the decision in the current case “retreats from the earlier formulations of the constitutional test and undertakes new definitions. . . . The difficulty is that we do not deal with constitutional terms, since ‘obscenity’ is not mentioned in the Constitution or Bill of Rights.”<sup>66</sup> Given the inconsistent, and subjective, nature of what courts can consider obscene, Justice Douglas stipulates that “[o]bscenity cases . . . have no business being in the courts. If a constitutional amendment authorized censorship, the censor would probably be an administrative agency. . . I do not think we, the judges, were ever given the constitutional power to make definitions of obscenity.”<sup>67</sup>

#### **IV. Ratings and Regulations through Private Entities**

“[E]very generation rebels. Your parents didn’t understand The Who or Jimi Hendrix; you don’t like or understand much of your children’s music. . . . Most parents believe in monitoring

the music their children to. . . The Parental Advisory Label helps parents stay informed about their children’s music.”<sup>68</sup> The Recording Industry Association of America (RIAA) started placing Parental Advisory Labels (PAL) on records in 1985, when two organizations, the National Parental Association (National PTA) and Parental Music Resource Center (PMRC), put pressure on RIAA to start labeling “music releases containing explicit lyrics, including explicit depictions of violence and sex.”<sup>69</sup> The RIAA is the manufacturer and/or distributor of “approximately 85% of all legitimate recorded music produced and sold in the United States.”<sup>70</sup> The Board of Directors has members from each major record company, and a few smaller record companies.<sup>71</sup> Since the PAL system was enacted, most major record companies and artists have decided to “participate” in the system and follow the list of guidelines and requirements, which includes, but is not limited to: clearly labeling on the cover of the product whether the sound recording has PAL content, recommended size and color of the label, all advertisements of the recording should “communicate the presence of PAL Content,” and all digital distributions should also contain PAL conspicuously.<sup>72</sup>

Due to the widespread influence of the RIAA and its members, almost every album that contains content that can be considered explicit, places the PAL logo on its cover.<sup>73</sup> While recording companies and the musical artists are the ones to determine whether a PAL Notice is necessary, RIAA gives a list of content considerations when determining whether a work contains PAL content, including “contemporary cultural morals and standards,” “context in which material is used,” and “expectations of the artist’s audience.”<sup>74</sup> “Though the association does not directly represent retailers, it does “work[] closely with the National Association Recording Merchandisers (NARM), the Digital Media Association (DiMA), the wireless

industry, and leading technology companies . . . ,”<sup>75</sup> which could negatively affect how an artist distributes his music and where the music will be sold.

The PMRC, the main interest group that pressured RIAA and record companies into enforcing PAL notices on musical works, formed in 1985.<sup>76</sup> The group’s twenty-five members consisted of several spouses of powerful Washington businessman and politicians, including Tipper Gore, Susan Baker and Nancy Thurmond.<sup>77</sup> At first, PMRC’s goal was for sexually explicit and violent recordings to stop being played on radio and television, and to make such forms of music be harder to gain access to.<sup>78</sup> Tipper Gore formed the PMRC, which appeared to be an organization aimed at censorship at its inception, after being disturbed by the lyrics of “‘Darling Nikki,’ a very sexually explicit song,” on Prince’s ‘Purple Rain’ album, which was purchased for her eleven year old daughter.<sup>79</sup> After further investigation of music videos and lyrics played on Music Television (MTV), Gore introduced the issue to others and, soon thereafter, the United States Senate started holding hearings on the “alarming content of popular music.”<sup>80</sup>

The influential group had a “Filthy Fifteen” list that listed “the top fifteen songs recommended to be banned, and their presumed subject matter.”<sup>81</sup> Of the fifteen songs listed, nine were deemed to have censorable content due to sexual material, two songs were listed due to violence, two songs had “drug and alcohol use,” and two songs had “occult” subject matter.<sup>82</sup> From the subject matter of the songs listed, it seems that the members were attempting to censor mainly sex with their promotion of upholding family values. Before the Senate hearings concluded, the RIAA agreed to placing stickers labeling albums with parental advisory labels, which fell short of the PMRC’s request of identifying an album’s specific content.<sup>83</sup> Many of the group’s demands that bordered on censorship were not enforced.<sup>84</sup>

Since 1922, the Motion Pictures Association of America (MPAA) has been present in the film industry in some form, although formerly known as Motion Picture Producers and Directors Association of America.<sup>85</sup> At first, the group's members wanted "to resist mounting calls for government censorship of American films" by creating "a system of industry-led self-censorship, known as The Production Code or the Hays Code."<sup>86</sup> However, due to the change and progression that took place in the United States throughout the decades following the society's formation, the MPAA decided "[a]mid our society's expanding freedoms, the movie industry's restrictive regime and self-censorship could not stand," and in 1966, the society started making revisions "to reflect changing social mores."<sup>87</sup> Since 1968, the "voluntary film rating system" has been revised to "giv[e] creative and artistic freedoms to filmmakers while fulfilling its core purpose of informing parents about the content of films so they can determine what movies are appropriate for their kids."<sup>88</sup> The MPAA's members consist of "the six major U.S. motion picture studios: Walt Disney Studios Motion Pictures; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; and Warner Bros. Entertainment Inc."<sup>89</sup>

The MPAA, in association with the National Association of Theatre Owners, Inc. (NATO), created the Classification and Rating Administration (CARA) as an independent division of MPAA, whose Rating Board "issues ratings for motion pictures exhibited and distributed in the United States."<sup>90</sup> CARA's Rating Board does not "evaluate the quality or social value of motion pictures," but seeks to give ratings to inform parents of certain content present in films, such as "violence, sex, drugs, language, thematic material, adult activities, etc."<sup>91</sup> The CARA Rating Board includes: a Chairperson, staff members, Senior Raters, and Raters; each member "must be a parent and may not have any other affiliation with the entertainment industry."<sup>92</sup> The

Chairperson is appointed by the Chairman of the MPAA in agreement with the President of NATO, and Senior Raters are selected by the Chairperson.<sup>93</sup> The five motion picture ratings consist of: G, PG, PG-13, R, and NC-17; each rating, outside of G, warrants a “rating descriptor,” given by the Chairperson, which helps parents know the content that caused the rating.<sup>94</sup> The rating system is voluntary, however, a film that does not receive a rating is labeled “Unrated,” and “the big theater chains treat unrated films like NC-17 films, since usually the films are unrated because of graphic sexuality.”<sup>95</sup>

After each motion picture has been submitted and “viewed by designated members of the Rating Board, including at least one Senior Rater,” the Raters discuss and determine the rating to be assigned to the film.<sup>96</sup> “The rating descriptor for each rated motion picture is determined by the Chairperson of CARA or the Senior Rater, in conjunction with the Raters who viewed the motion picture, based on the elements . . . identified in the ballots of the Raters . . . that caused the motion picture to receive that rating.”<sup>97</sup> The Rating Board members determine a film’s assigned rating by “evaluat[ing] each motion picture in its entirety and consider[ing] . . . mature themes, language, depictions of violence, nudity, sensuality, depictions of sexual activity, adult activities (i.e. activities that adults, but not minors, may engage in legally), and drug use.” Once the rating is assigned, CARA informs the “rating contact,” who then “advise[s] CARA whether the producer or distributor accepts the rating and rating descriptor.”<sup>98</sup>

If the producer or distributor does not accept the rating given by the Ratings Board, they may appeal for a final certified rating to the Classification and Rating Appeals Board, “Appeals Board.”<sup>99</sup> The Appeals Board is composed of several people, including: the CEO of the MPAA and President of NATO (or his/her representatives); up to three members designated by members of MPAA; up to three members designated by NATO; and, up to two representatives designated

by independent producers and distributors; along with others making up the Board.<sup>100</sup> Each member is appointed for a term and must attend training sessions informing them of “the procedures and processes of the Rating Board and the Appeals Board.”<sup>101</sup> A producer can “only seek the next less restrictive rating on an appeal,” and “only one appeal may be taken of the rating of each version of a motion picture and only two appeals total may be taken of the ratings of different versions of a motion picture.”<sup>102</sup> The appeals process is quite similar to that of the legal system after the Appeals Board has viewed the movie, with the producer or distributor making “a statement of the reasons for the Appeals Board to overturn the rating of the motion picture” and the Chairperson of CARA “mak[ing] a statement of the reasons for the Appeals Board to uphold the rating” in front of the “quorum” of nine members making up the Appeals Board.<sup>103</sup>

Recently, attention has been drawn to the MPAA ratings and appeals process due to the documentary motion picture, “Bully,” produced by The Weinstein Company.<sup>104</sup> The documentary, “which follows five kids and families who have been impacted by bullying,” received an “R” rating from the MPAA in early 2012, for the “use of one curse word that is used six times in the movie.”<sup>105</sup> After appealing the initial “R” rating, “over half of the appeals board agreed that [the movie] should be re-rated PG-13. However, the board fell one vote short of the 2/3 majority required to overturn a rating.”<sup>106</sup> Instead of accepting the “R” rating, The Weinstein Company chose to release the movie unrated.<sup>107</sup> Usually, unrated films are “treated like an NC-17 film, but AMC Theaters, one of the largest chains in the country, announced . . . they will allow children under 17 to see it with a parent. They can also see it without a parent if they have a signed permission slip.”<sup>108</sup> After a compromise, the MPAA granted “Bully” a PG-13 rating in response “to edit[ing] out three uses of the particular word, and the MPAA agreed to allow one

key scene in which one of the film's subjects is beaten on a school bus and the word is used three times.”<sup>109</sup>

Similar to the music and movie industries, Entertainment Software Ratings Board (ESRB) is a “self-regulatory body that assigns ratings for video games and apps so parents can make informed choices.”<sup>110</sup> The organization formed in 1994 by the Entertainment Software Association with a mission to “empower consumers, especially parents, with guidance that allows them to make informed decisions about the age-appropriateness and suitability of video games and apps while holding the video game industry accountable for responsible marketing practices.”<sup>111</sup> And while, “[t]he rating system is voluntary, . . . virtually all video games that are sold at retail in the U.S. and Canada are rated by the ESRB[,]” with “[m]any U.S. retailers . . . hav[ing] policies to only stock or sell games that carry an ESRB rating, and console manufacturers requir[ing] games that are published on their systems in the U.S. and Canada to be rated by ESRB.”<sup>112</sup> The ESRB, also, has principles and guidelines for the marketing and advertising of video games.<sup>113</sup> There are four rating categories that are given to video games and placed on the front cover, ranging from appropriate for all ages to mature for persons 18 and over.<sup>114</sup> There are also short descriptions of the prevalent content that gave rise to the rating, which are typically place on the back cover.<sup>115</sup>

Typically, for “packaged or boxed” video games, the publisher provides a filled out “Long Form” questionnaire, along with a DVD that “captures all pertinent content . . . along with the most extreme instances of content,” to the ESRB raters to “evaluate the content of each game in advance of its public release.”<sup>116</sup> For games that are delivered via download or solely online, the publisher is required to fill out a “Short Form” with multiple choice questions, but foregoes providing a DVD, which is then “assigned ratings via an automated online process.”<sup>117</sup> The

ESRB raters give final ratings based on these processes, and wait to “play-test” the actual game until shortly after being publicly released, “to verify that the content disclosure provided to ESRB was accurate and complete.”<sup>118</sup> While, “the identities of ESRB raters are kept confidential . . . they are not permitted to have any ties to or connections with any individuals or entities in the video game industry,” and must be “adults who typically have experience with children, whether through prior work experience, education or as parents or caregivers.”<sup>119</sup> The raters base their rating assignments on “criteria such as violence, language, sexuality, gambling, and alcohol, tobacco and drug reference or use; and . . . relative frequency of extreme content.”<sup>120</sup> And due “the interactive nature of video games the ESRB rating system also takes into account certain unique elements, such as the viewer’s perspective, reward system and the degree of player control.”<sup>121</sup>

Separate from larger organizations having direct ties to politicians and the entertainment industry, smaller corporate entities have attempted to suppress certain forms of entertainment, as well. In 2012, the e-commerce company, Paypal, a successful and common method of payment on online selling forums such as eBay, decided to stop allowing merchants to use their services to sell books that fall under the genre of “erotica.”<sup>122</sup> The corporation gave an “ultimatum” to several online bookstores to remove all content containing “bestiality, rape, and incest,” as well as, BDSM (bondage & discipline/domination & submission/sadism & masochism), “or face deactivation of their PayPal account[s].”<sup>123</sup> Since a media backlash on Paypal, the corporation has receded from banning “entire classes of books,” and focusing on individual books that go against their corporate policy.<sup>124</sup>

## V. Violence Versus Sexual Content

Whereas sexual content has continuously found itself being regulated by the legislature and judged in the court system, with certain categories being deemed unfit for society, violence has always been an inappropriate subject for judges to consider limiting protection to under the First Amendment. When cases concerning violence in media are brought to the judicial system, courts persistently assert that violent content is protected by freedom of speech. This has led to the arbitrary reality that sexually-themed entertainment is subject to being more harshly analyzed by judges and juries and outside organizations, while violence in entertainment is capable of reaching the masses with little, to no, interference by judicial or legislative bodies.

In Pahler v. Slayer, the California Supreme Court, while noting that the heavy metal band, Slayer's, lyrics "are profane and glorify grisly violence against women," could not correlate the selling of Slayer's album to be "harmful to children" under the California Penal Code section 313.1.<sup>125</sup> In Pahler, the plaintiffs filed suit against the band following the sentencing of three teenage boys who kidnapped, tortured, raped and eventually killed the plaintiff's young daughter.<sup>126</sup> Defendant's lyrics were argued to have influenced the crime; however, Slayer's content could not fall under the California obscenity law.<sup>127</sup> The California statute criminalized "knowingly sell[ing], rent[ing], distribut[ing], send[ing], caus[ing] to be sent, exhibit[ing], or offer[ing] to distribute or exhibit by any means . . . any harmful matter to the minor."<sup>128</sup> However, the "harmful matter" in the statute was defined in a subsection, using the three elements for judging obscenity as pronounced in Miller v. California.<sup>129</sup> The Court explained that "[t]he statute limits its application to material that describes sexual conduct in a patently offensive way. It does not make unlawful the distribution of media which offensively describes death, violence, or brutality."<sup>130</sup>

The court further explained why Slayer's lyrics were not capable of being analyzed by the California law as defined by the state's penal code by assessing that "[t]he dominant theme of Slayer lyrics is not sex. It is death, violence, brutality, and sociopathic behavior. References to sexual conduct appear infrequently."<sup>131</sup> When analyzing one of the band's more disturbing songs, "Sex. Murder. Art," the court describes the song's lyrics as "refer[ing] to the speaker's 'sexual fascination' and the act of 'raping again and again.'" But the focus of the composition is not sexual conduct; rather, it is violence and the pleasure derived by the performer in repeatedly whipping, beating, and raping a woman."<sup>132</sup> Staying within the parameters of what obscenity laws can regulate, the court determines that "the lyrics are offensive and abhorrent because of the callous violence described, not because of their sexual content."<sup>133</sup> The California court ended its analysis of Slayer's material by stating that, "Slayer recordings do not appeal to a morbid interest in sex and do not, taken as a whole, depict or describe sexual conduct in a patently offensive way. The violent content of Slayer materials does not subject them to regulation under Penal Code section 313.1."<sup>134</sup>

In McCullum v. CBS, the California Court of Appeals dealt with the parents of a suicide victim who blamed Ozzy Osbourne's lyrics and message in the death of their son.<sup>135</sup> And while the plaintiffs brought suit under the "incitement to imminent action" exception of the First Amendment, the analysis of the California appeals court when judging Osbourne's music is broad enough to cover all areas of speech in entertainment.<sup>136</sup> The Court defended Osbourne's lyrics by asserting that "the First Amendment is an absolute bar to plaintiffs' claims."<sup>137</sup> The court's opinion identified that "musical lyrics and poetry cannot be . . . read literally on their face, nor judged by a standard of prose oratory. . . . To do so would indulge a fiction which neither common sense nor the First Amendment will permit."<sup>138</sup> In concluding the court's

reasoning of why Osbourne’s music is constitutionally protected and, therefore, not liable for criminal or civil damages, the court further expressed its belief that “[t]he deterrent effect of subjecting the music and recording industry to such liability because of their programming choices would lead to a self-censorship which would dampen the vigor and limit the variety of artistic expression.”<sup>139</sup>

In a more recent decision in accord with the tradition of protecting expression that is not associated with sexual content, the Supreme Court struck down a California statute that attempted to regulate the content of “‘violent video games’ to minors.”<sup>140</sup> In Brown v. Entertainment Merchants Ass’n, Entertainment Merchants Association (EMA), a large corporation in the video game industry, “filed a preenforcement challenge to a California law that restricts the sale or rental of violent video games to minors.”<sup>141</sup> The statute mirrored the test for obscenity as spelled out in Miller and adopted by California, replacing “prurient interest” with “a deviant or morbid interest of minors,” and listing a “range of options” considered to be violent.<sup>142</sup> Coinciding with previous Supreme Court holdings concerning the expansion of unprotected speech, Justice Scalia states that “California has tried to make violent-speech regulation look like obscenity regulation . . . That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of ‘sexual conduct.’”<sup>143</sup>

In the dicta of the opinion, the Court expounds on why the California statute cannot be upheld under the same theory or analysis of state-enacted obscenity laws, nor using similar reasoning for not protecting sexual content.<sup>144</sup> The Court relies heavily on the established institution of permitting depictions of violence to be widely accessible, if not glorified, in the United States.<sup>145</sup> Justice Scalia explains that “California’s argument would fare better if there

were a longstanding tradition in this country of specially restricting children’s access to depictions of violence, but there is none. Certainly the books we give children to read – or read to them when they are younger – contain no shortage of gore.”<sup>146</sup> Advancing his argument, Justice Scalia lists popular stories read to children and books assigned in school curricula that depict violence, and a short overview of the resistance to violent material in entertainment over the decades, as new media has been developed and popularized.<sup>147</sup> The Justice explains that California cannot enact a law “impos[ing] a restriction on the content of protected speech . . . unless [the State] can demonstrate that it passes strict scrutiny,” which the State failed by not “show[ing] a direct causal link between violent video games and harm to minors.”<sup>148</sup> The Court acknowledges that strict scrutiny “is a demanding standard. ‘It is rare that a regulation restricting speech because of its content will ever be permissible.’”<sup>149</sup>

In the concurrence to Brown, with the Chief Justice joining, Justice Alito concurs with the judgment but disagrees “with the approach taken in the Court’s opinion,” expressing his belief that the “Court should proceed with caution.”<sup>150</sup> Justice Alito agrees with the Court’s outcome based solely on the reasoning that “the California law does not define ‘violent video games’ with the ‘narrow specificity’ that the Constitution demands.”<sup>151</sup> He recognizes that, “[f]or better or worse, our society has long regarded many depictions of killing and maiming as suitable features of popular entertainment,” and due to the lack of history of regulation of violent material in regards to any age group, the California legislature failed to clearly define the terms and standards referenced in the law.<sup>152</sup> Although, Justice Alito recognizes that the California law was not sufficiently narrow enough to adhere to the protection afforded by the First Amendment, he articulates his concern with the reality that stems from the Court’s reasoning in the opinion, which is that “[a]s a result of today’s decision, a State may prohibit the sale to minors of what

Ginsberg described as ‘girlie magazines,’ but a State must surmount a formidable (and perhaps insurmountable) obstacle if it wishes to prevent children from purchasing the most violent and depraved video games imaginable.”<sup>153</sup>

The New York criminal law that the California legislature attempted to model its state law regulating “‘violent video games’ to minors” on, was upheld as constitutional “on its face” in 1968 in the case, Ginsberg v. State of N.Y.<sup>154</sup> In Ginsberg, the appellant was a store owner in Bellmore, Long Island, who sold “girlie” magazines to a 16 year-old boy on two different occasions.<sup>155</sup> He was criminally charged for violating the “New York criminal obscenity statute which prohibits the sale to minors under 17 years of age of material defined to be obscene.”<sup>156</sup> Although, the Supreme Court recognizes that the “girlie” magazines in question were not considered obscene for adults, as stated in a prior case, the Court asserts that States have the power to regulate sexual material on a different scope when concerning minors.<sup>157</sup> Writing for the majority, Justice Brennan states that there are at least two reasons that States are justified in regulating “the availability of sex material to minors under 17”: providing “support of laws” to parents and others involved in rearing children, and there being an interest to the State “‘to protect the welfare of children’ and to see that they are ‘safeguarded from abuses’ which might prevent their ‘growth into free and independent well-developed men and citizens.’”<sup>158</sup>

Unlike the California statute regulating violent content in entertainment to minors, the New York law stemmed from a long-established foundation of regulating sexual material through obscenity laws. While, the appellant argued that there is no proof “‘that obscenity is or is not ‘a basic factor in impairing the ethical and moral development of youth and a clear and present danger to the people of the state,’ the Court emphasizes that, “‘while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been

disproved either.’ We do not demand of legislatures ‘scientifically certain criteria of legislation.’”<sup>159</sup> This is the opposite of the outcome stated in Brown v. Entertainment Merchants Ass’n, where the Court required the State of California to show a causal link between the state-enacted law and the purpose.<sup>160</sup> Another factor that differentiates Ginsberg from Brown, is that the Court found that the language and terms used in the New York statute in question in Ginsberg, were clearly defined in the New York Penal Code and through the established standards of judging sexual material through obscenity laws.<sup>161</sup>

Unlike the aforementioned cases in this section, Skywalker Records, Inc. v. Navarro dealt precisely with the array of content that can be judged through obscenity laws. In a case that has since been infamously overturned, the sexually explicit lyrics of the Florida rap trio, 2 Live Crew, were on trial in Skywalker Records, Inc.<sup>162</sup> 2 Live Crew filed suit against the defendant, the sheriff of Broward County, Florida, seeking to stop the sheriff’s ban of the group’s album, “As Nasty As They Wanna Be,” from being sold at local record stores.<sup>163</sup> A Broward County Circuit Court judge had previously “explicitly found probable cause to believe [the] recording was obscene under section 847.011 of the Florida Statutes and under applicable case law,” and allowed the Sheriff’s office to distribute a copy of the order banning the album throughout the county.<sup>164</sup> While the court clarifies that each state is capable of creating its own high or low standards of obscenity, it interprets the Florida legislature as having “intended to regulate obscenity to the maximum extent allowed by the Constitution of the United States.”<sup>165</sup> District Judge Gonzalez, sitting without a jury, agreed that “As Nasty As They Wanna Be,” violated the heightened Florida statute against obscenity and “normal, community standards,” stating that “‘Nasty’ appeals to the prurient interest for several reasons. First, its lyrics and the titles of its songs are replete with references to female and male genitalia . . . masturbation, cunnilingus,

sexual intercourse, and the sounds of moaning.”<sup>166</sup> The Court further observed that “music of the ‘rap’ genre focuses upon verbal messages accentuated by a strong beat. . . . 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.”<sup>167</sup>

The Eleventh Circuit reversed the District Court’s ban of “As Nasty As They Want to Be” in Broward County, FL, and the lower court’s finding of a violation under Florida’s obscenity law, because “[a] work cannot be held obscene unless each element of the Miller test has been met. We reject the argument that simply by listening to this musical work, the judge could determine that it had no serious artistic value.”<sup>168</sup> After the initial banning of the album in Broward County, 2 Live Crew was arrested and criminally tried for a concert performance within the district.<sup>169</sup> As opposed to the district court trial, where Judge Gonzalez made the obscenity determination without a jury, the jury selection of the criminal trial favored the rap group, and 2 Live Crew were found not guilty applying the “contemporary community standards” of Florida residents.<sup>170</sup> Bruce Rogow, the well-respected entertainment attorney for Luke Skywalker of the 2 Live Crew, was quoted after the obscenity trial victory exclaiming,

Censorship cannot survive the human desire to know and to judge things for one’s self. No law, judge or jury will ever eradicate that irrepressible instinct. We could have a thousand obscenity trials, but words and thoughts about sex will never be limited to a missionary view. Prurient interest, openly offensive descriptions of sexual conduct and serious artistic, literary, political, or scientific value should be discussed some place – any place – rather than the courts.<sup>171</sup>

Following 2 Live Crew’s highly-publicized trials throughout the court system, standing up against obscenity laws and defending artist’s freedom of speech, the group became more popular in the media, to musical peers and the American audience.<sup>172</sup>

## **VI. Conclusion**

Obscenity laws, and the reasoning behind why the courts have deemed certain sexual conduct and content to be analyzed using “prurient interest” standard, rely on a history of society not wanting material of a sexual nature to be easily accessible to children and adults, alike. “Sex has been called ‘a great and mysterious motive force in human life.’ Because of its power, both federal and state governments have chosen to regulate its abuse. For example, states have banned prostitution, incest, rape, and other sexually related material.”<sup>173</sup> The problem with this reasoning is that most violence goes against all social interest. Given the current U.S. social climate, children and many adults appear to not only be susceptible to violence, whether that violence comes through words, imagery or simulation in video games, but violence is becoming more pronounced in everyday life. The fact that almost all violent acts are criminalized through state statutes shows that violence goes against community standards. On the other hand, most consensual sex acts, even those considered outside the norm, are not state regulated. This gives less foundation to a state’s interest in regulating an artistic expression based on its sexual nature.

Whether in regards to clothing, dancing, rock and roll, rap/hip-hop, art, movies, or video games, there is perpetually going to be a previous generation that tries to lessen the value of an emerging art form they do not understand.<sup>174</sup> It is counterintuitive to continue to have judges and/or juries determine what has “serious artistic, literary, political, or scientific value.” For instance, the novel “Memoirs of a Woman of Pleasure” by John Cleland, held to be obscene in Massachusetts in 1821, was later found to have a “modicum of merit” in 1966 by the Supreme Court.<sup>175</sup> Obscenity laws, which seek to criminalize ‘obscene material,’ requires a “community standard”; a standard which is ever-changing.

Outside of the court rooms, sexual content continues to be regulated in different forums, by different agencies, using a lower threshold of offense than violence. The MPAA, RIAA, ESRB and others should quell any fears that without obscenity laws, sexual content might flow rampantly throughout entertainment and the arts. These organizations also seem to favor violence to sexually-themed material, as well, with most of their respective websites expressing their purpose and intent to continue to “respect the core American value of freedom of expression,” while “help[ing] parents determine what is and is not appropriate for their children.”<sup>176</sup> This balancing act, which U.S. history and obscenity laws have shown, gives more discretion to violence than sex in entertainment.

Obscenity laws have a subjective element that questions the “value” of a work. Courts should not be the reigning assessor of the worth of an individual’s expression of his, or her, ideas. In the 1933 case, U.S. v. One Book Called “Ulysses”, District Judge Woolsey stated, in regards to James Joyce’s novel:

If one does not wish to associate with such folk as Joyce describes, that is one's own choice. In order to avoid indirect contact with them one may not wish to read ‘Ulysses’; that is quite understandable. But when such a great artist in words, as Joyce undoubtedly is, seeks to draw a true picture of the lower middle class in a European city, ought it to be impossible for the American public legally to see that picture?<sup>177</sup>

These same concerns were shown in case against the rap trio, 2 Live Crew with the album, “As Nasty As They Wanna Be.” 2 Live Crew were expressing themselves in a form of music that was not well-regarded at the time and describing an urban lifestyle that some did not feel comfortable with acknowledging. This does not give their expression any less right to be protected under the First Amendment’s guarantee of freedom of speech.

I agree with Justice Douglas' dissent in Miller, that there needs to be a well-defined definition of "obscenity" to allow the courts to follow guidelines and not their "own predilections."<sup>178</sup> Since this unlikely to occur, courts should only look into the potential obscenity of a work when an artist's First Amendment right is being trampled, not when a form of art is being presented to a court by a state or individual's war on material they find offensive. In regard to multiple books that were brought into the court under the Pennsylvania obscenity statute in Commonwealth v. Gordon, Judge Curtis Bok remarked:

It will be asked whether one would care to have one's young daughter read these books. I suppose that by the time she is old enough to wish to read them she will have learned the biologic facts of life and the words that go with them. There is something seriously wrong at home if those facts have not been met and faced and sorted by then; it is not children so much as parents that should receive our concern about this. I should prefer that my own three daughters meet the facts of life and the literature of the world in my library than behind a neighbor's barn, for I can face the adversary there directly. If the young ladies are appalled by what they read, they can close the book at the bottom of page one; if they read further they will learn what is in the world and in its people, and no parents who have been discerning with their children need fear the outcome. Nor can they hold it back, for life is a series of little battles and minor issues, and the burden of choice is on us all, every day, young and old. Our daughters must live in the world and decide what sort of women they are to be, and we should be willing to prefer their deliberate and informed choice of decency rather than an innocence that continues to spring from ignorance. If that choice be made in the open sunlight, it is more apt than when made in shadow to fall on the side of honorable behavior.<sup>179</sup>

When balancing the state interest in "obscene material," being bought and sold by consenting persons, against the promotion of freedom of expression and the advancement of the arts, it is rare that the scale is in favor of suppressing creativity.

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- <sup>1</sup> Recording Industry Association of America, Parental Advisory, [http://www.riaa.com/toolsforparents.php?content\\_selector=parental\\_advisory](http://www.riaa.com/toolsforparents.php?content_selector=parental_advisory) (last visited Oct. 22, 2013).
- <sup>2</sup> Victor Lombardi, *Music and Censorship*, Noise Between Stations (Dec. 1991) [hereinafter Music and Censorship], [http://www.noisebetweenstations.com/personal/essays/music\\_censorship.html](http://www.noisebetweenstations.com/personal/essays/music_censorship.html) (last visited Oct. 22, 2013).
- <sup>3</sup> Oxford University Press, *Definition of Art in English*, Oxford Dictionary (2013), available at <http://oxforddictionaries.com/definition/english/art?q=art>
- <sup>4</sup> See generally Music and Censorship.
- <sup>5</sup> Introduction, Music and Censorship.
- <sup>6</sup> U.S. Const. amends I, XIV.
- <sup>7</sup> *Roth v. U.S.*, 354 U.S. 476, 485 (1957).
- <sup>8</sup> *Roth* at 488.
- <sup>9</sup> Robert Scheer, The Supreme Court's Video Game Ruling: Yes to Violence, No to Sex, The Nation (June 29, 2011), <http://www.thenation.com/article/161741/supreme-courts-video-game-ruling-yes-violence-no-sex#> (quoting Justice Scalia's majority opinion in *Brown v. Entertainment Merchants Ass'n*).
- <sup>10</sup> U.S. Const. amend. I (Findlaw, 2013).
- <sup>11</sup> *Roth* at 483.
- <sup>12</sup> *Id.* at 481-83 (citing *United States v. Chase*, 135 U.S. 255, 261; *Robertson v. Baldwin*, 165 U.S. 497, 508; *House v. Coyne*, 194 U.S. 275, 281; *Hoke v. United States*, 227 U.S. 308, 322; *Chaplinsky v. State of New Hampshire*, 357 U.S. 568, 571-572; *Winters v. People of State of New York*, 333 U.S. 507, 510).
- <sup>13</sup> *Id.* at 482-83 (quoting Acts and Laws of the Province of Mass. Bay, c. CV, § 8 (1712), Mass. Bay Colony Charters & Laws 399 (1814)). (See, O. John Rogge, 10 Am. Jur. Trials 1 Obscenity Litigation § 3 (1965)).
- <sup>14</sup> O. John Rogge, 10 Am. Jur. Trials 1 Obscenity Litigation § 3 (1965) [hereinafter, Obscenity Litigation].
- <sup>15</sup> *Com. V. Sharpless*, 1815 WL 1297, at \*102 (Sup. Ct. Penn. 1815).
- <sup>16</sup> *Sharpless* at \*102.
- <sup>17</sup> *Id.* at 101 (citing *King v. Curl*, 2 Str. 788; where, since there was no obscene law yet, the "obscene book was held to be a libel"). (See, Obscenity Litigation § 3).
- <sup>18</sup> Obscenity Litigation § 3.
- <sup>19</sup> *Id.* at § 4.
- <sup>20</sup> *Id.* (citing *Regina v. Hicklin*, 3 QB 360 (1868, Eng)).
- <sup>21</sup> Obscenity Litigation at § 4.
- <sup>22</sup> *U.S. v. One Book Called 'Ulysses'*, 5 F.Supp. 182, 185 (U.S.D.C. 1933).
- <sup>23</sup> *U.S. v. One Book Called 'Ulysses'* at 185.
- <sup>24</sup> Obscenity Litigation § 4
- <sup>25</sup> *Id.*
- <sup>26</sup> *Roth* at 479-81.
- <sup>27</sup> *Id.* at 481.
- <sup>28</sup> *Id.* at 485.
- <sup>29</sup> *Id.* at 487. (See, Obscenity Litigation § 5).
- <sup>30</sup> *Roth* at 487, n.20.
- <sup>31</sup> *Roth* at 489.
- <sup>32</sup> *Id.* at 490.
- <sup>33</sup> *Id.* at 512.
- <sup>34</sup> *Id.* at 514.
- <sup>35</sup> *Id.* at 495.
- <sup>36</sup> *Id.*
- <sup>37</sup> *Jacobellis v. State of Ohio*, 378 U.S. 184, 185-89 (1964).
- <sup>38</sup> *Jacobellis*, 378 U.S. 184. (It should be noted, that there was no Majority opinion. It was a 6-3 decision, with Justice Brennan writing an opinion in which J. Goldberg joined, J. White concurred in the judgment, J. Black wrote an opinion in which J. Douglas joined, J. Stewart wrote a concurring opinion, and J. Goldberg wrote a concurring opinion, as well.)
- <sup>39</sup> *Id.* at 191 (citing *Roth v. U.S.*, 354 U.S. 476, 489 (1957)).

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<sup>40</sup> Jacobellis at 195-96.

<sup>41</sup> Id. at 196.

<sup>42</sup> Id. at 195.

<sup>43</sup> Jacobellis, *supra*.

<sup>44</sup> Id. at 196.

<sup>45</sup> Id. (*citing* Kingsley Int’l Pictures Corp. v. Regents, 360 U.S. 684, 690 (1959)).

<sup>46</sup> Id. at 197.

<sup>47</sup> Id.

<sup>48</sup> Id. at 198.

<sup>49</sup> Id. at 199-204.

<sup>50</sup> Id. at 199.

<sup>51</sup> Id. at 200-01.

<sup>52</sup> Id. at 200.

<sup>53</sup> Id. at 202.

<sup>54</sup> Id. at 203-04.

<sup>55</sup> Id. at 204.

<sup>56</sup> Miller v. California, 413 U.S. 15, 18-19 (1973).

<sup>57</sup> Miller at 16-18.

<sup>58</sup> Id. at 18-19.

<sup>59</sup> Id. at 20.

<sup>60</sup> Id. at 24.

<sup>61</sup> Id. at 31.

<sup>62</sup> Id. at 31-32. (Justice Burger refers to Chief Justice’s dissent in Jacobelli at 200.)

<sup>63</sup> Id. at 24.

<sup>64</sup> Id. at 36-37.

<sup>65</sup> Id. at 30-41. (J. Douglas discusses the varying standards in Roth, *supra*, Jacobellis, *supra*, Memoirs v. Massachusetts, 383 U.S. 413 (1966), *supra*, Ginzburg v. U.S., 383 U.S. 463 (1965), *supra*, and Ginsberg v. NY, 390 U.S. 629 (1968), *supra*).

<sup>66</sup> Id. at 40.

<sup>67</sup> Id. at 41.

<sup>68</sup> Recording Industry Association of America, Information for Parents, [http://riaa.com/toolsforparents.php?content\\_selector=tools\\_info\\_for\\_parents](http://riaa.com/toolsforparents.php?content_selector=tools_info_for_parents) (last visited Oct. 22, 2013).

<sup>69</sup> Recording Industry Association of America, Parental Advisory, [http://riaa.com/toolsforparents.php?content\\_selector=parental\\_advisory#background](http://riaa.com/toolsforparents.php?content_selector=parental_advisory#background) (last visited Oct. 22, 2013). Carol Moore, *Sex & Rock ‘N’ Roll* (Sept. 1, 1985) (citing Patrick Goldstein, *Parent Warn: Take the Sex & Shock Out of Rock* (Aug. 25, 1985), [http://articles.latimes.com/1985-09-01/entertainment/ca-25656\\_1\\_rock-music-rock-n-roll-parents-music-resource-center](http://articles.latimes.com/1985-09-01/entertainment/ca-25656_1_rock-music-rock-n-roll-parents-music-resource-center)).

<sup>70</sup> Recording Industry Association of America, RIAA, [http://riaa.com/aboutus.php?content\\_selector=about-who-we-are-riaa](http://riaa.com/aboutus.php?content_selector=about-who-we-are-riaa) (Oct. 22, 2013).

<sup>71</sup> Recording Industry Association of America, Board of Directors, [http://riaa.com/aboutus.php?content\\_selector=who\\_we\\_are\\_board](http://riaa.com/aboutus.php?content_selector=who_we_are_board) (last visited Oct. 22, 2013).

<sup>72</sup> Recording Industry Association of America, Parental Advisory, [http://riaa.com/toolsforparents.php?content\\_selector=parental\\_advisory#background](http://riaa.com/toolsforparents.php?content_selector=parental_advisory#background).

<sup>73</sup> Id.

<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> See Kaden Byron, Daniel Earnhart, Dante Gagliardi, Parents’ Music Resource Center (PMRC), Censorship: Limits on Construction, <http://censorship7.tripod.com/id17.html> (last visited Oct. 22, 2013); See Parents Music Resource Center, NNDB, <http://www.nndb.com/org/374/000128987/> (last visited Oct. 22, 2013); See also Miss Cellania, *Tipper v. Music*, Neatorama (Jan. 2, 2012, 5:09 AM), <http://www.neatorama.com/2012/01/02/tipper-vs-music/#!3ccv>.

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<sup>77</sup> Tipper Gore was the wife of then-senator, Al Gore; Susan Baker was the wife of Treasury Secretary, James Baker; and Nancy Thurmond was the wife of Strom Thurmond, who was a U.S. senator for 48 years. See Kaden Byron, Daniel Earnhart, Dante Gagliardi, Parents' Music Resource Center (PMRC), Censorship: Limits on Construction, <http://censorship7.tripod.com/id17.html> (last visited Oct. 22, 2013); See Parents Music Resource Center, NNDB, <http://www.nndb.com/org/374/000128987/> (last visited Oct. 22, 2013); See also Miss Cellania, Tipper v. Music, Neatorama (Jan. 2, 2012, 5:09 AM), <http://www.neatorama.com/2012/01/02/tipper-vs-music/#!l3ccV>.

<sup>78</sup> See Kaden Byron, Daniel Earnhart, Dante Gagliardi, Parents' Music Resource Center (PMRC), Censorship: Limits on Construction, <http://censorship7.tripod.com/id17.html> (last visited Oct. 22, 2013); See also Miss Cellania, Tipper v. Music, Neatorama (Jan. 2, 2012, 5:09 AM), <http://www.neatorama.com/2012/01/02/tipper-vs-music/#!l3ccV>.

<sup>79</sup> Id.

<sup>80</sup> Miss Cellania, Tipper v. Music, Neatorama (Jan. 2, 2012, 5:09 AM), <http://www.neatorama.com/2012/01/02/tipper-vs-music/#!l3ccV> (last visited Oct. 22, 2013).

<sup>81</sup> The PMRC Filthy Fifteen, NNDB, <http://www.nndb.com/lists/405/000093126/> (last visited Oct. 22, 2013).

<sup>82</sup> Id.

<sup>83</sup> Miss Cellania, Tipper v. Music, Neatorama (Jan. 2, 2012, 5:09 AM), <http://www.neatorama.com/2012/01/02/tipper-vs-music/#!l3ccV> (last visited Oct. 22, 2013).

<sup>84</sup> See Kaden Byron, Daniel Earnhart, Dante Gagliardi, Parents' Music Resource Center (PMRC), Censorship: Limits on Construction, <http://censorship7.tripod.com/id17.html> (last visited Oct. 22, 2013); See also Miss Cellania, Tipper v. Music, Neatorama (Jan. 2, 2012, 5:09 AM), <http://www.neatorama.com/2012/01/02/tipper-vs-music/#!l3ccV> (last visited Oct. 22, 2013).

<sup>85</sup> Motion Pictures Association of America, History of the MPAA, <http://www.mpa.org/about/history> (last visited Oct. 22, 2013).

<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> Motion Pictures Association of America, About Us, <http://mpaa.org/about/> (last visited Dec. 3, 2013).

<sup>90</sup> Motion Picture Association of America, Inc., CLASSIFICATION AND RATING RULES (Jan. 1, 2010).

<sup>91</sup> Id.

<sup>92</sup> Id.

<sup>93</sup> Id.

<sup>94</sup> Id.

<sup>95</sup> Id.; See also Daniel S. Levine, AMC theaters to allow children under 17 to see unrated 'Bully' documentary with parent or permission slip, The Celebrity Café.com (Mar. 28, 2012), <http://thecelebritycafe.com/feature/2012/03/amc-theaters-allow-children-under-17-see-unrated-bully-documentary-parent-or-permiss> (last visited Oct. 22, 2013).

<sup>96</sup> Motion Picture Association of America, Inc., CLASSIFICATION AND RATING RULES (Jan. 1, 2010).

<sup>97</sup> Id.

<sup>98</sup> Id.

<sup>99</sup> Id.

<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> Id.

<sup>104</sup> Daniel S. Levine, The Weinstein Company considering leaving the MPAA after R-rating for 'Bully' upheld, The Celebrity Café.com (February 24, 2012), <http://thecelebritycafe.com/feature/2012/02/weinstein-company-considering-leaving-mpaa-after-r-rating-bully-upheld> (last visited Dec. 3, 2013).

<sup>105</sup> Msnbc.com Entertainment, MPAA changes 'Bully' rating to PG-13, TODAY Moms, (April 5, 2012 at 7:44pm), <http://www.today.com/moms/mpaa-changes-bully-rating-pg-13-670959> (last visited Dec. 3, 2013).

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<sup>106</sup> Daniel S. Levine, The Weinstein Company considering leaving the MPAA after R-rating for ‘Bully’ upheld, The Celebrity Café.com (February 24, 2012), <http://thecelebritycafe.com/feature/2012/02/weinstein-company-considering-leaving-mpaa-after-r-rating-bully-upheld> (last visited Dec. 3, 2013).

<sup>107</sup> Daniel S. Levine, AMC theaters to allow children under 17 to see unrated ‘Bully’ documentary with parent or permission slip, The Celebrity Café.com (Mar. 28, 2012), <http://thecelebritycafe.com/feature/2012/03/amc-theaters-allow-children-under-17-see-unrated-bully-documentary-parent-or-permiss> (last visited Dec. 3, 2013).

<sup>108</sup> Id.

<sup>109</sup> Msnbc.com Entertainment, MPAA changes ‘Bully’ rating to PG-13, TODAY Moms, (April 5, 2012 at 7:44pm), <http://www.today.com/moms/mpaa-changes-bully-rating-pg-13-670959> (last visited Dec. 3, 2013).

<sup>110</sup> Entertainment Software Ratings Board, About ESRB, <http://www.esrb.org/ratings/faq.jsp#1> (last visited Dec. 3, 2013).

<sup>111</sup> Id.

<sup>112</sup> Id.

<sup>113</sup> Id.

<sup>114</sup> Entertainment Software Ratings Board, ESRB Ratings, <http://www.esrb.org/ratings/index.jsp> (last visited Dec. 3, 2013).

<sup>115</sup> Id.

<sup>116</sup> Entertainment Software Ratings Board, ESRB Ratings Process, [http://www.esrb.org/search/ratings/ratings\\_process.jsp](http://www.esrb.org/search/ratings/ratings_process.jsp) (last visited Dec. 3, 2013).

<sup>117</sup> Id.

<sup>118</sup> Id.

<sup>119</sup> Entertainment Software Ratings Board, About ESRB, <http://www.esrb.org/ratings/faq.jsp> (last visited Dec. 3, 2013).

<sup>120</sup> Id.

<sup>121</sup> Id.

<sup>122</sup> Andrew Shaffer, PayPal Takes Controversial Stance Against Sex, The Huffington Post (Feb. 27, 2012, 1:46 AM), [http://www.huffingtonpost.com/andrew-shaffer/paypal-online-bookstores-erotica\\_b\\_1301306.html](http://www.huffingtonpost.com/andrew-shaffer/paypal-online-bookstores-erotica_b_1301306.html). (last visited Oct. 22, 2013).

<sup>123</sup> Id.

<sup>124</sup> Athlma Chansanchal, PayPal back down on erotic e-book ban, MSNBC.com (Mar. 14, 2012 10:31 AM), <http://www.nbcnews.com/technology/paypal-backs-down-erotic-e-book-ban-438760>.

<sup>125</sup> Pahler v. Slayer, 2001 WL 1736476 (Cal. Super. 2001).

<sup>126</sup> Pahler at 2001 WL 1736476, \*1.

<sup>127</sup> Id., supra.

<sup>128</sup> Pahler at \*3.

<sup>129</sup> Id.

<sup>130</sup> Id.

<sup>131</sup> Id.

<sup>132</sup> Id.

<sup>133</sup> Id.

<sup>134</sup> Id.

<sup>135</sup> McCollum v. CBS, Inc., 202 Cal. App.3d 989 (Ct. App. 1988).

<sup>136</sup> McCollum, supra.

<sup>137</sup> McCollum at 994.

<sup>138</sup> Id. at 1002.

<sup>139</sup> Id. at 1003.

<sup>140</sup> Brown v. Entertainment Merchants Ass’n, 131 S. Ct. 2729 (2011).

<sup>141</sup> Brown at 2731.

<sup>142</sup> Id. at 2732.

<sup>143</sup> Id. at 2734 (citing U.S. v. Stevens, supra; Winters v. New York, supra; Miller v. California, supra; Roth v. U.S., supra)

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<sup>144</sup> Brown, *supra*.  
<sup>145</sup> Id. at 2736.  
<sup>146</sup> Id.  
<sup>147</sup> Id. at 2736-37.  
<sup>148</sup> Id. at 2738.  
<sup>149</sup> Id. at 2738 (citing United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 818).  
<sup>150</sup> Id. at 2743.  
<sup>151</sup> Id.  
<sup>152</sup> Id. at 2745.  
<sup>153</sup> Id. at 2747.  
<sup>154</sup> Ginsberg v. State of N.Y., 390 U.S. 629 (1968).  
<sup>155</sup> Ginsberg at 631.  
<sup>156</sup> Id.  
<sup>157</sup> Id. at 634-39.  
<sup>158</sup> Id. at 640 (quoting Prince v. Commonwealth of Massachusetts, *supra*, 321 U.S., at 165).  
<sup>159</sup> Id. at 641-43 (citing Noble State Bank v. Haskell, 219 U.S. 104, 110).  
<sup>160</sup> Brown, *supra*.  
<sup>161</sup> Ginsberg at 643.  
<sup>162</sup> Skywalker Records, Inc. v. Navarro, 739 F.Supp. 578 (U.S.D.C., S.D. Fl. 1990) [hereinafter, Skywalker Records, Inc.].  
<sup>163</sup> Skywalker Records, Inc. at 582.  
<sup>164</sup> Id. at 583.  
<sup>165</sup> Id. at 585.  
<sup>166</sup> Id. at 591; also, Luther Campbell & John R. Miller, *As Nasty As They Wanna Be*, at 130 (1992).  
<sup>167</sup> Skywalker Records, Inc. at 591.  
<sup>168</sup> Luke Records, Inc. v. Navarro, 960 F.2d 134 (U.S.D.C., 11<sup>th</sup> Cir. 1992).  
<sup>169</sup> Luther Campbell & John R. Miller, *As Nasty As They Wanna Be*, at 137-41.  
<sup>170</sup> Id. at 142, 164.  
<sup>171</sup> Id. at 164.  
<sup>172</sup> Id., *supra*.  
<sup>173</sup> Skywalker Records, Inc. at 584 (quoting Roth v. U.S. at 487).  
<sup>174</sup> R. Andre Hall, *Music Censorship*, Lehigh University (2009), <http://www.lehigh.edu/~infirst/musiccensorship.html> (last visited Dec. 4, 2013); Victor Lombardi, *Music and Censorship*, *Noise Between Stations*, (Dec. 1991), [http://www.noisebetweenstations.com/personal/essays/music\\_censorship.html](http://www.noisebetweenstations.com/personal/essays/music_censorship.html) (last visited Dec. 4, 2013).  
<sup>175</sup> Memoirs v. Massachusetts, 383 U.S. 415, 433 (1966).  
<sup>176</sup> Recording Industry Association of America, *Parental Advisory*, [http://riaa.com/toolsforparents.php?content\\_selector=parental\\_advisory](http://riaa.com/toolsforparents.php?content_selector=parental_advisory).  
<sup>177</sup> U.S. v. One Book Called "Ulysses", 5 F.Supp. 182, 184 (U.S.D.C. 1933).  
<sup>178</sup> Miller v. California, 413 U.S. 15, 46-47.  
<sup>179</sup> O. John Rogge, 10 *Am. Jur. Trials* 1) *Obscenity Litigation* § 4 (1965) (citing Commonwealth v. Gordon, 16 Judge Bok held Erskine Caldwell's "God's Little Acre," James T. Farrell's "Studs Lonigan" trilogy, his "A World I Never Made," William Faulkner's "Sanctuary and Wild Palms," Calder Wallingham's "End As a Man" and Harold Robbins' "Never Love a Stranger" to not be obscene).