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Skyywalker Records, Inc. v. Navarro: Enough Already To the Obscene Results of Miller v. California

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Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises . . . and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition . . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

— Justice Holmes

I. INTRODUCTION

In Skyywalker Records, Inc. v. Navarro ("Skyywalker Records"), the Southern District Court of Florida found the rap music group 2 Live Crew's recording As Nasty As They Wanna Be legally obscene. The court began the opinion with the observation that "[t]his is a case between two ancient enemies: Anything Goes and Enough Already." In this case, "Anything Goes" advocates arguably broad protection of the first amendment rights of freedom of speech and expression. The concept loses to "Enough Already," which advocates judicial constraints on those rights such as the United States Supreme Court's current construction of the obscenity doctrine, the Miller v. California ("Miller") test.

3. Rap music is "popular music featuring a rhyming patter of urban slang intoned over a steady and insistent beat." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1191 (1989 ed.).
5. Id. at 582.
6. See id. at 582, 586.
However, there is a problem with denying first amendment rights through "Enough Already's" such as Miller.

For a work to be deemed obscene under Miller, it must be proved that the work appeals to the prurient interest, depicts sexual conduct in a patently offensive manner, and is without serious social value. This sets out an elusive and elastic standard that can vary from case to case as often as individual tastes and opinions vary. The vague standard encourages faulty applications by courts. For example, in Skyywalker Records, the court used its own "knowledge" of the relevant community standard in order to meet two of the three prongs of the Miller test.

Further, regardless of how a given court applies Miller, the test itself seems to violate the Supreme Court's constructions of the first amendment. The Court has recognized that when a legal doctrine is so vague as to be undefinable, as are the elements of Miller, the doctrine is unconstitutional because citizens are not able to predict what conduct may be illegal. Legitimate speech is also "chilled" for fear of meeting the test. These vagueness problems are particularly acute when a court attempts to decide if a work has serious value. Moreover, the Supreme Court has affirmed two first amendment theories which appear to contradict Miller or any such obscenity test. Both the recognized right to receive and possess obscene speech, and the right to protection of inexpressible emotions seem to preclude a Miller inquiry.

This note examines the vagueness problems intrinsic to the Miller test in the context of the Skyywalker Records decision and also discusses the basic unconstitutionality of any obscenity doctrine, absent evidence of exposure to young children or unconsenting adults.

II. FACTS

A. Procedural Background

The four members of the rap music group 2 Live Crew and its record company, Skyywalker Records, filed a civil action against Broward County, Florida Sheriff Nicholas Navarro, after he had warned record retailers in Broward County to remove the group's recording, *As Nasty As They Wanna Be* ("Nasty"), from the shelves because the recording was obscene. The plaintiffs brought the action under 42 U.S.C. § 1983, alleging that the Sheriff had infringed upon the group's first amendment right to freedom of speech because the seizure was an unconstitutional prior restraint of the recording. The plaintiffs also sought judicial determination under 28 U.S.C. § 2201(a) of whether the *Nasty* recording is legally obscene and injunctive relief under 28 U.S.C. § 2202(b).

The district court held that the Sheriff's actions were an unconstitutional prior restraint, but the court also concluded that the recording was legally obscene. The court emphasized that because this was a civil action, the decision did not criminalize 2 Live Crew's conduct nor charge anyone with a crime. Under the decision, however, individuals who sell, distribute, produce, or knowingly possess the recording may be prosecuted under a Florida state law. The law sets a maximum penalty of five years in jail and a $5,000 fine for selling "harmful material" to minors and a maximum penalty of one year in jail and a $1,000 fine for sales to adults. No criminal proceedings against either the recording or 2

19. Id. at 582-83.
20. The first amendment of the Constitution prohibits the restraint on a publication before it is published. A person defamed is left to a libel remedy. A prohibited prior restraint is not limited to the suppression of material before it is released to the public; rather, an invalid prior restraint is an infringement upon the constitutional right to disseminate matters that are ordinarily protected by the first amendment without there first being a judicial determination that the material does not qualify for first amendment protection. BLACK'S LAW DICTIONARY 1074-75 (5th ed. 1979).
22. Id.
23. The court correctly held that the seizure was unconstitutional. Id. at 603. This issue is not addressed in this note.
24. Id.
25. Id. at 582.
26. See infra note 40 for a description of section 847.011 of the Florida Statutes.
Live Crew have yet been instituted in Florida based on *Nasty*’s obscenity.  

B. Case History

2 Live Crew released *Nasty* to the public in 1989. The recording contains numerous expletives and much sexually explicit language. To date, sales of *Nasty* have totalled over two million copies.  

2 Live Crew includes a statement on the front of the paper insert to their recording which reads: “WARNING: EXPLICIT LANGUAGE CONTAINED.” The group has also produced a recording entitled *As Clean As They Wanna Be*, which contains the same music as *Nasty* but “without . . . explicit sexual lyrics,” and which has sold approximately 250,000 copies.

In February, 1990, in response to complaints by South Florida residents, the Broward County Sheriff’s Office began an investigation of

28. Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 584 (S.D. Fla. 1990). On March 27, 1990, Navarro filed an in rem proceeding in the Broward County Circuit Court against the *Nasty* recording seeking a judicial determination that it was obscene under state law. *Id.* at 583. See Navarro v. The Recording “As Nasty As They Wanna Be,” case number 90-09324(12) (Reasbeck). At the time the *Skyywalker Records* opinion was published, a trial date had not yet been set. *Skyywalker Records*, 739 F. Supp. at 583-84. The members of 2 Live Crew, however, were tried and acquitted in a jury trial on October 20, 1990 of charges of violating Florida obscenity laws during a June 10, 1990, Hollywood, Florida nightclub performance, in which the group performed songs from *Nasty*. *L.A. Times*, Oct. 21, 1990, § A, at 1, col. 4.


30. The court did not list any lyrics from the *Nasty* recording nor indicate which specific lyrics were considered in its decision. The court found, however, that the lyrics and titles of songs on the *Nasty* recording were replete with references to genitalia, excretion, oral-anal contact, fellatio, sexual intercourse, group sex, sadomasochism, other sexual activities, and sounds of moaning. *Id.* at 591. Use of musical lyrics in general which focus on these subjects, presented in a context such as the *Nasty* recording, appears to be what the court found obscene.


33. *Id.* at 582.

34. *Id.*

35. *Id.* Under cross-examination, the Broward County Deputy Sheriff who conducted the investigation of *Nasty*, Mark Wichner, conceded that his department had not received any complaints from Broward County residents. *Nat’l L.J.*, June 4, 1990, at 27, col. 4. There were no written complaints in the *Nasty* investigation file created by the Broward County Sheriff’s Office. *Skyywalker Records*, 739 F. Supp. at 589.

The opinion notes, however, the existence of complaints, “whether communicated by telephone calls, anonymous messages, or letters to the police,” which demonstrated the “significant community discontent” prompting the investigation. *Id.* The court further found that
the *Nasty* recording. On February 26, 1990, the Deputy Sheriff assigned to the case, Mark Wichner, purchased a cassette recording of *Nasty* at a Broward County retail music store, Sound Warehouse. Wichner listened to the *Nasty* recording, had six of the eighteen songs transcribed, and prepared an affidavit detailing these facts. On February 28, 1990, Wichner submitted these materials and the *Nasty* tape cassette to the Broward County Circuit Court and requested that the court find probable cause that the *Nasty* recording was legally obscene. The circuit court subsequently found probable cause to believe the recording was obscene and issued an order of this finding.

The Broward County Sheriff's Office distributed the court's order to any retail stores that might be selling the *Nasty* recording. Additionally, Wichner and other members of the Sheriff's Office visited fifteen to twenty stores and warned retailers that subsequent sale of the *Nasty* recording could result in their arrest and conviction. Within days, all retail stores in Broward County ceased offering the *Nasty* recording for sale. Those stores not directly visited by the Sheriff's Office pulled the recording from their shelves after learning of the Sheriff's visits from television and radio reports. Despite 2 Live Crew's own warning label on the recording, *Nasty* was no longer available even in stores which had policies of specially marking the recording with a warning and of refusing sales to minors. At the time the *Skyywalker Records* decision was

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37. Id. at 583.
38. Id.
39. Id.
40. Id. The circuit court found *Nasty* obscene under section 847.011 of the Florida Statutes and under case law. Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 583 (S.D. Fla. 1990). Subsection (1)(a) of section 847.011 criminalizes the distribution, sale, or production of any obscene thing including a "recording" which can be "transmuted into auditory... representations." Subsection (2) similarly makes it a crime for a person to knowingly have an obscene thing in his possession. Id. at 585.
42. Id.
43. Id.
44. Id.
45. Id.
The seizure of the *Nasty* recording in Broward County was not the first attempt in Florida to suppress 2 Live Crew's music. A Lee County, Florida judge had ruled as early as October, 1988 that probable cause existed to believe that 2 Live Crew's *Move Somethin'* recording was obscene. However, the obscenity controversy did not reach full momentum until Republican Governor Bob Martinez — citing a concern that minors had access to the music — asked statewide prosecutor Peter Antonacci in February, 1990 to determine whether 2 Live Crew's music violated the state obscenity or federal racketeering statutes. The Governor's interest had been prompted by Jack Thompson, a Coral Gables, Florida lawyer and self-styled crusader against pornography who had launched a letter-faxing campaign to law-enforcement officials throughout Florida, urging them to take action against *Nasty*. Prosecutor Antonacci advised Governor Martinez that the issue could be best handled at the local level, and the circuit court issued its probable cause determination against *Nasty* three days later.

Although Governor Martinez's concern that *Nasty* was available to children prompted the events leading to the recording's suppression in Broward County, *Nasty*'s impact on minors was not considered in the present case because there was insufficient evidence that *Nasty* was either targeted at, or had reached, children. Additionally, there was no indication in the court's opinion that unconsenting adults were unwillingly exposed to the recording. Thus, the *Skyywalker Records* court decided only that *Nasty* is unsuitable for exposure to consenting adults.

### III. The Rise in Anti-Obscenity Prosecutions

The *Skyywalker Records* trial and a February, 1990 criminal trial in Alabama, in which a record retailer was acquitted after a jury trial for selling 2 Live Crew's *Move Somethin'* recording, are believed to be the

48. *Id.*
49. *Id.* For a discussion of the use of the federal racketeering statute in obscenity prosecutions, see *infra* notes 60-67 and accompanying text.
53. *See id.* at 582-96.
54. *See id.*
first two music obscenity trials. Legal experts see the extension of the obscenity doctrine to music as part of a boom in anti-obscenity prosecutions that has taken place across the country. For example, obscenity prosecutions conducted by the Department of Justice rose from 37 in 1988 to 120 in 1989. Many observers attribute the rise in such anti-obscenity activity to politicians who seek to benefit from the current conservative public sentiment.

A further development is the use of the far-reaching federal anti-racketeering law, the 1970 Racketeering Influenced and Corrupt Organizations Act ("RICO"). RICO has been used to fuel cases against music and arts targets. There is increasing speculation among legal experts and entertainment industry observers that the controversy involving sexually explicit lyrics in popular music may soon escalate because the Federal Bureau of Investigation and the United States Justice Department are pressing the use of RICO in obscenity cases. Although the RICO statute has yet to be used to prosecute a record store owner or record store owner who refused to stop selling the Nasty recording in Texas, North Carolina, and Canada. L.A. Times, Dec. 13, 1990, § F, at 11, col. 5. Commercial obscenity charges brought against a San Antonio, Texas record store owner were dismissed on December 10, 1990. Id. Counts filed against the 142-store Dallas-based Sound Warehouse (the same record store chain involved in Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 583 (S.D. Fla. 1990)) were dismissed on November 8, 1990. L.A. Times, Dec. 13, 1990, § F, at 11, col. 5. Obscenity cases against retailers who sold Nasty in North Carolina and Canada are not expected to go to trial before early 1991. Id.


For instance, restrictions placed on federally funded arts projects containing sexually explicit material have been the focus of heated Congressional debates on budgeting for the National Endowment for the Arts. Id. In April, 1990, Cincinnati officials indicted the city's Contemporary Arts Center and its director for an exhibit of works by photographer Robert Mapplethorpe that contained sexually explicit material. Id. at 27, col. 1; L.A. Times, Oct. 4, 1990, § A, at 19, col. 1. The Center and its director were subsequently acquitted. L.A. Times, Nov. 1, 1990, § F, at 1, col. 4.

No charges have yet been filed. Id.
company, it played a key role in the Skyywalker Records case. Obscenity crusader Jack Thompson’s attempt to persuade Florida Governor Bob Martinez to investigate 2 Live Crew for possible violations of RICO, in addition to Florida obscenity statutes, ignited the events which led to the Skyywalker Records decision.

A RICO conviction carries a twenty-year prison term for each racketeering count and can force defendants to forfeit their entire interest in an enterprise, even if only a fraction of the earnings came from illegal activities. RICO allows for both civil and criminal prosecution, and a defendant establishes a pattern of illegal acts sufficient to constitute racketeering if he commits two offenses within a ten year period. As Thompson himself stated, “[a]ll the law requires [for a RICO prosecution] is that you sell two units of obscene material. [2 Live Crew] has sold 2 million.”

IV. BACKGROUND: THE OBSCENITY DOCTRINE

A. Overview

The first amendment to the Constitution provides that “Congress shall make no law . . . abridging the freedom of speech.” In the landmark case of Roth v. United States, ("Roth") the United States Supreme Court held that obscenity is not within the area of constitutionally protected freedom of speech or press — either under the first amendment, applied to the federal government, or under the due process clause of the fourteenth amendment, applied to the states. The Court found

64. Id.
65. Id. at 6, col. 1. On October 15, 1990, the Supreme Court let stand the racketeering conviction of a Virginia couple that included seizure of the couple's three adult bookstores and nine rental shops, for selling $105 worth of obscene material. Id. at 6, col. 2. See United States v. Pryba, 88-5001. Nat'l L.J., June 4, 1990, at 28, col. 4.
67. Id. at 6, col. 4.
68. U.S. CONST. amend. I.
69. 354 U.S. 476 (1957). Roth published and sold books, photographs, and magazines in New York. He used circulars and advertising to solicit sales. Roth was convicted of mailing obscene circulars and advertisements, and an obscene book, in violation of the federal obscenity statute. Roth v. United States, 354 U.S. 476, 480 (1957). The Supreme Court upheld the conviction. Id. at 494. The Roth test of obscenity was whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest. Id. at 489.
70. Id. at 481-85. The fourteenth amendment provides that “[n]o State shall . . . deprive any person of . . . liberty . . . without due process of law.” U.S. CONST. amend. XIV. It is well established that “liberty” includes the right to free speech. See Chaplinsky v. New Hampshire, 315 U.S. 568, 570-71 (1942).
that the unconditional phrasing of the first amendment that no law may abridge freedom of speech was not intended to protect every utterance.\textsuperscript{71} The Court further reasoned that implicit in the history of the first amendment is the rejection of obscenity as utterly without redeeming social importance.\textsuperscript{72}

The rationale behind the obscenity doctrine is that the message conveyed by obscene speech is of such slight social value that it is outweighed by compelling interests of society, as manifested in laws enacted by legislatures.\textsuperscript{73} In a companion case to \textit{Miller v. California}\textsuperscript{74} decided the same day,\textsuperscript{75} the Court offered three reasons why society could suppress the obscene rather than merely protect the right of people to avoid it if they wished: (1) there is at least an arguable correlation between obscene speech and crime; (2) states have the power to make a morally neutral judgment that obscene material injures the community as a whole by polluting the public environment; and (3) what is commonly read, seen, heard, and done intrudes upon us all, whether it is wanted or not.\textsuperscript{76}

\textbf{B. \textit{Miller v. California}}

1. The \textit{Miller} Decision

The Supreme Court heard \textit{Miller v. California} as one of a group of obscenity-pornography cases in an effort to re-examine the existing obscenity standards.\textsuperscript{77} In \textit{Miller}, the appellant conducted a mass mailing

\begin{itemize}
\item \textsuperscript{71} Roth, 354 U.S. at 483. The Court has delineated a number of areas in addition to obscenity which are not afforded first amendment protection, including defamation, “fighting words,” and types of commercial speech. L. Tribe, \textit{American Constitutional Law} \S 12-2, at 790 n.10, \S 12-10, at 850 (2d ed. 1988).

\item \textsuperscript{72} Roth, 354 U.S. at 484.


\item \textsuperscript{74} 413 U.S. 15 (1973).

\item \textsuperscript{75} Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

\item \textsuperscript{76} \textit{Id.} at 58-59, 68-69. Of course, each of these justifications is based upon arguable factual predicates. See, e.g., Stanley v. Georgia, 394 U.S. 557, 566-67 (1969) (a state law could not be defended on the ground that “exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence,” for

\item \textsuperscript{77} Miller v. California, 413 U.S. 15, 16 (1973). The controlling obscenity test at the time \textit{Miller} was decided was set out in \textit{Memoirs v. Massachusetts}, 383 U.S. 413 (1966), although it
campaign to advertise illustrated adult books.\textsuperscript{78} The appellant mailed five unsolicited advertising brochures to a restaurant in Newport Beach, California.\textsuperscript{79} He was subsequently convicted of mailing unsolicited sexually explicit advertisements, in violation of a California statute.\textsuperscript{80} The Court noted that the case involved application of a state obscenity statute in a situation where "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."\textsuperscript{81} The Court vacated and remanded the case for further proceedings under its new test.\textsuperscript{82}

2. The \textit{Miller} Test

In \textit{Miller}, the Court developed the current test for determining whether a given work is obscene.\textsuperscript{83} The Court held that to find material obscene, the basic guidelines for the trier of fact are:

(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.\textsuperscript{84}

In adopting \textit{Miller}, the Court built on the \textit{Roth} definition,\textsuperscript{85} yet also resolved some additional issues.\textsuperscript{86} First, the Court rejected the requirement of the prior \textit{Memoirs v. Massachusetts}\textsuperscript{87} ("\textit{Memoirs}") test that the work be "utterly without redeeming social value."\textsuperscript{88} \textit{Miller} broadens the

\begin{thebibliography}{99}
\item 78. \textit{Miller}, 413 U.S. at 16.
\item 79. \textit{Id.} at 18.
\item 81. \textit{Id.} at 18 (emphasis added).
\item 84. \textit{Miller}, 413 U.S. at 24 (citation omitted).
\item 85. \textit{Miller} reaffirmed \textit{Roth}. \textit{Id.} at 36.
\item 86. \textit{Id.} at 24-32.
\item 87. 383 U.S. 413 (1966).
\end{thebibliography}
scope of what is termed obscene to include not only works "utterly" without social value, but also works which do not have "serious" literary, artistic, political, or scientific value. Second, in adopting the contemporary community standards measure, the Miller Court rejected the prior notion that prurient interest and patent offensiveness should be determined by a national standard. The Court stated that the first amendment does not require that "the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." Third, the Court held that states may ban only depictions or descriptions of "hard core" sexual conduct. Further, this conduct must be specifically defined by state law, as written or construed, in order to "provide [the first amendment requirement of] fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

3. Explanation of the Miller Test

For a work to be deemed obscene, all three elements of the Miller test must be met and each element must be "'independently' evaluated." The first two elements, appeal to the prurient interest and patent offensiveness, are judged by contemporary community standards. The community is made up of all adults in the geographic area, including the most sensitive, but the court may not focus on "the most prudish or the most tolerant," or "the reactions of a sensitive or of a callous minority."

For material to appeal to the prurient interest, the material at issue must exhibit a "shameful or morbid interest in nudity, sex, or excre-
tion."  

However, appeals to normal, healthy sexual desires are not adequate to meet the test. Of course, the distinction between "shameful" and "healthy" is extremely nebulous.

A work is patently offensive if it deals with hard core sexual conduct which has been specifically defined by state law. The Miller Court offered two model state statutes describing hard core sexual conduct. A work's conformity with conduct described in the state statute is not dispositive on the question of whether the particular community would be patently offended, but it is entitled to significant weight.

To avoid prosecutions that are unforeseeable to the defendant, neither juries nor courts have unbridled discretion in determining what is patently offensive.

Finally, to rise to the level of obscenity the work in question must lack serious literary, artistic, political, or scientific value. A work does not meet the test's third prong if it has serious merit, measured objectively, even if a majority of the community would not agree. In other words, under this prong a work with slight or moderate artistic merit would be deemed obscene; once a work is attacked, and the first and second prongs are satisfied, the work must be serious to receive first

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102. See, e.g., Brockett, 472 U.S. at 504-05, in which the Court held that the word "lust" as a definition of "prurience" should be excised from a Washington statute, because "lust" now is taken to include a normal interest in sex. Prior to Brockett, the Court had defined prurient as "material having a tendency to excite lustful thoughts." Roth, 354 U.S. at 487 n.20. When Brockett was before the Ninth Circuit, the court noted that an example of the acceptance of "lust" as healthy and not obscene was shown by President Jimmy Carter's famous comments about his own lustful thoughts. See J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482, 490 (9th Cir. 1984) (Prior to his election in 1976, presidential candidate Jimmy Carter confessed he had "looked on a lot of women with lust [and] . . . committed adultery in [his] heart many times."). rev'd sub nom. Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985).


104. Miller, 413 U.S. at 25. See supra note 92.


106. Jenkins v. Georgia, 418 U.S. 153, 160-61 (1974) (no reasonable jury could find film patently offensive that depicted a woman with a bare midriff engaged in what were understood to be "ultimate sexual acts," when there was no exhibition of the actors' genitals).


amendment protection.\footnote{109} The relevant inquiry is whether a reasonable person would find the required social value in the material at issue, taken as a whole.\footnote{110} In \textit{Miller}, the Court noted that examples of works meeting the requisite value are "medical books for the education of physicians and related personnel [which] necessarily use graphic illustrations and descriptions of human anatomy."\footnote{111}

\textbf{C. The Supreme Court's Problems in Defining Obscenity}

In the years between the \textit{Roth} and \textit{Miller} decisions, the Supreme Court was entangled in conflicting views and changing tests of what was obscene and, therefore, without constitutional protection.\footnote{112} Justice Harlan noted that the attempt to separate obscenity from other sexually-oriented, but constitutionally-protected speech had "produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication."\footnote{113} Justice Black, Justice Brennan (who authored the \textit{Roth} opinion, but later changed his position)\footnote{114} and Justice Douglas were regular dissenters,\footnote{115} and the Court never held a majority on an obscenity decision.\footnote{116} The Justices, applying their separate tests,

\footnote{109. See Miller v. California, 413 U.S. 15, 24 (1973); Skywalker Records, 739 F. Supp. at 587.}
\footnote{111. Miller, 413 U.S. at 26.}
\footnote{112. The Court's obscenity test between \textit{Roth} and \textit{Miller} was announced in Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966). See supra note 77. Additionally, in the intervening years, each Justice seemed to follow his own formulation. See, e.g., Ginzburg v. United States, 383 U.S. 463, 476 (1966) (Black, J., dissenting); \textit{id.} at 482 (Douglas, J., dissenting); \textit{id.} at 497 (Stewart, J., dissenting) ("hard core" pornography is the limit of both federal and state power); \textit{Memoirs}, 383 U.S. at 445 (Clark, J., dissenting) ("social importance" could only "be considered with evidence that the material in question appeals to prurient interest and is patently offensive"); \textit{id.} at 460-62 (White, J., dissenting) (work is obscene only if it appeals to prurient interest by exceeding customary limits of candor and "social importance" is not an independent test but within the prurient interest inquiry); Mishkin v. New York, 383 U.S. 502, 508 (1966) (prurient appeal defined in terms of a deviant sexual group); Jacobellis v. Ohio, 378 U.S. 184, 192-95 (1964) (community standards should be national); \textit{id.} at 196 (Black, J., concurring, joined by Douglas, J., concurring); \textit{id.} at 200-01 (Warren, C.J., dissenting) (community standards should be local); \textit{id.} at 204 (Harlan, J., dissenting) (the federal government may control only "hard core" pornography, while the states have more latitude); Roth v. United States, 354 U.S. 476, 508, 512-13 (1957) (Douglas, J., dissenting, joined by Black, J., dissenting) (the government may not regulate any sexually oriented matter on the ground it is obscene).}
\footnote{113. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704-05 (1968) (Harlan, J., concurring in part and dissenting in part).}
\footnote{114. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting); Roth, 354 U.S. at 479, 485.}
\footnote{115. See, e.g., Paris, 413 U.S. at 70 (Douglas, J., dissenting); \textit{id.} at 73 (Brennan, J., dissenting); \textit{Roth}, 354 U.S. at 508 (Douglas, J., dissenting, joined by Black, J., dissenting).}
resorted to *per curiam* decisions, summary reversals, or denials of certiorari in obscenity cases, which only served to further the confusion by obscuring the Court's rationales.118

*Miller* offered only a slightly altered formulation of the basic Roth test.119 *Miller*, however, left unchanged the underlying approach120 which had posed so many problems.121 Interestingly, in the development of the obscenity doctrine, the original rationale behind the doctrine was negated.122

To illustrate, in Roth, obscene material was deemed unprotected precisely *because* it lacked even the slightest social worth.123 The definition of obscenity as expression utterly lacking social importance was the key to the conceptual basis of Roth and the Court's subsequent opinions.124 In the Court's next test, *Memoirs*,125 the Court declared a work unprotected *if* it was utterly worthless.126 Thus, in *Memoirs* the Roth rationale became part of the definition of obscenity itself.127 In the present *Miller* test, the Court reaffirmed the Roth holding that obscene speech is not protected by the first amendment.128 Under the third prong of *Miller*, however, a work is obscene and thus unprotected if it is without serious worth.129 The *Miller* approach assumes some works will be deemed obscene — even though they clearly have some social value — because the party alleging obscenity is able to prove the value is not serious enough.130 Thus, the basis originally established in Roth as to why obscene speech had no constitutional protection — obscene speech is utterly without social value — no longer exists in light of *Miller*'s third

117. A *per curiam* opinion is an opinion "by the court," which expresses its decision in the case but whose author is not identified. BARRON'S LAW DICTIONARY 327 (1984). It may represent a brief announcement of the disposition of a case by the court, not accompanied by a written opinion. BLACK'S LAW DICTIONARY 1023 (5th ed. 1979).

118. *Paris*, 413 U.S. at 82-83, 93 (Brennan, J., dissenting).
119. *Id.* at 83.
120. *Id.*
121. *Id.* at 96.
122. *Id.* at 97.
126. *Id.* at 418.
129. *Id.* at 24.
prong.\textsuperscript{131} \textit{Miller} is still the law after nearly two decades.\textsuperscript{132} The obscenity doctrine under \textit{Miller} nevertheless remains plagued by the vagueness of undefinable concepts which comprised each obscenity test before it.\textsuperscript{133} The vague components of the test lead courts to draw uncertain lines between protected and unprotected speech, thus creating a strong possibility of encroaching fundamental first amendment rights.\textsuperscript{134}

V. THE REASONING OF THE SKYYWALKER RECORDS COURT

A. The First Miller Inquiry: Appeal to the Prurient Interest

The district court found that, when applying contemporary community standards, \textit{Nasty}'s sexually explicit lyrics and song titles met the level of an appeal to the prurient interest.\textsuperscript{135} The court maintained that its holding was not based on its personal opinion as to \textit{Nasty}'s obscenity.\textsuperscript{136} Yet, the court reached its decision through conclusions which appear overtly subjective, such as a finding that "[\textit{Nasty}] is an appeal directed to 'dirty' thoughts and the loins, not to the intellect and the mind."\textsuperscript{137}

The court listed several factors that it considered probative to the

\textsuperscript{131} See, e.g., id. (The Court's \textit{Miller} approach requiring serious value "is not merely inconsistent with our holding in \textit{Roth}; it is nothing less than a rejection of the fundamental First Amendment premises and rationale of the \textit{Roth} opinion . . . ."). \textit{See also} L. TRIBE, supra note 71, § 12-16, at 908-09.

\textsuperscript{132} The fact that \textit{Miller} has survived this long is probably more a function of the Court's changing composition towards conservatism since the most volatile years of the obscenity doctrine, rather than a reflection of the \textit{Miller} test's soundness.

\textsuperscript{133} \textit{See} \textit{Paris}, 413 U.S. at 83-84 (Brennan, J., dissenting).

\textsuperscript{134} Id. at 84-85. Justice Brennan noted in \textit{Paris} that

[a]lthough we have assumed that obscenity does exist and that we "know it when [we] see it," [quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)], we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech. We have more than once previously acknowledged that "constitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line" [quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963)]. \textit{Id.} at 84.

Fundamental first amendment rights may be encroached, for example, when a publisher or distributor disseminates material beyond a particular small region. In light of the possibility of both state and federal prosecution in any locale through which allegedly obscene material might pass, "the pressure on a publisher or distributor to conform to the lowest common denominator of sexual acceptability" becomes enormous. L. TRIBE, supra note 71, § 12-16, at 913. This is especially true "since the defendant need not be shown to have realized that his work was obscene." \textit{Id.}


\textsuperscript{136} \textit{Id.} at 590.

\textsuperscript{137} \textit{Id.} at 591.
question of prurience. First, the court gave weight to the fact that Florida's legislature has codified definitions of obscene sexual conduct. The court found that the recording's lyrics and song titles were replete with sexual references, and that the definitions in the Florida Legislature obscenity statutes "cover most, if not all, of the sexual acts depicted in [Nasty]."

Second, the court found that the frequency and graphic description of the sexual lyrics evince "a clear intention to lure hearers into this activity." The court likened the vivid descriptions in Nasty to reading a book or watching a film on this subject. The court found it noteworthy that the material at issue was music, and rap music in particular, which necessarily emphasizes lyrics.

The court further gave some weight to the finding that 2 Live Crew presented Nasty to the public in a manner calculated to make a salacious appeal. The court found that the title of the recording, the names of many of the songs, and the illustration on the recording's insert fit within the Supreme Court's definition of materials "look[ing] for titillation [sic]." The court further noted that the difference between sales

138. Id. at 591-92.
139. Id. at 591. The court cites the following sections of the Florida Statutes: section 847.001(11), "which defines 'sexual conduct' to include 'actual or simulated sexual intercourse, deviate sexual intercourse, . . . masturbation, . . . sadomasochistic abuse[,] or actual lewd exhibition of the genitals;'" section 847.001(2), which "defines deviate sexual intercourse as sexual conduct between unmarried persons involving contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva;" and section 847.001(8), which "defines sadomasochistic abuse as satisfaction from sadistic violence derived by inflicting harm upon another." Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 591 (S.D. Fla. 1990).
140. See supra note 30.
142. Id.
143. Id.
144. Id.
145. Id. at 591-92. A court may look to the manner in which a work is distributed and promoted to determine if the "leer of the sensualist" permeates the work. Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 591 (S.D. Fla. 1990) (citing Ginzburg v. United States, 383 U.S. 463, 465-66, 468 (1966)). A court may consider this salacious intent of the work's creator to find that a work appeals to the prurient interest. Id. at 592 (citing Splawn v. California, 431 U.S. 595 (1977)).
146. The court did not describe the recording insert in its opinion. The insert should not be probative evidence, however, in finding that 2 Live Crew commercially exploited sex. The court noted the rationale behind considering commercial exploitation of sex as "tend[ing] to force public confrontation with the potentially offensive aspects of the work." Id. at 593 (quoting Ginzburg, 383 U.S. at 470). The insert to a recording cannot be viewed accidentally by the public at large, forcing exposure to the offensive matter. The insert is contained inside the recording's packaging and may only be seen when the recording has been purchased and unsealed.
147. Id. at 592 (quoting Ginzburg, 383 U.S. at 470).
of *Nasty* and the non-explicit alternative, *As Clean As They Wanna Be*,148 evidenced that 2 Live Crew's release of *Nasty* was motivated by the "leer of the sensualist."149

**B. The Second Miller Inquiry: Patently Offensive**

Not all speech with sex as its topic is obscene.150 The district court found, however, that under contemporary community standards, the *Nasty* recording was another matter.151 The court found *Nasty* patently offensive for the same reasons it determined that the recording appealed to the prurient interest: it depicts sexual conduct with frequency and in graphic detail,152 and its contents are within the realm of Florida's obscenity statutes.153 The court noted that the relevant Florida statutes were drafted similarly to proposed state statutes proffered in *Miller* for defining hard core obscenity.154

While the district court determined that the above factors sufficiently established that *Nasty* is patently offensive, it cited additional factors that supported its finding.155 First, the court considered *Nasty*'s "dirty words" and "depictions of female abuse," coupled with explicit sexual descriptions.156 Second, the court noted that because *Nasty* is music, the recording has the potential to intrude on unwilling listeners since it must be played to be experienced.157 The court concluded that while the law requires citizens to avert their ears when public speech is merely offensive,158 the law protects them from public obscenity that has been

148. *See supra* text accompanying notes 31 & 33-34.
152. *Id.* *See supra* note 30.
153. *Skyywalker Records*, 739 F. Supp. at 593. For an explanation of the applicable statutes, *see supra* note 139.
156. *Id.* The opinion does not contain any lyrics from the *Nasty* recording. *See supra* note 30. However, the court stated that the specificity of the graphic sexual descriptions "makes the audio message analogous to a camera with a zoom lens, focusing on the sights and sounds of various ultimate sexual acts." *Skyywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 592 (S.D. Fla. 1990).
157. *Skyywalker Records*, 739 F. Supp. at 593. There was no evidence, however, that any unwilling listener had been subjected to *Nasty*. *See supra* note 53 and accompanying text.
158. The court does not cite authority for this proposition. *Skyywalker Records*, 739 F. Supp. at 593.
defined by state legislation. Finally, the court again considered the finding that 2 Live Crew commercially exploited sex to promote sales.

C. The Third Miller Inquiry: Social Value

The Skyywalker Records court found that, based upon a reasonable person standard, the Nasty recording has no serious social value. The court refuted the contention of 2 Live Crew's witness, Professor Carlton Long, an expert on the culture of African-Americans, that the recording has serious sociological, political, and literary value. The court also concluded that the recording lacks serious artistic value, as comedy and satire, and lacks overall social value.

First, Professor Long testified that Nasty has political content. However, the court found that even if the passages cited by Long have political meaning, they are too isolated to give the entire recording serious political value. Next, Professor Long testified that since Nasty reflects the group members' African-American heritage, it has sociological value. Professor Long identified three cultural devices evident in the work to support his claim: (1) "call and response;" (2) "doing the dozens," a word game composed of a series of insults escalating in satirical content; and (3) "boasting." The court determined that these devices either do not exist in the recording or, where they do exist, are found in other cultures besides that of African-Americans and thus are not of serious sociological importance. Finally, Professor Long testified that Nasty has literary value through the use of literary devices such as rhyme, allusion, and personification. The court considered this con-

159. Id. The court supports this idea with the fact that a person lying on a public beach, sitting in a public park, walking down the street, or sitting in his automobile waiting for the light to change is essentially a captive audience to music playing around him. Id. However, there is no evidence of any such incidents in this case. See supra note 53 and accompanying text. Rather, the case concerns only whether Nasty in itself is obscene and thus whether its sale to a willing adult may be banned. Skyywalker Records, 739 F. Supp. at 582-83.

160. Skyywalker Records, 739 F. Supp. at 593. Commercial exploitation of sex to promote sales is a factor that may be considered in evaluating whether, in addition to prurient appeal, a work is patently offensive. Id. (citing Ginzburg v. United States, 383 U.S. 463, 470 (1973)). See supra note 145.

162. Id. at 594-95.
163. Id. at 595-96.
164. Id. at 594.
165. Id.
167. Id.
168. Id.
169. Id. at 594-95.
tention "nonsense regardless of the expert's credentials," and noted the Miller Court's statement that "[a] quotation from Voltaire in the fly leaf of a book will not constitutionally redeem an otherwise obscene publication."170

The court also found that the recording lacks serious artistic value as comedy and satire.171 The court explained that the initial laughter Nasty inspired when played in the courtroom could have reflected embarrassment, shame, and the nervous release of tension, as well as humor.172 The court found that laughter was heard only when the recording's first song was played and considered this probative in finding that the audience's reaction was for the former reasons.173 Finally, the district court determined that Nasty has no overall social value because, once the "riffs" — samples from pre-recorded music borrowed from outside sources — are removed, the recording consists only of valueless rhythm and sexual lyrics.174 Therefore, the court concluded that the Nasty recording is legally obscene.175

VI. THE MILLER TEST IS UNCONSTITUTIONALLY VAGUE, LEADING TO FAULTY APPLICATIONS LIKE SKYYWALKER RECORDS

A. Overview

The Miller test is composed of such vague components that it appears to violate the first amendment under the vagueness doctrine.176 A judicial doctrine becomes unconstitutional when citizens cannot understand and apply the doctrine with enough certainty to know, in advance of prosecution and conviction, whether their conduct is illegal.177 Such vagueness results both in criminal convictions and civil judgments that

170. Id. at 595.
172. Id.
173. Id.
174. Id. at 595-96.
175. Id. at 596.
176. The vagueness doctrine, as applied to Miller, was discussed in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 83-93 (1973) (Brennan, J., dissenting).
177. The due process clause of the fourteenth amendment requires that all criminal laws provide fair notice of "what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). The Court has frequently held that the definition of obscenity must provide adequate notice of exactly what is prohibited from dissemination. Paris, 413 U.S. at 86-87 (Brennan, J., dissenting) (citing Rabe v. Washington, 405 U.S. 313 (1972); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968); Winters v. New York, 333 U.S. 507 (1948)).

Skyywalker Records was a civil action, and thus 2 Live Crew was not subject to conviction. As a result of the court's ruling, however, any person possessing, selling, distributing, or producing Nasty may be convicted. See supra note 40. Moreover, although the Sheriff's Office in this case chose the route of seizing the recording rather than pressing criminal charges, the
the defendant had no reason to know could occur, and the "chill" of legitimate speech that the speaker fears may, after the fact, be deemed illegal. The Supreme Court has repeatedly recognized that the Constitution "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."180

Under the Miller test, the line between protected and unprotected speech is dependent upon indefinite concepts such as "prurient interest," "patently offensive," "sexual conduct," and "serious value." Publishers, filmmakers, museum curators, or record retailers must interpret for themselves the meaning of such phrases. The standard is further com-

178. Paris, 413 U.S. at 87-88 (Brennan, J., dissenting). In Paris, Justice Brennan found that even the most painstaking efforts to determine in advance whether certain sexually oriented expression is obscene must inevitably prove unavailing. For the insufficiency of the notice compels persons to guess not only whether their conduct is covered by a criminal statute, but also whether their conduct falls within the constitutionally permissible reach of the statute. The resulting level of uncertainty is utterly intolerable, not alone because it makes [for example] bookselling . . . a hazardous profession, but as well because it invites arbitrary and erratic enforcement of the law.

Id. (citation omitted). Justice Brennan concluded,

I know of no satisfactory answer to the assertion by . . . Justice Black [in Ginzburg v. United States, 383 U.S. 463, 480-81 (1966) (dissenting)], "after the fourteen separate opinions handed down" . . . in 1966, that "no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity.'"

Id. at 87.

179. For example, the Supreme Court has emphasized that the "vice of vagueness" is especially pernicious where legislative power over an area involving speech, press, petition and assembly is involved . . . . For a statute broad enough to support infringement of speech, writings, thoughts and public assemblies, against the unequivocal command of the First Amendment necessarily leaves all persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego the very rights the Constitution sought to protect above all others.


plicated because the obscenity of a particular item may depend on nuances of presentation,^{183} the context of its dissemination,^{184} or the defendant's "pandering."^{185} Additionally, the problems inherent to deciphering and applying "contemporary community standards"^{186} illustrate the vagueness of the test. Must the party holding the burden of proof present evidence of this standard? Or is the court able to draw solely upon its own experience within the community? Is it relevant that the plaintiffs claim their work reflects the experiences of and is directed at a particular racial group?

In the present case, the district court's analysis fails because it is based upon a faulty application of the Miller test. The vagueness of the community standards requirement in the first two prongs left the door open for the court to incorrectly apply Miller.

B. Application of Miller in Skyywalker Records

1. Sheriff Navarro Should Have Been Required to Submit Evidence of the Contemporary Community Standard

The Supreme Court has never held that the party with the burden of proof on a work's obscenity must present evidence of the relevant community standard.^{187} The Court has expressly noted a caveat, however, to the principle that expert evidence in obscenity cases is not required.^{188} This caveat, which notes that lack of expert testimony would be "plainly inadequate" when the standards of the relevant community are outside the trier of fact's knowledge,^{189} appears to apply in Skyywalker Records.^{190}

In the present case, a bench trial was held,^{191} and 2 Live Crew ar-
gued that the work was directed to a community outside the individual judge's knowledge.\textsuperscript{192} In this factual setting, the community standard is a genuine issue and presentation of evidence of the community standard should thus be required. Since Sheriff Navarro bore the burden of proof on the question of \textit{Nasty}'s obscenity,\textsuperscript{193} he should have been required to submit evidence on the relevant community standard, a crucial component of proving an obscenity claim.\textsuperscript{194} Instead, Sheriff Navarro, as well as 2 Live Crew, failed to present any evidence on the community standard in the relevant community of Dade, Broward, and Palm Beach counties.\textsuperscript{195} A court should not find \textit{Miller} satisfied absent this evidence.

However, the district court claimed that Sheriff Navarro's failure to provide the evidence did not defeat the state's case.\textsuperscript{196} The court relied on \textit{Paris Adult Theatre I v. Slaton}\textsuperscript{197} ("\textit{Paris}") for the proposition that the law does not require expert testimony in an obscenity case and that the alleged obscene material "can and does speak for itself."\textsuperscript{198} A close reading of \textit{Paris} suggests that the court's reliance is misplaced. The \textit{Paris} Court actually held that expert testimony that material is obscene is not necessary when the material itself is placed into evidence.\textsuperscript{199} This holding thus applies to the issue of whether an expert should offer an opinion on a work's obscenity or whether the work should be examined firsthand.\textsuperscript{200} The instant case presents a different question since the standards of the community are at issue.\textsuperscript{201}

Moreover, the \textit{Paris} Court expressly declined to consider the necessity of expert testimony in cases where the trier of fact's experience would be inadequate to judge the material.\textsuperscript{202} The \textit{Paris} Court noted

\begin{itemize}
\item \textsuperscript{192} 2 Live Crew's expert witness testified that the \textit{Nasty} recording was a product of and directed at the African-American community. \textit{Id.} at 594. The expert witness testified that he believed "white Americans 'hear' the \textit{Nasty} recording in a different way than [African-]Americans because of their different frames of references." \textit{Id.} Further, 2 Live Crew argued that the court's opinion would not reflect the relevant community standard, but only the personal opinion of the court. \textit{Id.} at 590.
\item \textsuperscript{193} \textit{Id.} at 582.
\item \textsuperscript{194} \textit{See supra} text accompanying notes 83-106 (the relevant community standard is an essential component of the first two of the three necessary prongs of the \textit{Miller} test).
\item \textsuperscript{195} \textit{Skyywalker Records}, 739 F. Supp. at 588.
\item \textsuperscript{196} \textit{Id.} at 590.
\item \textsuperscript{197} 413 U.S. 49 (1973).
\item \textsuperscript{199} \textit{Paris}, 413 U.S. at 56.
\item \textsuperscript{200} \textit{See id.}
\item \textsuperscript{201} \textit{See supra} note 192 and accompanying text.
\item \textsuperscript{202} \textit{Paris}, 413 U.S. at 56 n.6.
\end{itemize}
that expert testimony is usually admitted to explain to lay jurors what they otherwise could not understand.\textsuperscript{203} The Court declined to decide whether expert testimony would be necessary in a situation where material was directed at a group outside the realm of experience of the trier of fact.\textsuperscript{204} Part of 2 Live Crew's claim in the present case rests on the notion that Nasty was directed to and appealed to the African-American community, of which 2 Live Crew contended the court did not have significant personal knowledge.\textsuperscript{205} Thus, this case potentially presents the kind of question to which the Paris Court expressly noted its holding \textit{did not} apply.\textsuperscript{206}

The need for evidence of the community standard is especially clear in cases such as Skyywalker Records, where a court, rather than a jury, will determine if the material is obscene.\textsuperscript{207} Whereas the standard of the community can be thought to be relatively more ascertainable in the hands of a random cross-section of the community — the jury — the community standard becomes more elusive when a single person must define it. This problem is compounded when the single judge is not a member of the community to which the plaintiffs allege their work is directed.\textsuperscript{208} Thus, since this was a bench trial and 2 Live Crew argued its work is directed to a special community, evidence presented on the community standard by the party holding the burden of proof — Sheriff Navarro — should have been required.

\textsuperscript{203} \textit{Id.} (citing 2 J. Wigmore, \textit{Evidence §§ 556, 559} (3d ed. 1940)).

\textsuperscript{204} Paris Adult Theatre I \textit{v.} Slaton, 413 U.S. 49, 56 n.6 (1973).


\textsuperscript{206} The Paris Court stated that the type of group of which the trier of fact would have no knowledge would be "a bizarre, deviant group." 413 U.S. at 56 n.6. However, there of course will be groups outside the trier of fact's experience which are not necessarily bizarre and deviant. The court's reference to cases outside the trier of fact's realm only makes sense if it consists of this broader group, which could include a racial community different from that of the trier of fact's.

\textsuperscript{207} Skyywalker Records, 739 F. Supp. at 590.

\textsuperscript{208} \textit{Id.} at 590, 594. \textit{See supra} note 192.

The words that the Court . . . find so unpalatable may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that compose this Nation . . . . As one researcher concluded, "[w]ords generally considered obscene . . . are considered neither obscene nor derogatory in the [black] vernacular except in particular contextual situations and when used with certain intonations." Federal Communications Comm'n \textit{v.} Pacifica Found., 438 U.S. 726, 776 (1978) (Brennan, J., dissenting). Constitutional law scholar Laurence H. Tribe notes that in \textit{Pacifica}, \textit{id.} at 775, Justice Brennan correctly viewed the Court's contrary approach when defining indecency as reflecting "acute ethnocentrism," the product of a "depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of [the] Court, and who do not share their fragile sensibilities." L. Tribe, \textit{supra} note 71, § 12-18, at 942-43.
2. The Court Did Not Apply Its Finding of the Community Standard

Even if Sheriff Navarro's failure to provide community standard evidence should not defeat the state's case, the district court incorrectly supplemented this missing evidence with the court's own "knowledge" of the community standard. Further, the court erroneously failed to apply this community standard in its opinion. These deficiencies violate the requirements of the *Miller* test.

The district court found that since the parties failed to provide the evidence, the court, as the finder of fact, must rely upon its personal knowledge of the community standard. Paradoxically, the court stressed the fact that its decision was not based upon its personal opinion. Instead, the court asserted that it had sufficient personal knowledge of the community and its standards to make a decision in this case. The court was confident that it could successfully walk the line between the unacceptable use of its personal opinion and the acceptable use of its personal knowledge. The opinion does not reflect, however, that this difference came into play. The court's reasoning does not indicate where, if at all, its findings were based on an application of a community standard.

To illustrate, the district court concluded that the three counties had "a more tolerant view of obscene speech than would other communities within the state." The court refused, however, to label the community's standard as "tolerant per se." The court did not define either standard nor indicate how they differ. In the abstract, this differentiation has little substance.

Moreover, the differentiation becomes meaningless because the court never referred to either, or in fact any, standard within its analysis of the *Miller* elements. Under a proper application of *Miller*, the first two prongs of *Miller* must be analyzed *under* the relevant community

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209. *See infra* text accompanying notes 212-27.
213. *Id.* at 590.
214. *Id.*
215. *Id.*
216. *See id.* at 591-93.
218. *Id.* at 589 (emphasis in original).
219. *Id.*
220. *Id.*
221. *See id.* at 591-93.
This application is essential to satisfy *Miller*. Here, however, the court never analyzed the various findings, which it points to as probative, in light of the alleged "more tolerant" but not "tolerant per se" standard. Without analytical support, the court's mere labeling of the community standard as such is an empty exercise.

Although the court claimed its personal opinion of the community standard played no part, the court's failure to apply the facts to a specific community standard in order to reach its conclusions indicates otherwise. Due to this failure, the court's analysis does not comply with the Supreme Court's test in *Miller*. *Miller* mandates that the relevant community be made up of all adults in the area, not one judge, and that the questions of "appeal to prurient interest and patent offensiveness . . . are issues of fact for the jury [or judge] to determine applying contemporary community standards."

### VII. Any Obscenity Doctrine Directed at Willing Adults is Unconstitutional

#### A. Overview

On a more basic level, *Miller* and any obscenity doctrine which measures the suitability of speech — absent evidence of exposure to young children and unwilling adults — appears to be unconstitutional on its face. The doctrine itself defies basic precepts of the first amendment, regardless of how it is applied by a court. The *Miller* test needs rethinking because it leads to the encroachment of first amendment rights for a large body of expressions that may not be popular with, or tasteful to, all, yet should be in the "market place of ideas."

#### B. Finding Serious Social Value is Intrinsically Vague

The basic unconstitutionality of *Miller*, or any obscenity doctrine, can be seen in the unconstitutionally strict third prong of the *Miller* test. The third prong calls for analysis under the reasonable person standard. Unlike the purely objective use of this standard in tort

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222. See supra text accompanying notes 83-106.
223. Id.
224. See supra text accompanying notes 135-60.
230. Pope, 481 U.S. at 500-01.
law,\textsuperscript{231} evaluating the extent of a work's literary, artistic, political, or scientific value can only reflect one's subjective, personal opinion; a gauge which is impermissibly vague.\textsuperscript{232} It is illogical that a "reasonable person" conclusion could be reached when critiquing artistic works, in the same manner that courts determine a "reasonable person's" level of safety precautions or due care. Like art, film, and literature, music reflects personal tastes, and "tastes... are hardly reducible to precise definitions... For matters of taste, like matters of belief, turn on the idiosyncrasies of individuals."\textsuperscript{233}

In contrast to the third prong of \textit{Miller}, over forty years ago the Supreme Court recognized that "[w]hat seems to one to be trash may have for others fleeting or even enduring values."\textsuperscript{234} The Court stated that

\begin{quote}
[u]nder our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another... From the multitude of competing offerings the public will pick and choose.\textsuperscript{235}
\end{quote}

Years later, the Court again contradicted \textit{Miller}'s third prong when it found that "one man's vulgarity is another's lyric. Indeed, we think it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."\textsuperscript{236}

More recently, Justice Scalia echoed this idea in his concurring opinion in \textit{Pope v. Illinois}\textsuperscript{237} ("\textit{Pope}"): "it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada,\textsuperscript{238} and art in the replication of a soup can."\textsuperscript{239} Although \textit{Pope} addressed only the narrow issue of \textit{Miller}'s reasonable person standard and thus \textit{Miller} as a whole was not before the Court,\textsuperscript{240} Justice Scalia indicated that if

\begin{footnotesize}
\begin{enumerate}
\item 231. W. \textsc{Keeton}, \textsc{Prosser and Keeton on the Law of Torts} § 1, at 6 (5th ed. 1984).
\item 232. Vague criminal statutes unconstitutionally result in unforeseeable punishments and chill legitimate speech. \textit{See supra} notes 177-80 and accompanying text.
\item 235. \textit{Id.} at 157-58 (footnote deleted).
\item 237. 481 U.S. 497 (1987).
\item 238. Dada is an art movement which began in Europe in the early twentieth century. S. \textsc{Wilson}, \textsc{Tate Gallery — An Illustrated Companion} 157 (1989).
\item 240. \textit{Id.} at 500-01.
\end{enumerate}
\end{footnotesize}
given the opportunity, he might overrule *Miller* because "we would be better advised to adopt as a legal maxim what has long been the wisdom of mankind: *De gustibus non est disputandum*. Just as there is no use arguing about taste, there is no use litigating about it."241

Justice Stevens, dissenting in *Pope*, illuminated the vagueness of the third *Miller* prong:

The problem with this formulation is that it assumes that all reasonable persons would resolve the value inquiry in the same way. In fact, there are many cases in which *some* reasonable people would find that specific sexually oriented materials have serious artistic, political, literary, or scientific value, while *other* reasonable people would conclude that they have no such value. The Court's formulation does not tell the jury how to decide such cases.242

In *Skyywalker Records*, the court decided that no reasonable person could find serious social value in the *Nasty* recording.243 In contrast, a professor of African-American culture testified to the serious political, literary, and sociological value which he saw in the recording.244 Undoubtedly, some of the over two million people who have purchased the recording have arrived at one of each of these views. Many others have probably arrived at the myriad of other possible interpretations of the recording, including 2 Live Crew's argument that *Nasty*'s crudity is comedic.245

In sum, one "right" conclusion to the third prong of *Miller* seems impossible. If this kind of determination is indeed impossible, any conclusion under the third prong is basically an arbitrary decision.246 When a court finds that the requirements of *Miller* have been satisfied, arbitrary and thus unconstitutional punishments are subsequently meted.247

**C. Miller Contradicts Prior Supreme Court Holdings**

1. The First Amendment Protects Inexpressible Emotion

Nowhere in the text of the Constitution, or in its history until

241. *Id.* at 505.
242. *Id.* at 511 (emphasis in original) (Stevens, J., dissenting).
244. *Id.* at 594-95.
245. For example, in 2 Live Crew's trial for giving an allegedly obscene nightclub performance, see *supra* note 28, the jurors, before acquitting the group, were so amused that they requested permission from the judge to laugh during the proceedings. Stengel, *Best of '90*, *Time*, Dec. 31, 1990, at 61.
246. See *supra* note 178.
247. *Id.*
Miller, has speech and expression needed to be “serious” to receive first amendment protection. In fact, first amendment protection has always been based upon the opposite idea: thoughts, speech, and expression need not undergo the scrutiny of their appeal to “the intellect and the mind.” By requiring serious value, the third prong of Miller seems to directly contradict a constitutional right recognized by the Supreme Court: the protection of inexpressible emotions.

The Supreme Court has expressly found that the first amendment protects undefinable emotive speech as well as speech with a definable intellectual content. Justice Harlan recognized in Cohen v. California, ("Cohen") that expression “conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well.” In holding that the act of wearing a jacket bearing the words “Fuck the Draft” into a courthouse corridor was constitutionally protected, Justice Harlan’s opinion “implicitly rejected the ... dichotomy between reason and desire that so often constrains the reach of the first amendment.”

The first amendment protection of inexpressible emotions announced in Cohen seems to preclude a seriousness inquiry. If a work were truly undefinable and inexpressible, then to weigh its value at all, whether slight, moderate, or serious, would be impossible. Thus, if the first amendment protects inexpressible emotions, it seems unconstitutional to require a given expression to have seriousness.

The Cohen Court went further and defended the “constitutional right of free expression” as putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more

248. U.S. Const. amend. I; Paris Adult Theatre I v. Slaton, 413 U.S. 49, 97 (1973) (Brennan, J., dissenting). See also Cohen v. California, 403 U.S. 15, 25-26 (1971); Stanley v. Georgia, 394 U.S. 557, 565-66 (1969); Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949). In Stanley, the Court held that a state’s effort to control the moral content of a person’s thoughts “is wholly inconsistent with the philosophy of the First Amendment.” Stanley, 394 U.S. at 565-66. The Court found it “[i]rrelevant that obscene materials in general, or [a particular work] ... before the Court, are arguably devoid of any ideological content." Id. at 566 (emphasis added).

249. Paris, 413 U.S. at 97 (Brennan, J., dissenting). See also Cohen, 403 U.S. at 25-26; Stanley, 394 U.S. at 565-66; Terminiello, 337 U.S. at 4-5.


252. Id.


perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.\textsuperscript{256}

In contrast, neither \textit{Miller} nor any obscenity doctrine looks to the individual and the value of preserving the individual's right to voice ideas.\textsuperscript{257} Rather, \textit{Miller} considers how that expression will be received by others — that is, whether those in the relevant community will be offended.\textsuperscript{258} In the present case, there was no evidence that children or unwilling adults were exposed to the \textit{Nasty} recording.\textsuperscript{259} Therefore, the focus here on those receiving the material relates only to willing adults and whether the work is unsuitable for these consenting adults.\textsuperscript{260} When no possibility of injury through exposure to an innocent party exists, the above inquiry and the conclusion reached in \textit{Skyywalker Records} does not square with the Supreme Court's first amendment theory in \textit{Cohen} of choice and opportunity for free decision.

2. The First Amendment Allows Obscene Speech to be Received and Possessed

The \textit{Miller} test is also at odds with the Supreme Court's decision in \textit{Stanley v. Georgia}\textsuperscript{261} ("\textit{Stanley}"), in which the Court recognized the constitutionally protected right to receive and possess obscene material.\textsuperscript{262} In \textit{Stanley}, the appellant's home was searched for evidence of his alleged bookmaking activities.\textsuperscript{263} In the course of the search, Georgia officers found films that were later deemed to be obscene.\textsuperscript{264} The appellant was tried and convicted for possession of obscene matter, in violation of Georgia law.\textsuperscript{265}

On appeal, the Supreme Court reversed and remanded the case, finding that the first amendment prohibited making mere possession of obscene material a crime.\textsuperscript{266} The Court held that "the Constitution protects the right to receive information and ideas," and that "[t]his right to

\textsuperscript{256} \textit{Cohen}, 403 U.S. at 24.
\textsuperscript{258} \textit{Id}.
\textsuperscript{259} See \textit{supra} text accompanying notes 52-54.
\textsuperscript{260} \textit{Id}.
\textsuperscript{261} 394 U.S. 557 (1969).
\textsuperscript{263} \textit{Id} at 558.
\textsuperscript{264} \textit{Id}.
\textsuperscript{265} \textit{Id} at 558-59. Appellant was convicted of "knowingly hav[ing] possession of ... obscene matter," in violation of section 26-6301 of the Georgia Code. \textit{Id} at 558-59 & 558 n.1 (citing Georgia Code Annotated (Supp. 1968)).
\textsuperscript{266} \textit{Stanley}, 394 U.S. at 568.
receive information and ideas, regardless of their social worth, ... is fundamental to our free society."

The Court reasoned that the state's interest constituted only the weak interest of "protect[ing] the individual's mind from the effects of obscenity." The individual's interest was the directly contrary and much stronger interest of not having his thoughts controlled by the government. The Court found that,

[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

The Skyywalker Records decision makes it illegal to possess, sell, distribute, or produce the Nasty recording because, like the films in Stanley, the recording is obscene under state law. Although the Skyywalker Records holding involved a declaratory judgment of Nasty's obscenity, criminal proceedings may nevertheless be instigated under the decision for any of the above violations. One Ft. Lauderdale, Florida record store owner has already been convicted for having sold Nasty after the Skyywalker Records court found it obscene.

The Stanley Court distinguished Roth v. United States, stating that Roth involved governmental power to prohibit or regulate certain public activities involving obscene matter, whereas Stanley involved private possession of obscene material. Arguably, a court could attempt to distinguish Skyywalker Records with the same reasoning. However, the individual and state interests that the Stanley Court held to weigh so heavily in favor of the individual remain the same in either situation. Is it possible that we have the constitutional right to receive or possess ideas without regard to their social worth, yet we cannot legally disseminate

267. Id. at 564 (emphasis added).
268. Id. at 565.
269. Id.
270. Id.
271. See supra note 40.
273. See supra note 40.
274. For details of Charles Freeman's conviction, see supra note 27.
these ideas to a willing adult recipient?\textsuperscript{278} As Justice Stevens summarized the situation, it is "somewhat illogical . . . that a person may be prosecuted criminally for providing another with material he has a constitutional right to possess."\textsuperscript{279}

Further, the discrepancy between cases such as \textit{Stanley}, where receipt or possession of obscene films in the privacy of one's home is constitutionally protected,\textsuperscript{280} and \textit{Skyywalker Records}, where possession, sale, distribution, or production of the \textit{Nasty} recording has no protection,\textsuperscript{281} can only be viewed as arbitrary. Constitutional law scholar Laurence H. Tribe has noted that because the line between sexually-oriented, but constitutionally-protected speech and unprotected, obscene speech is impossible to draw, there is "grossly disparate treatment of similar offenders."\textsuperscript{282} Tribe notes that

the Court has retreated to a posture in which the erotic tastes of the educated and well bred emerge as part of the "grand conception of the First Amendment and its high purposes in the historic struggle for freedom," while the less fashionable eroticism of the masses becomes the mere subject of "commercial exploitation of obscene material."\textsuperscript{283}

\textbf{VIII. Conclusion}

The \textit{Skyywalker Records} decision illustrates how nebulous the application of the \textit{Miller} obscenity test is. With concepts so vague and objectively indefinable to work with, courts are left to make arbitrary distinctions of what will be judged obscene, and thus illegal. In \textit{Skyywalker Records}, the court isolated a crucial component of two of the three required prongs of \textit{Miller} — the relevant community standard — and: (1) defined the standard itself without any requirement that the party bearing the burden of proof make an evidentiary showing of the

\textsuperscript{278} See, \textit{e.g.}, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 85, 86 n.9. (1973) (Brennan, J., dissenting).
\textsuperscript{279} Marks v. United States, 430 U.S. 188, 198 (1977) (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{280} Stanley, 394 U.S. at 564, 568.
\textsuperscript{281} Skyywalker Records, 739 F. Supp. at 585, 596.
\textsuperscript{282} L. Tribe, \textit{supra} note 71, \S 12-16, at 919 (quoting Marks, 430 U.S. at 198 (Stevens, J., concurring in part and dissenting in part)).
\textsuperscript{283} Id. at 918 (quoting Miller v. California, 413 U.S. 15, 34 (1973)). \textit{See also} Roth v. United States, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring) ("It is not the [material] that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character.".).
standard;\textsuperscript{284} and (2) failed to apply the standard in its analysis as \textit{Miller} mandates.\textsuperscript{285} On a broader level, regardless of how a court applies \textit{Miller}, the test itself seems to violate the precepts of the first amendment and the Supreme Court's past constructions of it.\textsuperscript{286}

The \textit{Skyywalker Records} court noted that the court's role "is not to serve as a censor or an art and music critic,"\textsuperscript{287} yet the court held that "the law does not call [the Nasty recording] art — it calls it obscenity[,] . . . a crime in Florida."\textsuperscript{288} \textit{Miller} is in fact an inquiry into the artistic value of a work, and the court necessarily serves as a critic of the given art, music, or film. When the work does not rise to the level of a "serious" piece, and the first two prongs of \textit{Miller} have been met, the work is deemed legally obscene.\textsuperscript{289} In Florida, the distribution, sale, production, or mere possession of the work then becomes a criminal offense.\textsuperscript{290} This indeed is censorship.

It is time for a reappraisal of \textit{Miller} as well as the notion of any obscenity doctrine that prohibits what some may term obscene speech, in the absence of exposure to young children or unwilling adults. The history of the obscenity doctrine demonstrates that it is simply impossible to create an objective obscenity standard that complies with the first amendment.\textsuperscript{291} Recognizing this, the Supreme Court should reaffirm the first amendment's unconditional guarantee of free speech in cases involving consenting adults' access to allegedly obscene works — regardless of the extent of the work's value to the temporary occupant of the jury box or judge's bench.

An obscenity formulation would still be needed for judicial determination of cases where offensive speech was intentionally directed at unwilling adults or young children. This test would continue to face the many problems inherent in restricting the content of speech and would remain difficult to reconcile with the first amendment.\textsuperscript{292} It is only in this narrow instance, however, that the governmental interest of controlling the moral content of men's thoughts carries any real weight.\textsuperscript{293} The usually countervailing weight of the individual's right to freedom of

\begin{itemize}
\item \textsuperscript{284} See supra text accompanying notes 187-227.
\item \textsuperscript{285} See supra text accompanying notes 210-27.
\item \textsuperscript{286} See supra text accompanying notes 228-83.
\item \textsuperscript{288} Id. at 596.
\item \textsuperscript{289} Id.
\item \textsuperscript{290} Id. at 585.
\item \textsuperscript{291} See, e.g., supra notes 178-79.
\item \textsuperscript{292} See id.
\end{itemize}
thought and ideas\textsuperscript{294} no longer exists in the narrow circumstance where a person who does not wish to be exposed to these ideas is forced to do so, or a child young enough to be deemed needy of particular protection, is involved.\textsuperscript{295} Moreover, limiting the scope of an obscenity inquiry to only intentional dissemination of ideas to these groups would further safeguard against unforeseeable punishments and the chilling of legitimate speech.

Further, the increasingly conservative political shift in this country augments the need to reconsider \textit{Miller}. More politicians are using obscenity prosecutions as political tools.\textsuperscript{296} The results of such prosecutions are criminal convictions and civil judgments based on largely arbitrary and subjective criteria.\textsuperscript{297} With the growing use of the RICO statute in obscenity prosecutions,\textsuperscript{298} the stakes are higher than ever for those whose work fails an obscenity inquiry. RICO exacts extreme punishments: a conviction provides for a twenty-year prison term for each racketeering count and can force defendants to forfeit their entire enterprise,\textsuperscript{299} even if the portion of earnings that came from illegal activities is as little as $105.\textsuperscript{300} In the current political climate, the necessity for a timely reconsideration of \textit{Miller} is greater than ever.

\textit{Heather C. Beatty}

\textsuperscript{294} \textit{Id.}
\textsuperscript{295} See \textit{id.}
\textsuperscript{296} Nat'l L.J., June 4, 1990, at 27, col. 1.
\textsuperscript{297} See supra note 178.
\textsuperscript{299} \textit{Id.} at 6, col. 1-2. See supra notes 65-66 and accompanying text.
\textsuperscript{300} L.A. Times, Nov. 1, 1990, § F, at 6, col. 2. See supra notes 65-66 and accompanying text.