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Sex, Violence, and Profanity: Rap Music and the First Amendment

Lauded by some and condemned by others, rap music does not want for a divergence of views on its nature, meaning, or message. The deluge of profanity coupled with vivid images and themes of sex and violence have provided fertile ground for discussion of rap’s merits. Critics have characterized rap as “ugly macho boasting,” “bombastic, self-aggrandizing,” and “repulsive.” Rap artist Ice Cube’s Death Certificate album was the subject of a rare editorial comment by Billboard magazine deriding the lyrics as “the rankest sort of racism and hatemongering.”

Detractors fear that the violently negative messages promote a value system that celebrates the decadence of the street. Providing support for that view, a federal district court in Florida declared the rap group 2 Live Crew’s album.

1. Jerry Adler, et. al., The Rap Attitude, Newsweek, Mar. 19, 1990, at 56. The article also claims that rap has “taken sex out of teenage culture, substituting brutal fantasies of penetration and destruction.” Id. This view is an interesting contrast to the view expressed by Judge Gonzalez in Skywalker Records, Inc. v. Navarro, 739 F. Supp. 578 (S.D. Fla. 1990). See infra note 4.

2. Alexander Tresniowski, People, Time, Dec. 2, 1991, at 88. At the same time the album was ranked number two on nationwide album charts. Id.

3. “Sure, the streets are tough, but we need to promote a different set of values,” Robert C. Bobb, then city manager of Richmond, Virginia. David Mills, Guns and Poses, Wash. Times, Aug. 17, 1989, at E1. “You teach that your culture need aspire to nothing high, because the low is the high; and that your culture . . . need look no further than the street.” Too Cruel, Live, The New Republic, July 9, 1990, at 8.
bum As Nasty As They Wanna Be legally obscene. In the summer of 1992, rap artist Ice-T found himself embroiled in controversy over his song “Cop Killer” which New York governor Mario Cuomo called “[u]gly, destructive and disgusting.” Yet, rap has also been praised as reflective of the “wit, energy and hope of a generation . . . a positive development in a miserable environment.” Even though some rap artists paint vivid pictures of “a harsh and violent world [,] . . . their popularity is based in the basic realism of [the] street life they present.” It has even been suggested that these “bulletins from the front in a battle for survival” are so “threatening precisely because [they are so] bold and ugly.”

Now, with all of the controversy, the question seems to be whether or not rap music is protected speech. Does this form of expression with its explicit sex, violence, and profanity fall outside First Amendment protection? Or does it speak from the “gut of disenfranchised America” in such a way that entitles it to every bit of protection the First Amendment can afford?

This Article considers some of the more violent, profane, and sexually oriented rap music in light of three categories of protected expression. The lyrical message of the music and the messages the artists themselves expound in interviews will be carried through the topics of subversive ad-


5. Alan Light, Ice-T, The Rolling Stone Interview, ROLLING STONE, Aug. 20, 1992, at 30. It is important to note that “Cop Killer” will not be discussed in this Article. “Cop Killer” was recorded and released by Ice-T’s speed-metal band, Body Count. Id. Therefore, because it is technically not a rap song, it does not fall within the parameters of this Article. However, the song’s rap mentality and the fact that a prominent rap artist was involved in its recording demonstrate the ever-continuing and growing controversy that surrounds this type of expression.

12. Specifically artists such as N.W.A., Ice Cube, Ice-T, Public Enemy, and 2 Live Crew.
13. Unfortunately, the entire scope of free speech and its related topics is beyond the scope of this Article. This in no way means the other topics are less worthy of analysis and discussion in this context or less important than the three chosen here.
vocacy, offensive language (as it has been derived from the "fighting words" doctrine), and obscenity. The effort is to establish that rap music is a protected form of expression despite its potentially shocking lyrical content.¹⁴

I. Subversive Advocacy

A. Legal Doctrine

The first United States Supreme Court rulings in this area were borne out of World War I and the advocacy of insubordination and obstruction of enlistment in the armed forces.¹⁵ Justice Holmes, speaking for the majority in Schenck v. United States,¹⁶ originated the "clear and present danger" test to determine what type of speech could be abridged despite the First Amendment guarantees.¹⁷ In Schenck and Debs v. United States,¹⁸ the Court found that defendants' efforts to influence recruits to resist service in the war were intended to obstruct the draft and recruitment for service in the armed forces.¹⁹ Because these efforts presented a "clear and present danger" of disrupting the United States' war effort, the Court allowed the suppression of this speech.²⁰

In Abrams v. United States,²¹ however, Justice Holmes dissented arguing that an additional requirement in the "clear and present danger" test...
was the immediacy of the danger. According to Justice Holmes, if the danger was not immediate then suppression of speech was unconstitutional. Justice Holmes further elaborated on this concept in his dissent to *Gitlow v. New York*, again stressing that only the danger of immediate action justified the suppression of speech. The Court majority in *Gitlow*, however, deferred to legislatures and allowed them to forbid advocacy of doctrines aimed at overthrowing the government without requiring the legislatures to wait until "a present and imminent danger of the success of the plan advocated" was upon them. Speech could be curtailed, consistent with the First Amendment, even if it did not advocate specific acts, immediate action, or even a call to specific persons to act.

Justice Brandeis' concurrence in *Whitney v. California* was the first signal of the Court's shift to a probability standard for constitutional suppression of speech that would reach full fruition in *Dennis v. United States*. Justice Brandeis said "to justify suppression of free speech there must be reasonable ground to . . . believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one." Justice Brandeis went further to state that a "clear and present danger" could not be found unless one could expect serious violence to immediately follow the speech or that the speech advocated such immediate violence.

In *Dennis* the court convicted the defendants of conspiring to organize a group or society of persons that advocated the overthrow or destruction of the United States government by force or violence in violation of the Smith Act. The advocacy in this case was organizing the Communist Party of the United States of America. The Court changed the *Schenck* standard to an outright balancing test. The test placed the "gravity" of

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22. *Id.* at 630 (Holmes, J., dissenting). "[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe . . . unless they so imminently threaten immediate interference with . . . the law that an immediate check is required to save the country." *Id.*
24. *Id.* at 673 (Holmes, J., dissenting). "Every idea is an incitement . . . [if it had been] an attempt to induce uprising against government at once and not at some indefinite time in the future it would have presented a different question." *Id.*
25. *Id.* at 669 (quoting People v. Lloyd, 136 N.E. 505, 512 (Ill. 1922)).
26. *Id.* at 671-72.
27. 274 U.S. 357 (1927).
29. 274 U.S. at 376 (Brandeis, J., concurring).
30. *Id.* at 377. Justice Brandeis stressed the immediacy requirement by saying "[i]f there be time . . . to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Id.*
31. 341 U.S. at 497.
32. *Id.*
the evil on a scale with the improbability of the evil's occurrence. The balance would determine if an invasion of free speech to prevent the evil was justifiable under the First Amendment. The Court concluded that organizing and advocating the violent overthrow of government was a "clear and present danger" justifying suppression of free speech. Justice Jackson, in his concurrence to Dennis, propounded that it is not easy, when deciding if suppression of speech is appropriate and justifiable, to distinguish between teaching or advocating violence with the goal of inciting violence from teaching or advocating violence with the goal of explanation. This particular problem that Justice Jackson recognized has haunted the Court in most of its decisions in the subversive advocacy field of First Amendment jurisprudence.

The decision in Brandenburg v. Ohio appears to have been the last formulation of the applicable rule in this area of First Amendment law. In a per curiam opinion, the Court stated that the constitutional guarantee of free speech permitted advocacy of the use of force or violation of the law unless such advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The Court held that speech teaching a resort to force or violence may not be abridged while speech preparing a group for violent action and "'steeling it to such action'" could be justifiably suppressed.

The limitations on government suppression of speech advocating the use of force or violence, expressed by the Court in Brandenburg, have been illustrated in several cases. Two examples are Hess v. Indiana and NAACP v. Claiborne Hardware Co. In Hess antiwar demonstrators blocked traffic on a street. Law enforcement officers were in the process

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33. Id. at 510.
34. Id. at 517.
35. Id. at 572. This proposition is of special interest in the context of this Article because rap music of the type under discussion often seems to do no more than explain the why of violence rather than attempt to incite its action.
37. Yates v. United States, 354 U.S. 298 (1957), attempted to refine the Dennis rule and give it more body to provide a clearer picture of the circumstances in which Dennis would allow the suppression of speech. The Yates majority defined the essence of Dennis as focusing on a group of "sufficient size and cohesiveness" and indoctrinated for "future violent action." Id. at 321. Thus, Yates effectively limited Dennis to suppression of speech advocating overthrow of the government when it is delivered in the context of an organized group like the Communist Party. The Brandenburg decision incorporated the Yates decision's refinement of the Dennis rule.
38. 395 U.S. at 447 (footnote omitted).
39. Id. at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).
42. 414 U.S. at 106.
of clearing the street when defendant Hess was heard to say "fuck" and was arrested. It was stipulated at trial that Hess had said, "We'll take the fucking street later." The evidence at trial indicated that Hess was not exhorting the crowd to go into the street when he made the statement, nor was his statement directed at any particular person or group. The Court held that this did not amount to advocacy of imminent lawless action and thus, the Court could not suppress the speech under the Brandenburg formulation.

Claiborne Hardware concerned a speech made to a large crowd. The speech threatened violence to any individuals who patronized white merchants. The merchants were subject to a boycott directed at securing racial equality. Emphasizing that no violence followed this statement, the Court held that the statement was protected speech. The Court declared that "[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech."

B. Rap Music and Subversive Advocacy

Most rap music does not flatly advocate violent overthrow of governmental institutions. Rap's language could, however, lend itself to a discussion in this vein. Three songs indicative of this type of advocacy are Public Enemy's "Fight the Power," KRS-One's "Bo! Bo! Bo!," and N.W.A.'s "Fuck Tha Police." "Fight the Power" raps:

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Got to give us what we want  
Got to give us what we need  
... We got to fight the powers that be
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Undoubtedly these words advocate some kind of action against the present power structure. Presumably the specific target is government, but the words are ambiguous and the specific target is unclear. It would seem

43. Id. at 107.  
44. Id.  
45. Id. at 108. The Court maintained that the additional fact the comment was not directed at particular people prevented suppression. Id. at 108-109.  
46. 458 U.S. at 899-902. The precise threat was "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck." Id. at 902.  
47. Id. at 928.  
48. Id.  
49. The F.B.I. sent a letter to N.W.A.'s distributor condemning the album containing "Fuck Tha Police," STRAIGHT OUTTA COMPTON, as "encourag[ing] violence against and disrespect for the law-enforcement officer." Adler, supra note 1.  
50. PUBLIC ENEMY, Fight the Power, on FEAR OF A BLACK PLANET (Def Jam 1988).
at first glance that this is protected because it does not advocate a resort to force or violence as required by *Brandenburg*. On the other hand, the “got to give” and “got to fight” imply the use of force or violence and might allow suppression. However, these lyrics do not incite lawless action; they can just as easily refer to manipulation of the present power structure for the achievement of the goal urged by the song.

None of the Supreme Court cases reviewed above support suppression of speech that advocates action yet is ambiguous as to the lawfulness of the action advocated. All of the cases, from *Schenck* to *Claiborne Hardware*, require an incitement to lawless action in terms more certain than those voiced in “Fight the Power.”

Slightly more difficult to dispatch are the police revenge fantasies of KRS-One and N.W.A. KRS-One raps:

On the ground was a bottle of Snapple  
I broke the bottle in his f— Adam's apple  
As he fell, his partner called for back up  
Well, I had the shotgun and began to act up  
With than [sic] “bo bo bo bo, kak kak kak kak kak”  
... The only way to deal with racism if you're black.

N.W.A. raps:

Ice Cube will swarm  
On any motherfucker in a blue uniform  
... Punk police are afraid of me  
A young nigger on the warpath  
And when I finish  
It's gonna be a bloodbath  
Of cops dyin' in L.A.  
... Pullin' out a silly club so you stand  
With a fake-ass badge and a gun in your hand  
Take off the gun so you can see what's up  
And we'll go at it punk, and I'm 'a fuck you up  
... I'm a sniper with a hell of a 'scope  
... Takin' out a cop or two  
They can't cope with me  
... Without a gun and a badge, what do you got?  
A sucker in a uniform waitin' to get shot  
By me, or another nigger

Both of these songs clearly advocate lawless action and violence. KRS-One states that to come out from under the shackle of racism, the black man (or even race) must strike out violently at his (or its) oppressors—in this case it is the police. N.W.A. espouses the same sort of philosophy with “waitin’ to get shot/ By me, or another nigger.” N.W.A., in contrast to KRS-One, speaks in the future and not the past tense. Although the language of these songs seem to advocate, if not incite, lawless action, Brandenburg’s requirement of imminence of the threat, derived from Justice Holmes’ immediacy concerns in Abrams, prevents suppression. No imminent or immediate threat exists here; at most these admittedly violent songs advocate a resort to violent force at some indefinite future date, which is expressly protected by Brandenburg.  

The statements in these two songs should be accorded no greater weight than Hess’ threat of force or violence at some indefinite future time. Following Justice Brandeis in Whitney, there can be no “clear and present danger” with these lyrics because the evil—violence against the police—is not so imminent that more speech can not be introduced to avert the evil before it occurs.

Another aspect of the advocacy concerns involves what rap artists say about their message in interviews—in other words, what they advocate outside of their music. Black separatism has been advocated more than once by rap artists and the obvious concern here is how to accomplish separatism. Although most rap artists do not advocate a violent, forceful, or total separation of the races, they do call for separation on at least some level. The message is to work within the structure to change it because it can and does change.

The Brandenburg requirements are still left unsatisfied; no advocacy of lawless action and certainly no imminent lawless action exist. In fact, Claiborne Hardware clearly covers the separatism ideas. Claiborne Hardware protects speech about separatism because it is merely an appeal for unity and common action. Most importantly under Claiborne Hardware, arguably no lawless action has resulted from these appeals for separatism. Despite the violence and what appears to be advocacy of violence against

55. Ice Cube, formerly with N.W.A., advocates unity among blacks and separatism: “It’s unite or perish... We... need to separate ourselves... to create the identity that we don’t have as a people.” Dennis Hunt, Outrageous as He Wants to Be, L.A. Times, Nov. 3, 1991, at 5. Public Enemy’s Chuck D. is “looking for separate development so that we can get to the level of the rest of society.” Rap—The Power and the Controversy; Chuck D.—The Interview, L.A. Times, Feb. 4, 1990, at 6. Chuck D. also says blacks must “hate your oppressor... [your oppressor is] a collective train of thought; it’s a collective state of mind. You should hate that shit... [If]... [a] person claims that he’s at the steering wheel of that force of oppression, then you make your move.” Bill Wyman, 20 questions: Chuck D., Playboy, Nov. 1990, at 134.
government (often in the form of the police) and demands for racial separation, the rap music considered here does not present a "clear and present danger" that would allow suppression of free speech.

II. OFFENSIVE LANGUAGE

A. Legal Doctrine

Offensive language in the form of profanity permeates rap music. The treatment accorded offensive language under the First Amendment was born at the same time as the "fighting words" doctrine, so the law concerning both is intertwined. The genesis of this line of cases is Cantwell v. Connecticut. In Cantwell the Court held that some speech may be suppressed because it amounts to a breach of the peace due to the violence it provokes in others. The Court stated that the use of epithets and personal abuse was not communication of information or opinion that the Court would safeguard from suppression. Under this broad brushstroke the Court included "profane, indecent, or abusive remarks" directed at the "hearer." Chaplinsky v. New Hampshire provided the basic model in this field that guided the Court for many years. Chaplinsky addressed a government official as a "God damned racketeer" and a "damned Fascist." The Chaplinsky case defined speech that had little social value "as a step to truth" as worthless and unprotected. Worthless speech included the lewd, obscene, profane, libelous, and "fighting words"—"those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace." The Court decided that the words Chaplinsky used were epithets that would likely provoke retaliation by the average person thereby causing a breach of the peace. Thus, Chaplinsky merged profane and other offensive utterances under the "fighting words" rationale.

Terminiello v. City of Chicago appears to modify Chaplinsky and allow suppression only when speech is likely to produce a "clear and present danger" of substantive evil of more consequence than "public incon-

56. 310 U.S. 296 (1940).
57. Id. at 309.
58. Id. at 309-10.
59. Id. at 309.
60. 315 U.S. 568 (1942).
61. Id. at 569.
62. Id. at 572.
63. Id.
64. Id. at 574.
65. 337 U.S. 1 (1949).
venience, annoyance, or unrest." In effect, Terminiello limits the definition of breach of the peace to a narrower range of occurrences than might be allowed under Chaplinsky's "likely to provoke retaliation by the average person" standard.

Cohen v. California provides the next major shift in the doctrine of this area of the law. Defendant Cohen wore a jacket into the Los Angeles County Courthouse that clearly displayed the sentiment "Fuck the Draft." Defendant was convicted, under California law, of disturbing the peace by offensive conduct. The Court quickly removed Cohen from the "fighting words" context by concluding that no individual present at the time could reasonably consider Cohen's jacket to be a "direct personal insult" as required by Cantwell and Chaplinsky. The Court refined the issue of Cohen to be one of a state attempting to remove an offensive word from the public vocabulary. The theory, in the Court's eyes, behind the attempted removal was that it was a proper exercise of the state's role as "guardian[] of public morality" to seek such removal. The Court refused to allow the State to practice such a blatant form of censorship. The Court reasoned that states do not have a right to cleanse public debate so that it is inoffensive to even the most sensitive of its citizens. The statement "one man's vulgarity is another's lyric," encapsulates the approach the Court adopted in considering Cohen. In concluding its opinion, the Court recognized that specific words can themselves embody ideas and inexpressible emotions and that suppression of certain words can, therefore, also suppress speech protected by the First Amendment.

66. Id. at 4.
67. 315 U.S. at 574.
69. Id. at 16.
70. Id. at 20.
71. Id. at 22-23.
72. Id. at 23.
73. Id.
74. Id.
75. Id. at 26. This view has gained eloquent support:

The notion that speech is not suppressed by regulations on the manner of expression, because alternative ways of communicating the same message are available, does not seem to hold up under the scrutiny of contemporary communication knowledge. It is a "separate but equal" doctrine that suffers some of the same defects as that doctrine did when applied to educational opportunities. For example, it can hardly be maintained that phrases like, "Repeal the Draft," "Resist the Draft," or "The Draft Must Go" convey essentially the same message as "Fuck the Draft." Clearly something is lost in the translation.

Following Cohen, the Court remanded three cases for reconsideration in light of Cohen. The assumption that follows is that the Court believed Cohen effectively allowed the language concerned in the cases. In Lewis v. City of New Orleans, defendant addressed police officers, during the performance of their duties, as "'G[od]d[amn] M[other]F[uckers].'" Defendant in Rosenfeld v. New Jersey used "'m[other] f[ucker]'" on four occasions at a public school board meeting attended by a large number of women and children. Brown v. Oklahoma concerned references defendant made during a question and answer period in front of a large group. The statements at issue included references to police officers as "'m[other]f[ucking] fascist pig cops'" and a reference to a particular police officer as a "'black m[other]f[ucking] pig.'"

In each of the three cases, the Court's remand implies that the language is protected under Cohen and may not be suppressed. The mere offensiveness of the language used cannot justify suppression. The only instance of potential suppression is in Lewis, but Justice Powell's concurrence proposes that police officers are "'trained to exercise a higher degree of restraint than the average citizen.'" Justice Powell effectively renders the Chaplinsky "fighting words" test ineffective in Lewis by removing police officers from the realm of average citizens. Justice Powell's dissent in Rosenfeld, however, raises the issue of using such offensive language in front of an "unwilling audience" and whether that fact could have some bearing on the suppression of free speech when in that context.

Cohen (and Lewis, Rosenfeld, and Brown) caused Chaplinsky to undergo redefinition. The holdings of the later cases extricated profane utterances from Chaplinsky suppression. This completely removes Chaplinsky from the analysis of offensive profane language and relegates the case only to the "fighting words" doctrine. Although this relegation really makes no analytical difference here, it does help remove the offensive language discussion from the problematic holding of Chaplinsky that profane speech may constitutionally be suppressed.

One more case of interest on this topic is FCC v. Pacifica Foundation. Although the case primarily deals with the broadcasting of indecency, some of the principles espoused are of some concern. Pacifica deals with

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76. 408 U.S. 913 (1972).
77. Id. at 913 (Powell, J., concurring).
78. 408 U.S. 901 (1972).
79. Id. at 910 (Rehnquist, J., dissenting).
80. 408 U.S. 914 (1972).
81. Id. at 911 (Rehnquist, J., dissenting).
82. 408 U.S. at 913 (Powell, J., concurring).
83. 408 U.S. at 909 (Powell, J., dissenting). Justice Powell believes that the unwilling audience changes the level of tolerance that must be accorded such language. Id.
comedian George Carlin’s “Filthy Words” monologue. The monologue makes liberal use of the words “shit, piss, fuck, cunt, cocksucker, motherfucker, and tits,” words that appear frequently in the style of rap music under discussion.

In Pacifica the Court held that Federal Communication Commission (“FCC”) regulation of speech such as that in the Carlin monologue was not a violation of the broadcaster’s First Amendment rights. The Court relied on the “uniquely pervasive presence” of broadcast media in society and the media’s unique accessibility to children to justify its ruling that the FCC could prohibit the broadcast of such language during the afternoon.

Although the holding in Pacifica seems to be inconsistent with the holding in Cohen, it is not. The Court in Pacifica did not allow the removal of the “offensive language” from common discourse; that would contradict the holding of Cohen. Instead, the holding in Pacifica relates more to the timing of the language’s exposure during the broadcast day. The timing restriction in Pacifica is consistent with the decision in Cohen, which is mainly concerned with governmental attempts to remove profanity from common discourse.

Justice Stevens’ opinion for the Court in Pacifica recognizes that the content and context of speech are important in freedom of expression analysis. Justice Stevens asserted that speech like that concerned in Pacifica depends on the circumstances to define its social value and its capacity to offend. Justice Stevens even went as far as paraphrasing Justice Harlan in Cohen by stating that “one occasion’s lyric is another’s vulgarity.” Thus, while the Cohen decision prevents outright suppression of profanity, the Pacifica decision allows its regulation dependent upon the context of the language. The unique accessibility of broadcasting to children is a determinative factor in the Pacifica holding disallowing broadcasts like the Carlin monologue during times children would likely be in the audience. The question this raises naturally is what message Pacifica sends to rap artists whose recordings are easily accessible to children?

85. Id. at 751.
86. Id. at 748.
87. Id.
88. Id. at 749.
89. Id. at 729. The Court emphasized the narrowness of its holding, basically stating that while the language may be acceptable to be broadcast, the time of day was inappropriate and thus allowed for regulation by the FCC. Id. at 750.
90. Id. at 744.
91. Id. at 747. Words “commonplace in one setting are shocking in another.” Id.
92. Id.
93. Id. at 749-50.
B. Rap Music and Offensive Language

In the context of the type of rap music being discussed, Cohen's statement that "one man's vulgarity is another's lyric" is of extreme importance. Profanity is a staple of this form of rap music. Recall the sample lyrics from "Fuck Tha Police" by N.W.A. and the importance of the Cohen decision becomes all too clear. Consider these examples from N.W.A.:

AK-47 is the tool
Don't make me act a motherfuckin' fool

Public Enemy:

Elvis was a hero to most
But he never meant shit to me you see
Straight up racist that sucker was
Simple and plain
Motherfuck him and John Wayne

and Ice-T:

Girls, Let's get butt naked and fuck.

In every context mentioned, the profanity does not carry the same weight as it did in Cohen because it is not all politically oriented. However, Cohen's holding is not limited to profanity in speech that was politically oriented, and Cohen was not interpreted that restrictively by Lewis, Rosenfeld, and Brown.

Clearly none of the quoted examples are "fighting words" as defined under Chaplinsky because they are not directed at any specific person and are not uttered in that person's presence. In that sense they are more like Cohen; the expletives are used for purposes other than personally abusive epithets. Justice Brennan's dissent in Pacifica appropriately states that the words George Carlin used may be everyday conversational fare in some of the cultures of this country. Indeed, in the culture populated by rap aficionados, expletive-laced conversation is commonplace. Otherwise this type of rap music would not enjoy the amount of success and popularity that it does enjoy.

94. See supra note 74.
95. Supra note 53 and accompanying text.
97. Public Enemy, supra note 50.
99. 438 U.S. at 776 (Brennan, J., dissenting). Justice Brennan cites several academic research works as support for this proposition.
Cohen is not limited to allowing the words for their own sake. Justice Harlan's opinion in Cohen states:

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which . . . may often be the more important element of the overall message sought to be communicated . . . . [W]e cannot . . . forbid particular words without also running a substantial risk of suppressing ideas in the process.100

Thus, Justice Harlan recognized that allowing the use of profanity in common discourse is justifiable, if not necessary.

Rap artists often tend to see themselves as communicators or reporters from the street. Ice-T encapsulates this view by saying that black culture uses music as "a forum for communication and education."101 Chuck D. of Public Enemy says music is "communication . . . [A]ll us rappers are—communicators."102 Ice Cube explains that "[r]ap . . . gives you information. It tells you about what you're up against in society."103

If rap is such a powerful medium to communicate and educate, why is it so laced with profanity? Rap artists say that to reach the audience they want to reach, they must speak the language the audience speaks or else the artists will be ignored. "I can't code or dilute my message, because I'd sound like a hinky-dink to my brothers," says Ice-T.104 In other words, drop the profanity and the artist loses his credibility with his audience. Ice Cube asserts, "I speak in a language we talk in the streets"105 and "[t]he homeboys know exactly what we're saying."106

The basic lesson is that rappers are trying to communicate something to an audience that must be addressed in its own language. Whether it is pride in the black race ("Motherfuck him and John Wayne"), pure rage ("Don't make me act a motherfuckin' fool"), or a host of other complex emotions, the vernacular of the street is essential to get the message across. It is this type of speech that Cohen and its progeny protect. Cohen protects speech that embodies a message to its primary audience

100. 403 U.S. at 26.
104. Kot, supra note 101.
105. Hunt, supra note 55.
106. Hilburn, supra note 102.
even though the form of that message offends other members of society. The vitality of the message is expressed in its simple configuration using four-letter words that in the street culture can mean far more than just a "scurrilous epithet."\footnote{107}

III. OBSCENITY

A. Legal Doctrine

\textit{Roth v. United States}\footnote{108} established concretely that obscenity enjoys no constitutional protection.\footnote{109} The \textit{Roth} test for obscenity asks whether the average person applying contemporary community standards would find that a work's dominant theme appealed to the prurient interest; if it does then the work is considered to be obscene.\footnote{110}

The \textit{Roth} test greatly disturbed Justice Douglas who vehemently attacked the Court's position in his dissent. Justice Douglas was disturbed by the Court's punishment of thoughts and utterances when they were totally unrelated to action.\footnote{111} He desperately tried to incorporate the \textit{Dennis} stance that to punish speech there must be a relation between the speech being suppressed and some action.\footnote{112} He even went so far as asserting that "the arousing of sexual thoughts and desires happens every day in normal life in dozens of ways,"\footnote{113} and therefore, no suppression should attach to mere arousal. Justice Douglas, however, remained in the minority. His views, contrasted with the Court in \textit{Roth}, reflect the divisiveness on the issue of sexually oriented speech—a divisiveness that can be traced through all of the Court's cases concerning obscenity.

\textit{Jacobellis v. Ohio}\footnote{114} is most famous for Justice Stewart's concurrence in which he says that he has difficulty defining obscenity but "I know it when I see it."\footnote{115} This catch phrase reflects the difficulty the Court has had developing a standard in this area of law, and it also lends itself, unfortunately, to use by censors who merely wish to suppress speech they find offensive. Beyond Justice Stewart, however, \textit{Jacobellis} also establishes that the work being considered must be utterly without redeeming social value in order to be obscene.\footnote{116} Thus, a work with any social value

\begin{itemize}
  \item \textit{Roth v. United States} 354 U.S. 476 (1957).
  \item \textit{Id.} at 485.
  \item \textit{Id.} at 489.
  \item \textit{Id.} at 509 (Douglas, J., dissenting).
  \item \textit{Id.} at 509.
  \item \textit{Id.} at 509 (Douglas, J., dissenting).
  \item \textit{Id.} at 509.
  \item \textit{Id.} at 184 (1964).
  \item \textit{Id.} at 197 (Stewart, J., concurring).
  \item \textit{Id.} at 191.
\end{itemize}
at all is not obscene under Jacobellis. The Court also defined the community in the community standards requirement as a national community.117

The obscenity standard was crystallized in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts,118 only to be altered seven years later by the decision in Miller v. California.119 The Court in Memoirs required three elements to coalesce before establishing a finding of obscenity.120 The elements required for finding obscenity were: the dominant theme of the work as a whole had to appeal to the prurient interest; the work had to be patently offensive in its description of sexual matters in a manner offending contemporary community standards; and the work had to be utterly without social value.121 Justice Douglas' concurrence in Memoirs recognizes the fundamental flaw in all of obscenity jurisprudence. Justice Douglas' observation is both the most easily ignored and the most damning indictment of the arbitrariness of the decisions in this field: "We are judges ... [w]e are not competent to render an independent judgment as to the worth of ... any ... book, except in our capacity as private citizens."122 Justice Douglas truly recognized how absurd it is for the Court to sit in judgment of artistic works when the only true test of obscenity is a personal, value-laden morality.

Miller established the presently controlling test for obscenity. It rejected the Roth-Memoirs test123 and redefined community standards to the local level, thereby rejecting Jacobellis' national standard ruling.124 The Miller obscenity standard requires proof of three factors. The first factor is that the average person applying contemporary community standards would find the work as a whole appeals to the prurient interest. The second factor requires that the work depict or describe sexual conduct, specifically defined by state statutes, in a patently offensive manner. Finally, the work as a whole must lack "serious literary, artistic, political, or scientific value."125

B. 2 Live Crew and Obscenity

The obscenity law applied to the type of rap music under consideration is best discussed in the context of the 2 Live Crew case—Skywalker

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117. Id. at 195.
120. 383 U.S. at 418.
121. Id.
123. 413 U.S. at 23.
124. Id. at 30.
125. Id. at 24.
Records. The two portions of the Miller test that will be focused on are the community standard requirement and the serious literary value requirement.

The rap group 2 Live Crew, plaintiffs in Skyywalker Records, released the album *As Nasty As They Wanna Be* in 1989. Complaints by some south Florida residents led to an investigation of the recording by the Broward County Sheriff's office. A deputy sheriff purchased a copy of the recording at a retail music store and had six of the eighteen songs transcribed. The deputy prepared an affidavit seeking a finding of probable cause that the recording was legally obscene. The deputy submitted the affidavit, the transcription, and the copy of the recording to the Broward County Circuit Court.

An order was issued that established probable cause to believe the recording was obscene. Deputy sheriffs, displaying their badges in plain view, visited approximately twenty stores, furnished the managers with copies of the order, and told the managers that they should refrain from selling the recording. Within days, all retail stores in Broward County stopped selling the recording.

In determining the community standard to be applied in Skyywalker Records, Judge Gonzalez stated that although the community standard applied was not his personal opinion, it was reflective of his "personal knowledge of community standards." The Eleventh Circuit conceded, without deciding, that the judge's familiarity with the contemporary community standards was sufficient to satisfy the Miller test.

This seems highly suspect. Even though the small segment targeted by 2 Live Crew cannot serve as the community standard for the entire community, it is a vitally important segment of the community when the obscenity of rap music is under consideration. It is not a stretch of the imagination to believe that Judge Gonzalez probably had little, if any, knowledge of the contemporary community standard in the community that 2 Live Crew (or other rap artists) was striving to reach. Even the Eleventh Circuit stated that if the material in question was not directed to a "'bizarre, deviant group' not within the experience of the average person, the best evidence is the material."

Although the rap audience would not likely fit into a legal definition of bizarre or deviant, it cannot truly be said to be in the experience of the

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127. Id. at 583.
128. Id. This paper will not discuss the second major portion of the Skyywalker Records opinion dealing with the prior restraint issue. Id. at 600.
129. Id. at 590.
131. Id. at 137.
average person. The implication is that the material itself is not the best evidence and some other evidence of the community standard is required. Judge Gonzalez should have accepted testimony from other sources that would instruct him on the community standards of the culture that produces and is targeted by rap artists like 2 Live Crew. A true community standard cannot be derived for obscenity purposes until that culture is considered. A community consists of too many standards and cultures for one judge to be conversant enough in them all to derive a community standard based solely on personal knowledge.

2 Live Crew produces sexist and sexually explicit rap music, the precise issues that concerned Judge Gonzalez.132 Despite the sexism and explicit sex, rap music of the type that 2 Live Crew produces has been called "unerringly precise" in its reflection of its community.133 Judge Gonzalez seemed to ignore even the clearest indication of community standards available to him—the fact that approximately 1.7 million copies of the album *As Nasty As They Wanna Be* had been sold by the time of the trial.134 It is true that album sales figures span the nation and are not local, and community-specific, and *Miller* instructs that the local community must provide the community standard. Despite that fact, the evident popularity of the recording must at least indicate that "a lot of the community is laughing and singing along,"135 and provide an indicator warranting consideration when setting the community standard. Basing the determination of the applicable community standard on personal knowledge when that standard will be used to suppress speech is both errant and irresponsible.

In an attempt to show that their rap songs had serious artistic value, 2 Live Crew made two points: it discussed raps' roots in the black oral tradition and explained how those roots were evident in 2 Live Crew's music.136 "Doing the dozens" (escalating satirical insults) and "boasting" (overstating virtues like sexual prowess) were two such traditions focused on at trial that Judge Gonzalez glibly dismissed as "part of the universal human condition."137 Even if Judge Gonzalez was right, these traditions are most (if not exclusively) prevalent in modern rap music. The prevalence of these oral traditions would suggest that they are somehow vital to the meaning and importance of rap music. Denying the consideration of these traditions on the basis of their supposed universality could very well have destroyed the key to understanding the artistic value of the

132. 739 F. Supp. at 591.
137. *Id.*
music. It would be and is foolish to deny that songs with titles like "Me So Horny" and "Dick Almighty" do not employ the "exaggerated style [of] inner-city culture."\textsuperscript{138}

The Eleventh Circuit reversed Judge Gonzalez on the artistic merit prong of the \textit{Miller} test.\textsuperscript{139} The court stated that the question of whether a work possesses serious value is not to be decided by contemporary community standards.\textsuperscript{140} The court rejected "the argument that simply by listening to this musical work, the judge could determine that it had no serious artistic value."\textsuperscript{141}

A culture was just as surely on trial in \textit{Skyywalker Records} as was 2 Live Crew; a culture that Gonzalez virtually ignored by not entertaining the notion that perhaps that culture viewed sexual conduct from a different perspective. "[J]udges must be willing to accept as authoritative the views of . . . rap music critics. . . . Otherwise, it is unclear what criteria judges [will] use in determining artistic value and the danger of rulings based on personal bias is increased."\textsuperscript{142}

The problem with the \textit{Miller} test as applied to rap music of this genre is that this rap music is born of a culture that is a segment of the community standard. Never before has this segment clashed with the community as a whole so clearly as it does now. Judges must accept both the existence of this segment and the fact that they probably know nothing about the roots and genesis of its music. A judge cannot make a personal determination of what the community standard is without first considering the community that is home to this musical expression. A judge cannot determine serious literary or artistic merit without considering what this expression means to the people who say it and the culture that has fostered its growth. \textit{Pacifica} teaches that speech means nothing without its context. Judge Gonzalez ignored this lesson in \textit{Skyywalker Records} and thus, reached an erroneous determination that 2 Live Crew's recording \textit{As Nasty As They Wanna Be} is legally obscene. The Eleventh Circuit, however, did not ignore the lesson, at least in part.

\textbf{IV. Conclusion}

The rap music considered in this Article is an urgent message that deserves to be heard. Despite the abundant profanity, the violence, and the explicit sex, this rap music is constitutionally protected speech.
Under the Supreme Court's subversive advocacy decisions, rap music cannot be suppressed because it either does not advocate lawless action or because it does not pose any threat of imminent lawless action. There is no "clear and present danger," as defined in the Court's decisions.

This rap music cannot be suppressed because of its offensive language. It contains no "fighting words" because it does not address a specific person directly in the face of that person. Government cannot purge profanity from the vocabulary of the citizenry simply because it is offensive. Even profane words can have value because they can express some ideas with more clarity and force than other less "offensive" words.

Finally, this rap music is not obscene. Community standards must include the standards of the culture that gave birth to this type of expression. The serious literary or artistic merit of this rap music must be determined in the light of what it says, the culture that gave it life, and the culture to which it speaks.

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