Comics, Courts & Controversy: A Case Study of the Comic Book Legal Defense Fund

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COMICS, COURTS & CONTROVERSY:
A CASE STUDY OF THE
COMIC BOOK LEGAL DEFENSE FUND

Marc H. Greenberg*

Cartoons and comics have been a part of American culture since this nation’s formation. Throughout that lengthy history, comics and cartoons have also been a subject of controversy, censorship, legislation, and litigation. They have been viewed as a threat to society and a cause of juvenile delinquency; they are scandalous, indecent, and obscene. The Comic Book Legal Defense Fund ("CBLDF"), a New York-based non-profit organization, provides legal defense for comic artists, collectors, distributors, and retailers who face civil and/or criminal penalties for the creation, sale, and ownership of comics, cartoons, graphic novels, and related works.

The Introduction to this article charts the history of the comic art form and, in particular, its history in the United States. This section offers a summary of the first efforts to restrict the content of comics via investigations and Congressional hearings fueled by the dubious psychology and social science theories of Dr. Frederic Wertham. These theories offer an example of the kind of misguided fears that currently augment attacks on the comic art form today. Finally, the Introduction explains the origin of the CBLDF due to the prosecution of a comic storeowner.

The second section of the article provides a detailed discussion of Mavrides v. Franchise Tax Board. In Mavrides, comic creator Paul Mavrides, co-author of the notorious underground comic The Fabulous Furry Freak...

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* Marc H. Greenberg is a Professor of Law and Co-Director of the Intellectual Property Law Center at Golden Gate University School of Law. Various iterations of this article have been presented at the Intellectual Property Scholars Conferences in 2008, 2009, and 2011, and the author thanks the participants in those conferences for their critiques and commentary. In-person interviews with CBLDF Founder Denis Kitchen, CBLDF Executive Director Charles Brownstein, and artist and plaintiff Paul Mavrides offered invaluable insights in the development of this work. The tireless efforts of dedicated research assistant Julia Harris must also be acknowledged with thanks. The research grants afforded by Golden Gate University School of Law were also vital to the completion of this work, as was the critical feedback received from Associate Professor William Gallagher. This article is dedicated to my wife Kim Munson, author and art historian, for her inspiration and assistance in locating resources focusing on the history of comics.
Brothers, successfully battled the California Franchise Tax Board over the taxation of comics. As a result, independent comic artists were free of undue tax burdens that otherwise would have limited their ability to continue to create comics with edgy political and social commentary.

The third section of the article focuses on the principal type of case the CBLDF has worked on for the past two decades—fighting the U.S. Justice Department and local state prosecutors’ efforts to censor the content of comics, usually by alleging that the content is obscene or indecent. In particular, the section focuses on the cases of Gordon Lee, a Georgia-based distributor prosecuted for allegedly distributing an obscene graphic novel to a minor, and Christopher Handley, an adult prosecuted under the PROTECT Act for the mere possession of allegedly obscene Manga comics.

The final section of the article argues that the current American jurisprudence imprisons creators, distributors, and collectors for the ideas they express in graphic formats. It argues that the Supreme Court was wrong when it decided that obscene materials are outside of the protection of the First Amendment. Unfortunately, this decision has had a tremendous impact on the rights of comic creators, distributors, and collectors. Furthermore, the rationale for criminalizing explicit sexual material, to protect children from the alleged harm exposure to these materials causes, is flawed. The absence of any definitive proof of that harm leads to the recommendation that at the very least, penalties for the creation, distribution, and ownership of comics and cartoons with sexual content must be de-criminalized.

I. INTRODUCTION

Many children born in the 1950s spent their time and meager allowance on their entertainment of choice: comic books, newspaper cartoons, comic strips, and Saturday morning cartoon shows. In the late 1960s, their focus shifted from superhero comic books to what were called “underground comix,” a heady mix of anti-war politics, drugs, and sex—the creations of artists like R. Crumb, Art Spiegelman, Vaughn Bode, and Gilbert Shelton. ¹ Many of those children eventually went to law school and became lawyers and law professors who still have a passion for this genre of expressive work.²

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2. As one example, the creators of the Law and the Multiverse blog, http://lawandthemultiverse.com/, use current superhero comic plot lines as a base upon which to
Scholars of this genre note that it is inaccurate to assume that comic art is limited to superhero comics or to daily newspaper strips. Instead, this is an amazingly diverse art form with a history that can be traced back to cave art, the earliest artistic expression of man. Therefore, a historical perspective is needed to overcome the inaccurate perceptions that surround certain forms of comic art.

A. A Brief History of the Comic Art Form

At its core, art is a form of communication. Telling stories and sharing experiences was a key element of prehistoric tribal communities, and it was in these early days of the human experience that art was created to use a visual image to help tell that story.

In our media-saturated age, people often take for granted that images represent reality—a mental exercise that must have been, at an earlier point in our development, not an automatic response. Attorney and media entrepreneur John Carlin summarizes the birth of comics and their connection to this response as follows:

The early development of comics is typically traced from Egyptian hieroglyphics through the illuminated manuscripts of medieval Europe up to the cheap illustrations which proliferated in the post-Renaissance era as a result of the invention of movable type.

The earliest existing works of representation are the well-known depictions of animals found in cave paintings. It is noteworthy that the technique was that of the cartoon. Because we are so accustomed to representation, it is difficult to

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3. See, e.g., Ryan Davidson, *Thor, L. & MULTIVERSE* (May 6, 2011), http://lawandthemultiverse.com/2011/05/06/thor/ (using a scene from the recent movie *Thor*, in which government agents seize the research of a scientist, as a basis to discuss the circumstances under which such government seizures are lawful); see also William A. Hilyerd, *Hi Superman, I’m a Lawyer: A Guide to Attorneys (and Other Legal Professionals) Portrayed in American Comic Books: 1910–2007*, 15 *WIDENER L. REV.* 159 (2010) (offering a detailed and exhaustive study of the numerous ways in which attorneys have been portrayed in comic books over a ninety-three year period).


5. Id.

6. Id.
conceive of the original leap of the imagination that allowed images to stand for things and enabled the observer to respond to those images with his whole being. The cartoon continues to derive its effectiveness from this basic cathartic response.\(^\text{7}\)

Essentially, a comic is comprised of a series of images arranged in a narrative sequence, and usually, although not always, accompanied by words.\(^\text{8}\) Comics are sometimes referred to as “sequential art,” and similar to “hieroglyphics . . . comics share certain structural characteristics. This sense of layout, in which images are read sequentially like words, was carried over into the graphic designs which illuminate medieval manuscripts.”\(^\text{9}\)

The history of Western narrative sequential art\(^\text{10}\) spanned the Middle Ages, declined in popularity during the Renaissance, but resurged in the seventeenth and eighteenth centuries. Englishman William Hogarth’s popular prints, *The Harlot’s Progress* (1732) and *The Rake’s Progress* (1733–1734), were “the first modern works to express the narrative sequence through images.”\(^\text{11}\) Hogarth employed satire and caricature for the purpose of offering social and political commentary in what are considered some of the first political cartoons in Western history.\(^\text{12}\)

Hogarth’s success prompted other artists to venture into the cartoon and comics genre, and in 1800, Hogarth’s contemporary, Thomas Rowlandson, created Dr. Syntax, arguably the first continuing comic character.\(^\text{13}\) Dr. Syntax was followed in the 1840s by Rudolphe Töpffer’s illustrated stories, which used a panel sequence to link pictures and text, creating one of the early forerunners of the modern comic book.\(^\text{14}\)

In the next decade a host of famous French and English artists and writers began creating more works in the comic and cartoon satire genre.\(^\text{15}\)

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\(^{7}\) Id.

\(^{8}\) McCLOUD, supra note 3, at 9.

\(^{9}\) Carlin, supra note 4, at 11.

\(^{10}\) For reasons both of brevity and the limited scope of research, this article will not address the development of comic and cartoon art in Asia, Africa, South America, or the Middle East. This form of art also developed and thrived in those regions of the world, and creators there made significant contributions to the development of this art form. Regrettably, those contributions are beyond the scope of this article, and for that reason, this discussion is limited to the development of the comic art form in Europe and in the United States.

\(^{11}\) Carlin, supra note 4, at 11.


\(^{13}\) Carlin, supra note 4, at 13.

\(^{14}\) Id.

\(^{15}\) See id. at 13–14.
Gustave Dore, Honor Daumier, Odilon Redon, and other artists illustrated works of political and social commentary in comic and cartoon modes.\footnote{16} Lewis Carroll created the original illustrations for \textit{Alice in Wonderland}, which were later professionally redone by Sir John Tenniel.\footnote{17} French art critic Charles Baudelaire was one of the first writers to give comics serious attention via an 1855 article titled, \textit{On the Essence of Laughter, and in General, on the Comic in the Plastic Arts}.\footnote{18}

In the United States, artists were influenced by their European counterparts, and the mid-19th century became the launching point for many political satire magazines,\footnote{19} which gave a home to artists like Winslow Homer, Thomas Nast, and Joseph Keppler.\footnote{20} Their work attacked Lincoln and Civil War politics, the political tyranny of New York’s “Boss” Tweed and Tammany Hall (his notorious political machine), and the unsuccessful presidential campaign of Republican James G. Blaine (Keppler’s candidate, Grover Cleveland, won in a tight race).\footnote{21}

As the world entered the 20th century, the cartoon genre morphed into a new art form. Historian Harry Katz captured this change:

By 1900, comic art had become an indelible feature of American popular publishing, and two new genres emerged to great acclaim: the daily editorial cartoon and the comic strip. . . .\footnote{22}

One of these new comic strips became the source of a huge battle between Pulitzer and Hearst.\footnote{23} Richard Felton Outcault’s comic strip, \textit{At the Circus in Hogan’s Alley}, introduced a street urchin named Mickey Dugan,
who became known as the Yellow Kid.24 Introduced by Pulitzer in the New York World, Hearst opened and won, a bidding war for the strip, which then moved to the New York Journal.25

As should be evident from the history of comics as they entered the 20th century, the genre was principally oriented to adult readers, appearing in adult-focused magazines and newspapers.26 As the century progressed, comic strips moved onto a separate series of pages within these publications, primarily appearing on Sundays, and including humorous strips in color, which were popular with children and young adults27 (the concept of “teenagers” was not to be introduced until the 1950s).28

The interest children showed in this new medium caught the attention of educators, who were critical of the lack of moral instruction in these comics.29 However, the educators’ reactions may in part stem from the misleading use of the term “comics” to describe this art form.30 While humor is an element in many sequential graphic works, there are also many such works that focus on drama, characters, “the absurd, grotesque, and surreal.”31

A recent Google search under the question “Are Comics Just for Kids?” generated fifty-seven million hits, the majority denying that comics are now, or ever really were, a medium targeted just for kids.32 Although the over 100,000 attendees at the annual San Diego International Comic-Con, one of the world’s largest comic conventions,33 are a mix of people of all ages; there are more adults than children.34 Despite the considerable evidence that comics are not primarily an art form for children, concern about

27. Robert C. Harvey, How Comics Came to Be: Through the Juncture of Word and Image from Magazine Gag Cartoons to Newspaper Strips, Tools for Critical Appreciation Plus Rare Seldom Witnessed Historical Facts, in A COMIC STUDIES READER, supra note 26, at 25, 36.
31. See id.
the impact they might have on children triggered the first major legal challenge to the genre—the 1954 Congressional hearings.35

B. Censoring Comics: The 1954 Congressional Hearings

The first comic books published in the United States were reprints of Sunday newspaper comic strips that were re-formatted into a soft-cover book presentation and bore names like *Funnies on Parade* and *Famous Funnies*.36 The popularity of the books led publishers to seek original material, and thus detective stories became the next iteration of comic books, along with mystery stories and adventure tales, with titles like *Henri Duval of France*, *Famed Soldier of Fortune*, and *Dr. Occult, the Ghost Detective*.37

In June 1938, Detective Comics (“DC Comics”) published the first superhero comic featuring a character named Superman.38 The superhero age had arrived, and DC Comics published hero comics featuring Batman, Wonder Woman, the Flash, Green Lantern, and many others.39 Comic books became immensely popular with all ages, and increasingly so among young children.40 The subject matter of these comics extended well beyond superhero narratives and covered a wide range from westerns to romances, from detective stories to fantasy and horror.41

In 1950, William Gaines’s company, Entertaining Comics, launched one of the most successful lines of horror comics, including titles such as *Crypt of Terror*, *Haunt of Fear*, and *Vault of Horror*.42 Gaines’s success was quickly copied by a variety of companies, and by 1954, there were more than forty horror titles published every month.43 Comic book sales in the early 1950s, before the widespread distribution of televisions, were between 80 and 100 million per week.44 By 1954, however, an event oc-

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35. See infra Part I.B.
38. See id. at 31–35.
39. See id. at 47.
40. See id. at 47–52.
41. See id. at 70; see also Amy Kiste Nyberg, *William Gaines and the Battle over EC Comics, in A Comic Studies Reader*, supra note 26, at 58, 58–59.
42. Nyberg, supra note 41, at 58–59.
43. Id. at 59.
curred which would mean trouble for comics—a Senate Judiciary Committee investigating the causes of juvenile delinquency took aim at the comic book industry.45

Based on his clinical experiences treating young people who had engaged in acts of violence, Dr. Fredric Wertham, a psychiatrist who devoted his career to the study of criminal behavior,46 became convinced that comic books in the horror, detective, and crime genres were a major contributing factor in juvenile delinquency.47 In 1954, he set forth his findings in a book titled The Seduction of the Innocent.48 Although Wertham’s conclusions about the causal relationship between comics and delinquency were subjected to some criticism by social scientists, his conclusions struck a chord with the general public and caught the attention of the United States Senate.49 Subsequently, a subcommittee of the Senate Judiciary Committee investigated the causes of juvenile delinquency and held hearings on the issue.50 Dr. Wertham was invited to testify at the April 21, 1954 session.51

Commentators have extensively written about Dr. Wertham’s attack on comic books in The Seduction of the Innocent; however, most paraphrase his work, rather than citing it directly.52 However, paraphrasing robs the reader of the force of Wertham’s rhetoric and makes it difficult to understand why his work created such an impact. The following representative sampling from his book describes his concerns with the three iconic superheroes from DC Comics—Superman, Batman and Wonder Woman53—and illustrates his style and its impact:

The Superman type of comic books tends to force and superforce. Dr. Paul A. Witty, professor of education at Northwestern University, has well described these comics when he

45. Id.
46. Id.
47. Id. at 124, 125.
50. Id. at 124–25.
51. Id.
53. Wertham referred to these three superhero comics with the general term “crime comics.” See Wertham, supra note 48, at 33.
said that they “present our world in a kind of Fascist setting of violence and hate and destruction. I think it is bad for children” he goes on, “to get that kind of recurring diet . . . [they] place too much emphasis on a Fascist society. . . .

Actually, Superman (with the big S on his uniform—we should, I suppose, be thankful that it is not an S.S.) needs an endless stream of ever new submen, criminals and “foreign-looking” people not only to justify his existence but even to make it possible. . . .

. . .

Superwoman (Wonder Woman) is always a horror type. She is physically very powerful, tortures men, has her own female following, is the cruel, “phallic” woman. While she is a frightening figure for boys, she is an undesirable ideal for girls, being the exact opposite of what girls are supposed to want to be. 54

Batman and Robin warrant a significant focus in Wertham’s book, which claims that their relationship is a thinly disguised man-boy homosexual pairing:

Several years ago a California psychiatrist pointed out that the Batman stories are psychologically homosexual. Our researches confirm this entirely. Only someone ignorant of the fundamentals of psychiatry and of the psychopathology of sex can fail to realize a subtle atmosphere of homoeroticism which pervades the adventures of the mature “Batman” and his young

54. Id. at 34. Wonder Woman is the creation of another psychologist, Dr. William Moulton Marston, who held a law degree as well as a medical degree, and is also famous for his role in the invention of the lie detector. LES DANIELS, WONDER WOMAN: THE COMPLETE HISTORY—THE LIFE AND TIMES OF THE AMAZON PRINCESS 22–23 (2000). Married to an attorney and the father of four, his love of Greek mythology and desire to create a role model counterpart to Superman that girls and women could admire, he describes Wonder Woman in terms very different from those of Dr. Werham:

Frankly, Wonder Woman is psychological propaganda for the new type of woman who should, I believe, rule the world. There isn’t love enough in the male organism to run this planet peacefully. Woman’s body contains twice as many love generating organs and endocrine mechanisms as the male. What woman lacks is the dominance or self assertive power to put over and enforce her love desires. I have given Wonder Woman this dominant force but have kept her loving, tender, maternal and feminine in every other way.

Id.
friend “Robin.” Male and female homoerotic overtones are present also in some science-fiction, jungle and other comic books.

... Sometimes Batman ends up in bed injured and young Robin is shown sitting next to him. At home they lead an idyllic life. They are Bruce Wayne and “Dick” Grayson. Bruce Wayne is described as a “socialite” and the official relationship is that Dick is Bruce’s ward. . . . Batman is sometimes shown in a dressing gown. . . . It is like a wish dream of two homosexuals living together. Sometimes they are shown on a couch, Bruce reclining and Dick sitting next to him, jacket off, collar open, and his hand on his friend’s arm. Like the girls in other stories, Robin is sometimes held captive by the villains and Batman has to give in or “Robin gets killed.”

Furthermore, Wertham expands his attack from specific superheroes to the comic genre in general. He argues that comics lack any artistic merit and have no value:

By no stretch of critical standards can the text in crime comics qualify as literature, or their drawing as art. Considering the enormous amount of time spent by children on crime comic books, their gain is nil. . . . And since almost all good children’s reading has some educational value, crime comics by their very nature are not only non-educational; they are anti-educational. They fail to teach anything that might be useful to a child; they do suggest many things that are harmful.

... Brutality in fantasy creates brutality in fact.

At the conclusion of one section of his book, Wertham offered a summary of his findings:

56. Id. at 118.
57. Id. at 89–90.
58. Id. at 109.
The general lesson we have deduced from our large case material is that the bad effects of crime comic books exist potentially for all children and may be exerted along these lines:

1) The comic-book format is an invitation to illiteracy.
2) Crime comic books create an atmosphere of cruelty and deceit.
3) They create a readiness for temptation.
4) They stimulate unwholesome fantasies.
5) They suggest criminal or sexually abnormal ideas.
6) They furnish the rationalization for them, which may be ethically even more harmful than the impulse.
7) They suggest the forms a delinquent impulse may take and supply details of technique.
8) They may tip the scales toward maladjustment or delinquency.

Crime comics are an agent with harmful potentialities. They bring about a mass conditioning of children, with different effects in the individual case. A child is not a simple unit which exists outside of its living social ties. Comic books themselves may be the virus, or the lack of resistance to the social virus of a harmful environment.  

Modern social scientists shudder at Dr. Wertham’s faulty methodology and the broad, sweeping, unsubstantiated conclusions he drew from his collection of anecdotal evidence. In her book, Not in Front of the Children, Marjorie Heins discusses the weakness of Dr. Wertham’s argument by noting that Wertham “interviewed juvenile offenders . . . and asked them if they had read comic books.” She notes the children typically said that they had read comics, and based on these responses, Wertham concluded that reading comic books led to juvenile delinquency. Heins states that Wertham’s study “is now cited in courses on mass communication as a form of error” because at the time Wertham conducted his study, ninety-

59. Id. at 118.
61. Id. at 240.
62. Id.
three percent of all children had read comics.\textsuperscript{63} And, Heins concludes: “they were not all juvenile delinquents.”\textsuperscript{64}

However, in April 1954, critics of Dr. Wertham were not heard by the Judiciary subcommittee hearings.\textsuperscript{65} Instead, after receiving what, at the time, was considered compelling testimony by Dr. Wertham, a hostile committee took testimony from William Gaines, the lone member of the comics community who had agreed to offer a response.\textsuperscript{66} His testimony was an unmitigated disaster, in part because of the effects of prescription medication he was taking at the time.\textsuperscript{67} In Louis Menand’s \textit{New Yorker} article, he discusses one particularly tough cross-examination by the committee’s junior counsel, Herbert Beaser, in which Gaines was trapped into some damaging admissions:

BEASER: Let me get the limits as far as what you put into your magazine . . . . Is the sole test of what you would put into your magazine whether it sells? Is there any limit you can think of that you would not put in a magazine because you thought a child should not see or read about it?

GAINES: No, I wouldn’t say that there is any limit for the reason you outlined. My only limits are bounds of good taste, what I consider good taste.

BEASER: Then you think a child cannot in any way, in any way, shape, or manner, be hurt by anything that a child reads or sees?

GAINES: I don’t believe so.\textsuperscript{68}

Once the debate shifted to whether horror comics were in good taste, the battle was lost.\textsuperscript{69} Of course horror comics are not in “good taste”—very little that appeals to adolescent boys fits that category.\textsuperscript{70}

The Congressional hearings, which were televised on the newly widespread medium of television, evoked in the public a very negative view of

\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} See Menand, supra note 44, at 124–25.
\textsuperscript{66} See id. at 125.
\textsuperscript{67} See id.
\textsuperscript{68} Id. at 124–25.
\textsuperscript{69} Id. at 124, 126.
\textsuperscript{70} See id.
A Gallup poll taken in November 1954 found that seventy percent of Americans believed that comic books were a cause of juvenile crime, and more than a dozen states passed laws restricting their sale. Furthermore, there were public burnings of comic books. In the two-year period from 1954 to 1956, the comic book industry suffered a huge loss, publishing only 250 titles a year as opposed to 650 titles per year, and losing over 800 artists, writers, and related creators (for example, letterers, colorists, etc.).

In October 1954, desperate to salvage the tattered remnants of their industry, comic publishers established a trade organization, the Comics Magazine Association of America, and created a code of conduct ("the Code" or "CCA") that was "an unprecedented (and never surpassed) monument of self-imposed repression and prudery." A team of five censors reviewed all comics published after adoption of the Code; comic books that were approved for publication bore a replica of a stamp with the words "Approved by the Comics Code Authority" on their front covers. Over time, the fear and hysteria about the role of comics in young people's lives died down, and the market for comics shifted to a more adult market, resulting in the gradual elimination of the Code. However, it was not until 2011 that the last major comic publishers, DC and Archie Comics, dropped the CCA stamp, making the fifty-six year self-imposed period of censorship one of the longest of any creative industry.

The text of the Code is remarkable. The Code is astonishingly similar to contemporary efforts to limit the content of comics and related graphic

71. See Menand, supra note 44, at 124, 126.
72. Id.
73. Id.
74. Id. (stating that EC Comics was among the casualties—it published its last comic in November 1955. Gaines, however, stayed in the business. In order to avoid the strictures of the Comic Code (discussed infra), he took his satire comic book, MAD, and converted it into a black-and-white magazine format, thereby allowing him to ignore the Code and its limits.).
75. See id.
76. See id.
79. See Weldon, supra note 78.
80. See id.
works under the Federal PROTECT Act, discussed infra. Relevant sections of the Code, adopted in October 1954 by the Comics Magazine Association of America, Inc. read:

Code For Editorial Matter
General Standards Part B:
1) No comic magazine shall use the word “horror” or “terror” in its title.
2) All scenes of horror, excessive bloodshed, gory or gruesome crimes, depravity, lust, sadism, masochism shall not be permitted.
3) All lurid, unsavory, gruesome illustrations shall be eliminated.
4) Inclusion of stories dealing with evil shall be used or shall be published only where the intent is to illustrate a moral issue and in no case shall evil be presented alluringly nor so as to injure the sensibilities of the reader.
5) Scenes dealing with, or instruments associated with walking dead, torture, vampires and vampirism, ghouls, cannibalism, and werewolfism are prohibited.
General Standards Part C:
All elements or techniques not specifically mentioned herein, but which are contrary to the spirit and intent of the Code, and are considered violations of good taste or decency, shall be prohibited.

Dialogue:
1) Profanity, obscenity, smut, vulgarity, or words or symbols which have acquired undesirable meanings are forbidden.
2) Special precautions to avoid references to physical afflictions or deformities shall be taken.
3) Although slang and colloquialisms are acceptable, excessive use should be discouraged and wherever possible good grammar shall be employed.

Religion:
Ridicule or attack on any religious or racial group is never permissible.

Costume:

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1) Nudity in any form is prohibited, as is indecent or undue exposure.
2) Suggestive and salacious illustration or suggestive posture is unacceptable.
3) All characters shall be depicted in dress reasonably acceptable to society.
4) Females shall be drawn realistically without exaggeration of any physical qualities.

NOTE: It should be recognized that all prohibitions dealing with costume, dialogue, or artwork applies as specifically to the cover of a comic magazine as they do to the contents.

Marriage and Sex:
1) Divorce shall not be treated humorously nor shall be represented as desirable.
2) Illicit sex relations are neither to be hinted at nor portrayed. Violent love scenes as well as sexual abnormalities are unacceptable.
3) Respect for parents, the moral code, and for honorable behavior shall be fostered. A sympathetic understanding of the problems of love is not a license for moral distortion.
4) The treatment of love-romance stories shall emphasize the value of the home and the sanctity of marriage.
5) Passion or romantic interest shall never be treated in such a way as to stimulate the lower and baser emotions.
6) Seduction and rape shall never be shown or suggested.
7) Sex perversion or any inference to same is strictly forbidden.82

The Code was universally accepted for years following its adoption.83
The first signs of erosion of that acceptance likely trace to the beginnings of the Free Speech Movement, launched in Berkeley in 1965, when Mario Savio led Berkeley students in a protest over the University’s effort to limit the kinds of allowable speech on the campus.84 The Free Speech Movement became the springboard for protests against the United States’ ex-

82. Comics Code Authority, supra note 77.
83. See Weldon, supra note 78.
panding involvement in the Vietnam War and by the late 1960s, a full-
blown counter-culture had developed.  

Comic artists and writers enthusiastically embraced the counter-
culture and began self-publishing black-and-white comics that allowed 
them to address topics banned by the Code.  

Explicit sexual activity, anti-
war protests, drug use, and many other counter-cultural expressions were 
the subject of the “underground comix” of this era. 

Mainstream comics followed, with the rise of Marvel Comics, led by Stan Lee and Jack Kirby, 
and DC Comics, both offering characters and story lines that dealt with controversial issues. 

Following the comic book battles of the 1950s, comics and graphic 

novels began to mature as literary forms, to address more adult themes, and to appeal to a broader demographic. 

However, such comics again came under the scrutiny of law enforcement on the ground that their content vio-
lated obscenity law. 

It was under those circumstances that the Comic Book Legal Defense Fund arose. 

C. The Origins of the Comic Book Legal Defense Fund 

By the fall of 1986, Denis Kitchen had been involved in the comic art and business fields for over twenty years. 

He was part of the group of artists who were active in the underground comics movement, which also in-
cluded the now-famous artists Robert Crumb and Art Spiegelman. 

Kitchen got involved in publishing during that time and founded the eponymous 

Kitchen Sink Press, a company he ran until 1999. 

Currently, he is a co-

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86. See generally DANKY & KITCHEN, supra note 85, at 48–49.
87. See generally id.
88. See generally id. at 57; Stan Lee, Steve Ditko & Jack Kirby, THE AMAZING SPIDER-MAN #1, MARVEL COMICS (March 1963) (featuring Marvel Comics’ Spiderman character’s alter ego, Peter Parker, who was depicted as an insecure high school student); see also Denny O’Neill & Neal Adams, IN THE HEART OF AMERICA: A WAR ZONE, GREEN LANTERN/GREEN ARROW #77, DC COMICS (June 1970) (featuring DC’s Green Lantern superhero, in a series of comic books created by Neal Adams, traveling across America viewing instances of social injustice).
89. See Weldon, supra note 78.
91. See id.; see infra Part I.C.
93. Id.
94. Id.
owner and founder of a number of comics-related businesses, including Kitchen, Lind & Associates, a company that packages books and represents cartoonists to the mainstream literary marketplace; and Comic Art Productions and Exhibitions (“CAPE”), a company that produces comic-focused museum and gallery shows and related apps for mobile devices.

In December 1986, Kitchen received a telephone call from Frank Magiaracina, the owner of a chain of comic book stores called Friendly Franks. Magiaracina told him that his store in Lansing, Illinois had been the subject of a police raid. Six police officers entered the shop and seized seven comic titles, including Omaha the Cat Dancer, Weirdo, and Heavy Metal. They arrested the store manager, Michael Correa, charging him with having obscene books on display, and closed the Friendly Franks store for a five-day period. A few weeks after the original raid, the police added Elektra: Assassin, Love & Rockets, Ms. Tree, Bodessey, and Elfquest to the list of allegedly obscene material.

The arresting officer, Sergeant Jack Hoestra, told the Gary Post-Tribune that, in addition to the legal charges of obscenity, he noticed a “satanic influence” in many of the shop’s comics. He told the paper: “Oh yes, there was absolutely a lot of satanic influence in the comics there. . . . If you know what you’re looking for, you can see the satanic influence all over. Three-quarters of the rock groups today show satanic influence, and it’s all over the television.”

Kitchen was appalled at the total lack of merit in the police action. He felt obligated to help Magiaracina and Correa, especially because Kitchen Sink Press distributed Omaha the Cat Dancer, one of the seized titles. Shortly after the raid, while attending a comic convention in St. Paul, Minnesota, Kitchen discussed various fundraising options to support

95. Id.
97. Kitchen, supra note 90.
98. Id.
99. Id.
100. Id.
101. Id.
102. Id.
103. Kitchen, supra note 90.
104. Id.
105. Id. Kitchen notes that although Omaha the Cat Dancer contains adult content (primarily nudity by the lead character, an anthropomorphic feline creature who works as a dancer in a strip club), the book had received critical praise all over the world, and was one of the few comics in 1986 with a high female readership. Id.
Correa’s legal defense effort with his colleagues. One noteworthy option was to create and sell limited-edition prints by an impressive array of artists, under the rubric of a First Amendment Portfolio. Kitchen contributed to the effort by enticing a group of fourteen artists to create the portfolio and finding a printer to print the work at cost. The resulting effort yielded a net profit of $20,000, which Kitchen put into a bank account that he named the Comic Book Legal Defense Fund.

Before the funds raised could be put to use, Correa’s case went to trial and he was convicted of intent to disseminate obscene material. Thus, Kitchen used the fundraising proceeds to hire Burton Joseph, a well known attorney specializing in the First Amendment to appeal the conviction.

The appeal was successful, and the conviction was overturned.

Following the successful conclusion of the Correa case, Kitchen discovered that several thousand dollars remained in the bank fund. After discussing options with his colleagues in the venture, he decided that the Friendly Frank’s raid was unlikely to be an isolated incident, and he took steps to create a 501(c)(3) non-profit organization using the same name he had applied to the bank account—The Comic Book Legal Defense Fund (“CBLDF”). Non-profit status was obtained in 1990, and, through additional fundraising, enough money was raised to hire a full-time Executive

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106. Id.  
107. Id.  
108. Kitchen, supra note 90.  
109. Id. The artists contributing to the portfolio, and the work they were known for, include: Sergio Aragones (MAD MAGAZINE), Hilary Barta (PLASTIC MAN), Reed Waller (OMAHA THE CAT DANCER), Steve Bissette (SWAMP THING), Bob Burden (FLAMING CARROT), Richard Corben (BODIESSEY), Robert Crumb (WEIRDO AND ZAP), Howard Cruse (WENDEL), Will Eisner (THE SPIRIT), Frank Miller (BATMAN: THE DARK KNIGHT AND ELECTRA), Mitch O’Connell and Don Simpson (MEGATON MAN), and Eric Vincent (ALIEN FIRE). Id.  
110. Id.  
113. Kitchen, supra note 90.  
114. Id.
Director and a small staff to run the office. The organization presently occupies offices at 255 West 36th Street, Suite 501, in the heart of New York City.

Although the case that launched the CBLDF focused on obscenity law, and many of the cases it dealt with in the years to come would share that focus, not all of them dealt with obscenity. For example, the first major case after the creation of the CBLDF dealt with another issue vital to comic creators—the use of the power to tax to potentially limit free speech.

II. THE POWER TO TAX AND THE FIRST AMENDMENT: 
MAVRIDES V. BOARD OF EQUALIZATION

Paul Mavrides has worked as an artist in a variety of media, including comics and graphic art since the late 1970s. He is best known for the Fabulous Furry Freak Brothers, an underground comic he co-created with Gilbert Shelton in the 1970s. In the comic, three brothers expended a great deal of time and effort in pursuit of drugs (mostly marijuana), casual sex, and rock and roll.

The Board of Equalization (“BOE”), California’s state taxing authority, registered Mavrides as a vendor. When he sold original pieces of his artwork to clients, he charged sales tax on the transaction, which was then paid to the BOE. In 1992, on his state tax returns for the 1990 calendar year, Mavrides listed his sales income and the tax owed. Also, he filed for a tax exemption for the royalty income for his comic work. This exemption was a standard in the comics industry and was based on his understanding that the work of an author, submitted for subsequent publication,

115. Id.
117. Kitchen, supra note 90.
118. See infra Part II.
120. See GILBERT SHELTON, THE FABULOUS FURRY FREAK BROTHERS (1971) (republishing early Freak Brothers stories that were originally published in underground newspapers not aimed at children).
121. See generally id. (“Well, that’s all reet . . . we have plenty of grass, and as we all know, dope will get you through times of no money better than money will get you through times of no dope!”).
123. Id.
124. Id.
125. Id.
was exempt from taxes since the sale of the published work would ultimately be a taxable transaction, thereby resulting in double taxation.\textsuperscript{126}

The relevant regulation in California law was found in section 1543(b) of the California Sales and Use Tax Regulation. Adopted in 1939, it provided the following:

\textbf{(b) APPLICATION OF TAX}

\textbf{(1) AUTHORS}

(A) The transfer by an author to a publisher or syndicator, for the purpose of publication, of an original manuscript or copy thereof, including the transfer of an original column, cartoon, or comic strip drawing, is a service, the charge for which is not subject to sales tax. If the author transfers the original manuscript or copy thereof in tangible form, such as on paper or in machine-readable form such as a tape or compact disc, that transfer is incidental to the author’s providing of the service, and the author is the consumer of any such property. However, the transfer of mere copies of an author’s work is a sale of tangible personal property, and tax applies accordingly.

(B) Tax applies to charges for transfers of photographic images and illustrations, whether or not the photographic images or illustrations are copyrighted. Transfers of photographic images or illustrations illustrating text written by the photographer or illustrator are not taxable when they are merely incidental to the editorial matter.\textsuperscript{127}

This law led the BOE to request that Mavrides explain the nature of the work for which he was claiming an exemption.\textsuperscript{128} He responded with an explanation of his work as an artist-writer of comic books, citing the relevant portion of section 1543(b).\textsuperscript{129} The BOE rejected his explanation, and sent him a tax bill for $1,036.\textsuperscript{130} Mavrides sought reconsideration of this bill through the BOE’s informal grievance procedure.\textsuperscript{131} During this pro-

\begin{flushright}
\textsuperscript{126} Id.
\textsuperscript{128} Mavrides, \textit{supra} note 122, at 4.
\textsuperscript{129} Id. (discussing a letter received from the BOE requesting an explanation of his exemption claim).
\textsuperscript{130} Amicus Letter from Paul L. Hoffman & Ann Brick, Am. C.L. Union Counsel, to Brad Sherman, Chairman, State Board of Equalization (Sept. 8, 1994); Mavrides, \textit{supra} note 122, at 4.
\textsuperscript{131} \textit{See generally} Mavrides, \textit{supra} note 122, at 4–5.
\end{flushright}
cess, he was the subject of an audit by the BOE.\textsuperscript{132} He met with an auditor in his home and convinced her that his position regarding the exemption claim was correct, and he was assured that the tax demand would be rescinded.\textsuperscript{133} However, the auditor was overruled by her supervisor.\textsuperscript{134}

In December 1991, Mavrides received a letter from the BOE rejecting his argument that, as a comics writer and illustrator, he was entitled to an exemption under section 1543(b).\textsuperscript{135} The BOE asserted that the very nature of comics, which intertwine illustration with text, made them subject to taxation.\textsuperscript{136} The implications of this determination on the mainstream comics industry are both profound and absurd. This interpretation, applied to a typical superhero comic book, would mean that the writer of the book (Stan Lee in the early Marvel days, for example) would not be taxed when he or she sent in his or her story to the publisher; but an independent illustrator or artist who drew and inked the same story, would be taxed on the submission of his or her work to the publisher. This is more sophistry than logic.

Mavrides spent the next two years battling with the BOE over this issue.\textsuperscript{137} Unable to personally finance the retention of a qualified tax attorney, he sought the assistance of the Comic Book Legal Defense Fund (“CBLDF”).\textsuperscript{138} The CBLDF Board recognized the significant damage the BOE’s interpretation of section 1543(b) would cause, agreed to provide legal and financial assistance, and was able to retain the services of a tax attorney.\textsuperscript{139} Sanford Presant, speaking on a panel at the July 1994 San Diego Comic Convention (“ComicCon”), summarized in simple terms the nature of the BOE’s position: “They are saying that a comic work is not an author’s manuscript; in other words, a comic author is not an author.”\textsuperscript{140}

The American Civil Liberties Union (“ACLU”), a watchdog organization that focuses on conduct jeopardizing civil rights,\textsuperscript{141} felt that the issues in the Mavrides case were important and submitted an amicus brief in sup-

\begin{itemize}
  \item \textsuperscript{132} Id. at 5.
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Id. at 5.
  \item \textsuperscript{135} Id. at 15.
  \item \textsuperscript{136} Id. at 1.
  \item \textsuperscript{137} See Mavrides, supra note 122, at 6–7.
  \item \textsuperscript{138} See id. at 7–8.
  \item \textsuperscript{139} See id.
  \item \textsuperscript{140} Sanford Presant, Panel Discussion at the 1994 San Diego Comic Convention: The Mavrides Case 2 (July 1994).
  \item \textsuperscript{141} See generally Key Issues, ACLU, http://www.aclu.org/key-issues (last visited Apr. 8, 2012).
\end{itemize}
port of Mavrides. Paul Hoffman, also a panelist at the 1994 ComicCon panel, spoke eloquently of the intersection between the power to tax and the First Amendment issues in the case:

From a First Amendment standpoint, the ACLU views this in the same way... it’s a clear-cut case. The Supreme Court has often focused on the fact that the power to tax is the power to destroy, the power to censor. Our First Amendment values can be severely undermined by taxing someone, even where those taxes are not intentionally creating a damaging effect on the freedom of speech....

... And that’s in the core of the First Amendment: that bureaucrats shouldn’t be deciding those kinds of questions.

Several months after Mavrides’s tax issue first arose, Hoffman, with assistance from a CBLDF research team, filed an eleven-page amicus letter with the BOE (“ACLU Brief” or “Brief”), in support of Paul Mavrides’s claim for a refund of the tax at issue. The ACLU Brief noted that the organization normally does not become involved in tax cases, but it was making an exception because of the significant First Amendment issues involved. The Brief also noted that there is case law precedent establishing that comics and cartoons are entitled to the same robust level of First Amendment protection afforded to text materials. It asserts that the dis-

142. Press Release, Comic Book Legal Defense Fund, Mavrides Beats California BOE (Jan. 16, 1996). In 1993 the BOE imposed a personal property lien on Mavrides’s property in the amount of the tax claim, which Mavrides subsequently paid with assistance from CBLDF funds.

143. Paul Hoffman, Panel Discussion at the 1994 San Diego Comic Convention: The Mavrides Case 2–3 (July 1994). Mr. Hoffman’s reference to the Supreme Court’s statement comes from the case of McCullough v. Maryland. 17 U.S. 316 (1819). In that case, Supreme Court Chief Justice John Marshall, writing for the majority in striking down a Maryland state tax levied against a branch of the U.S. Bank that had issued bank notes but had not obtained a state charter to do so, found that the state did not have the power to tax the conduct of a federal government chartered entity. Id. at 436–37. His famous quote on the limits of taxation reads:

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one Government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which excerts the control, are propositions not to be denied.

Id. at 431.

144. Hoffman & Brick, supra note 130; see also CBLDF Case Files—Illinois v. Correa, supra note 112. In 1993 the BOE imposed a personal property lien on Mavrides’ property in the amount of the tax claim, which Mavrides subsequently paid with assistance from CBLDF funds.

145. Hoffman & Brick, supra note 130, at 1.

146. Id. at 3.
tinction the BOE made between illustration and text for purposes of determining qualification for exemption was “impermissible.”

Hoffman and ACLU Counsel Ann Brick argued that because section 1543(b) imposes different tax obligations on works depending on whether or not they contain illustrations, the regulation is a content-based restriction on speech.

The principal rebuttal to ACLU’s claim regarding content-based restriction is that, since the regulation just specifies that illustrations are taxable without focusing any attention on the subject of the illustration, the regulation is content-neutral and thereby not in violation of any free speech rights.

Hoffman and Brick respond by noting there is significant authority to the contrary, citing a line of cases where similar taxes and fees were found ultimately to be content restrictive. The Brief concludes that it is the suppression of particular ideas or viewpoints that are conveyed through illustration as a means of expression, that give rise to the First Amendment violation in the present case.

The final section of the ACLU Brief argues that the BOE regulations are void for vagueness because it is impossible to determine, particularly in the case of comics and cartoons, “what is primarily illustrative and what is primarily textual.”

Paul Mavrides’s encounters with the BOE suggest

147. Id. at 2.
148. Id. at 3–4.
149. See generally id.
150. Id.; Paul Hoffman & Paul Mavrides, Panel Discussion at the 1994 San Diego Comic Convention: The Mavrides Case 4 (July 1994); see Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123 (1992) (finding that a scheme where license fees for political demonstrations were set based on the expected costs of security at the demonstration was found to be a content-based restriction because, in order to assess the security risk, the county would have to look at the content of the speech); Simon & Schuster, Inc. v. Crime Victims Bd., 502 U.S. 105 (1991) (finding that a “Son of Sam” law calling for the confiscation of proceeds from books that discussed the previous crimes of the author or his or her mental state towards them was a content-based restriction); J-R Distrib., Inc. v. Eikenbery, 725 F.2d 482, 495 (9th Cir. 1984) (finding that a fine structure that bases fines on profits from adult book sales violates the First Amendment); Festival Enter. v. City of Pleasant Hill, 227 Cal. Rptr. 601, 603 (Ct. App. 1986) (finding that an admissions tax on movie theaters was a First Amendment violation); see also Ark. Writers’ Project v. Ragland, 481 U.S. 221, 229, 231 (1987) (finding that a tax scheme that exempted daily newspapers, religious, professional, trade, and sports magazines, but applied the sales tax to other forms of expression was an impermissible content-based restriction).
151. Hoffman & Brick, supra note 130, at 7 (noting that the BOE regulations do not address how section 1543(b) is to be interpreted in the case of editorial cartoons, and pointing out, as is discussed herein, that the works of Thomas Nast in the turn of the century, and the more recent Pulitzer Prize winning work of Garry Trudeau in DOONESBURY, the long history of political and social satire via cartoons found in the pages of MAD MAGAZINE and THE NEW YORKER and even such mainstream newspaper comics as CATHY, FOR BETTER OR FOR WORSE, and Johnny Hart’s B.C., all offer more than simple illustration—they offer social commentary in the realm of ideas).
152. Id.
that the agency is similarly uncertain of how to make this determination. In a talk he gave at a CBLDF benefit fundraiser, Mavrides described an incident on May 1995 at a BOE Appeals Board hearing where he asked a BOE senior auditor to explain the literary standard the Board was using in making its determination that his work was not literature.\textsuperscript{153} She replied, “[t]here are none. But we know it when we see it.”\textsuperscript{154} This statement is reminiscent of Justice Stewart’s famous statement confirming the similar lack of clarity on the definition of obscenity.\textsuperscript{155}

Hoffman and Brick argued that the difference between a comic book and a drawing in a book is that, in a comic book, the drawings are part of the narrative—they are a part of the text in a way that a book illustration, for example John Tenniel’s illustrations in Lewis Carroll’s Alice’s Adventures in Wonderland, are not.\textsuperscript{156} They concluded this argument with a warning that, if these vague regulations are allowed to limit free expression through the means of an oppressive tax scheme, great damage will be done to society.\textsuperscript{157}

Alas, these eloquent arguments did not, at least initially, sway the BOE.\textsuperscript{158} The BOE considered both the ACLU Brief as well as arguments presented by Mr. Mavrides’s counsel in a hearing before the Business Taxes Appeals Review Section on January 20, 1995.\textsuperscript{159} Four months later, the Decision and Recommendation of the Board, authored by Staff Counsel Carl J. Bessent, rejected these arguments and denied Mavrides’s refund claim.\textsuperscript{160}

The first half of Mr. Bessent’s statement of the Board’s Decision accurately summarizes the claims made by Mr. Mavrides and the response of

\textsuperscript{153} Paul Mavrides, Speech at the Comic Book Legal Defense Fund Benefit (Oct. 31, 1995).

\textsuperscript{154} Id.

\textsuperscript{155} Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.” (emphasis added)).

\textsuperscript{156} Hoffman & Brick, supra note 130, at 4–5.

\textsuperscript{157} Id. at 10 (“The economic damage to Mr. Mavrides from having to pay this tax is significant; the damage to our system of free expression is incalculable. The power to tax is literally the power to destroy [citation omitted]. Free expression is too important to be sacrificed at the altar of vague regulations that selectively tax illustrations.”).

\textsuperscript{158} Letter from Carl J. Bessent, Staff Counsel, State Board of Equalization, to Paul Mavrides (May 18, 1995) (recommending that the claim filed by Mavrides be denied).

\textsuperscript{159} See id.

\textsuperscript{160} See id. (recommending that the claim filed by Mavrides be denied).
the Sales and Use Tax Department ("Department"). 161 This summary is followed by Bessent’s analysis and conclusions.162 At the outset, Bessent framed the relevant issue as one in which “we must discuss the true object sought by the publishers.”163 From this point on Bessent launched into a convoluted argument about the difference between a text manuscript and illustrations. While acknowledging that comics and comic strips are expressions of ideas, he asserted that the issue is whether the publisher sought “the service of creating the comic per se or the expression of the idea in its physical form.”164 He concluded it is the latter—the publisher wants the physical camera-ready art.165 He contrasted this with a text manuscript, asserting that in that instance the publisher is only interested in the ideas in the text, and not the physical text itself, noting that “[t]he manuscript is merely a convenient method of conveying words and ideas.”166 From this premise, he concluded:

Since the true object sought by the publisher is the property produced by the service of creating the comics, rather than the service per se, the transfer of possession of the comics to the publisher in California for a consideration is subject to tax.167

This is specious logic at best. The claim that a manuscript is “merely a convenient method of conveying words and ideas,”168 taken at face value, means that the words used by an author have no merit other than to deliver an idea—so Shakespeare’s prose, word choice, pacing, and plots are of no value—it is only the ideas embodied in those words that have value. Moreover, why would this argument not be available to the comic creator?

161. Id. (citing Mem. of Decision and Recommendation from the Board of Equalization Business Taxes Appeals Review Section, at 1–5, In re Claim for Refund Under the Sales and Use Tax Law of Paul Mavrides, SR BH 19-760740-001, May 18, 1995 [hereinafter Mem. of Decision and Recommendation]) (recommending that the claim filed by Mavrides be denied).

162. Id. (citing Mem. of Decision and Recommendation, supra note 161, at 5–8) (recommending that the claim filed by Mavrides be denied).

163. Id. (quoting Mem. of Decision and Recommendation, supra note 161, at 5) (recommending that the claim filed by Mavrides be denied).

164. Bessent, supra note 158 (quoting Mem. of Decision and Recommendation, supra note 161, at 6) (recommending that the claim filed by Mavrides be denied).

165. Id. (citing Mem. of Decision and Recommendation, supra note 161, at 6) (recommending that the claim filed by Mavrides be denied).

166. Id. (quoting Mem. of Decision and Recommendation, supra note 161, at 6) (recommending that the claim filed by Mavrides be denied).

167. Id. (quoting Mem. of Decision and Recommendation, supra note 161, at 7).

168. Id. (quoting Mem. of Decision and Recommendation, supra note 161, at 6).
The illustrations are merely a different but equally convenient method of conveying words and ideas.

The other flaw in this argument is its suggestion that what the publisher wants is the physical possession of the camera-ready art, which would require that the nature of the transaction be a sale of that art by the artist to the publisher. However, comics’ art pages are generally returned to the artist, unless the artist is an employee of the comic book publisher (and in many cases, even employees get their original art back). One need only stroll the lanes of any comics convention to see hundreds of comic artists selling their original pages to collectors. It is those sales, and not the transfer of the work to the publisher, which should be, and are, subject to sales tax, since the object of those transactions is the purchase of the original page as a work of art.

Mr. Bessent next addressed the Constitutional claims made by the ACLU and Mr. Mavrides. In response, he cited Article III, section 3.5 of the California Constitution, which states that state agencies may not refuse to enforce state statutes on the basis of a claim that the law is unconstitutional unless a decision to that effect has been rendered by a court. While he acknowledged that Mavrides has, by raising the constitutional issues, preserved his right to litigate them in court, he concluded that the BOE has no jurisdiction to act on those claims, even if it thought that the regulation was constitutionally invalid.

Based on the BOE’s analysis that section 1543(b) allows taxation of comic art, it began to contact other comic art publishers and distributors to


171. Bessent, supra note 158 (citing Mem. of Decision and Recommendation, supra note 161, at 8) (recommending that the claim filed by Mavrides be denied).

172. Id. (citing Mem. of Decision and Recommendation, supra note 161, at 8) (recommending that the claim filed by Mavrides be denied). Bessent also declines to consider the merits of the argument that this interpretation of California tax law will result in an exodus of comic artists and publishers from the state, who will leave the state rather than pay this tax. He dismisses this argument on the same jurisdictional grounds, noting, “[i]n regards to the loss of California revenue to other states, the possible impact of this decision on other businesses cannot affect my recommendation in this case. Claimant may be correct that there would be a revenue loss to other states, but I have no authority to change the law.” Id. (quoting Mem. of Decision and Recommendation, supra note 161, at 8) (recommending that the claim filed by Mavrides be denied).
collect tax revenue.\textsuperscript{173} The first effort requested seven years of records from Creators Syndicate, which distributed columns by Ann Landers, Hillary Clinton, and Dan Quayle, and editorial cartoons by Herblock, Mike Luckovitch, and Doug Marlette,\textsuperscript{174} as well as daily \textit{B.C.} comic strip creator Johnny Hart.\textsuperscript{175} This endeavor was followed by a similar request to the \textit{Siskiyou Daily News}, a small Northern California newspaper, for records relating to payments it made for its comics page and editorial cartoons.\textsuperscript{176}

While it seems safe to assume that the BOE’s intention all along was to collect tax on comics transfers to more publishers than just those in Paul Mavrides’s case, once the BOE began to take action, these other parties realized that they now had a stake in the outcome of the case.\textsuperscript{177} Mavrides and his counsel sought a further appeal of the May 1995 denial of their claim, and subsequently, the BOE scheduled a public hearing for January 10, 1996 in Sacramento.\textsuperscript{178} For this hearing, Mavrides’s team gathered an impressive list of amicus submissions,\textsuperscript{179} while at the same time preparing to take the case to the next level, a state court filing, if they were once again unsuccessful in convincing the BOE of the merits of its claim.\textsuperscript{180} The Creators Syndicate was considering the possibility of joining that state court litigation depending on the outcome of the BOE’s investigation of their records.\textsuperscript{181}

The added support may have turned the tide. Another possibility to explain the outcome of the case is that the BOE saw Steve Greenberg’s editorial cartoon about the case, which appeared as:

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\item \textsuperscript{175} Milner, supra note 173.
\item \textsuperscript{177} See Letter from Elsa Moreno Vega, Staff Tax Auditor, State Bd. of Equalization, to Sanford Presant, Battle & Fowler, LLP (Mar. 6, 1996) (on file with CBLDF).
\item \textsuperscript{178} See id.
\item \textsuperscript{179} California Sales Tax Appeal of Comic Author Paul Mavrides: Executive Summary by Susan Alston, from Comic Book Legal Defense Fund, on California Sales Tax Appeal of Comic Author Paul Mavrides (Dec. 19, 1995) (listing the following amici submissions: ACLU of Northern California; ACLU of Southern California; Association of American Publishers; California Newspaper Publishers Association; Children’s Book Council, Inc.; Creators Syndicate; National Cartoonists Society; Printing Industries of California; Society of Children’s Book Writers and Illustrators); see Mavrides, supra note 153 (identifying famous writers, comic artists and publishers Ray Bradbury, Will Eisner, Mort Walker, Roger Corman, Paul Conrad, and Stan Lee as persons also offering support for his claim).
\item \textsuperscript{180} Stark, supra note 174.
\item \textsuperscript{181} Id.
In any event, following the public hearing, the Board voted, 3-2, that cartoon artwork was not subject to tax. In its final confirming letter regarding its decision, dated March 6, 1996, the Board offered no explanation for its change of heart, saying only: “The Board concluded that cartoon artwork is not subject to tax. Accordingly, the Board ordered that the claim for refund be granted.”

Alf Brandt, an aide to BOE Chairman Johan Klehs, offered this brief explanation to The New York Times: “We’re trying to be consistent with the intent of the law that a cartoon is an expression of an idea and should be treated as a manuscript.”

As all-consuming as the Mavrides case was for the CBLDF, it was not the only case CBLDF worked on during the 1990s. CBLDF’s primary slate of cases dealt with the issue of obscenity and the First Amendment. And in these cases, the stakes were even higher, since a violation

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184. Vega, supra note 177.
185. Adelson, supra note 183, at D4.
of laws prohibiting the distribution and/or sale of obscene materials generally was prosecuted as a criminal matter, with jail time as a very real possible outcome.

III. OBSCENITY LAW AND THE FIRST AMENDMENT: COMIC BOOK LEGAL DEFENSE FUND TO THE DEFENSE

A. Florida v. Mike Diana: Do Gross Illustrations Merit Criminal Penalties?

Mike Diana is not everyone’s cup of tea. Creator and artist of a comic book “zine” called Boiled Angel, he was described in a 1994 Mother Jones magazine profile as follows:

He has tattoos and long, stringy hair, likes the band Nine Inch Nails, sports a pronounced anarchist attitude, and fits most people’s definition of, well, creepy.

. . .

. . . Diana isn’t the boy next door; his artistic tastes, when compared to the mainstream, are completely off the meter. Whether it’s death and excrement, or simply shapes that make no sense, most of Diana’s material leaves viewers wondering, “[w]hat’s wrong with this kid?”

The article summarized two story lines from issues of Boiled Angel:

A child is sodomized by his adoptive father, who is killed by the family dog. The boy thinks he is finally free until the dog picks up where the dad left off.

A man looks at a pretty woman. In the next frame[,] a montage[,] the man has the look of a psychopath and is surrounded by slivers of abstract images, including a nipple being sliced off by a knife.

This is strong, disturbing, and uncomfortable material. So much so that when a copy of Boiled Angel, which had a miniscule subscriber base of

189. Henry, supra note 186.
190. Id.
300 people, “found its way into the hands of a California law enforcement officer,” the violent images reminded him of a brutal series of unsolved student murders in Gainesville, Florida (Diana lived in Largo, Florida).\(^{191}\) The officer sent the “zine” to Florida law enforcement, who sought out Diana and asked him to give a blood sample to determine whether he was the perpetrator.\(^{192}\) Although the lab tests ruled him out as the murderer, the copy of *Boiled Angel* was sent on to the Pinellas County Sheriff’s office, which charged Diana with a violation of Florida’s obscenity law.\(^{193}\)

The Comic Book Legal Defense Fund (“CBLDF”) hired Tampa attorney Luke Lirot to defend Diana.\(^{194}\) Trial testimony offered the unsubstantiated claim that his images could appeal to or inspire serial murderers, and a six-member jury found Diana guilty of distributing, publishing, and advertising obscene material.\(^{195}\) The Judge’s sentence was a bit unusual.\(^{196}\) Diana was ordered to pay a $3,000 fine, undergo psychiatric evaluation at his own expense, do eight hours of community service per week during a three-year probation period, refrain from any contact with children under the age of eighteen, take a course in journalism ethics (again at his own expense), and refrain from drawing any “obscene” material during his probation period.\(^{197}\) The Judge ordered that this last element of his sentence would be enforced by unannounced inspections of his home at any time, conducted without warrant or notice, to determine if he was in possession of, or was creating, any “obscene material.”\(^{198}\)

Stuart Baffish, the Assistant State Attorney for Pinellas County, who prosecuted the Diana case explained, “a teen slasher movie available at a video store would not be ruled obscene, because it portrays violence in a gross way, but it does not portray sex in a patently offensive way.”\(^{199}\) A *Mother Jones* article features this quote from the prosecutor, distinguishing Diana’s crime from violent movies, in a prescient observation that fore-

\(^{191}\) See *id.*

\(^{192}\) Id.

\(^{193}\) See *id.*

\(^{194}\) See *id.*


\(^{196}\) See Henry, *supra* note 186.

\(^{197}\) See *id.*; Alston, *supra* note 188, at 25.


\(^{199}\) Henry, *supra* note 186.
shadowed the Supreme Court’s 2011 decision rejecting a California law banning violent video games.200

Another challenge the prosecution faced in the Diana case was how to meet the first prong of the Miller v. California test for obscenity, which states the work must appeal to the “average” person’s prurient interest in sex.201 Diana’s work was challenging in that regard—it might be gross or repulsive to jurors, but how could it be found to be sexually appealing to the average person?202 The prosecution found an answer to that question in the pre-Miller decision, Mishkin v. New York.203 Mishkin posed a similar question dealing with whether cheap pulp magazines that featured sexual activity described as “such deviations as sadomasochism, fetishism, and homosexuality,”204 could support a finding of appealing to the average person’s prurient interest, under the then-applicable test for obscenity, found in Roth v. United States.205

The Court in Mishkin explained that the use of the term “average person” in Roth was not to be narrowly interpreted to mean that deviant sexual materials could not be found obscene because they were not sexually arousing to “normal” people.206 Rather, the Court stated that “[w]e adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group...”207 Based on this rationale, the prosecution in the Diana case was able to argue that Diana’s work would appeal to the prurient interest of people who found the gross and disgusting images in

200. Id. See generally Brown v. Entm’t Merchs. Ass’n, 131 S. Ct. 2729, 2734 (2011) (“[N]ew categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.”).

201. Miller v. California, 413 U.S. 15, 24 (1973) (setting forth the following three-part test: “[t]he basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest [citations omitted]; (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”). But see Miller, 413 U.S. at 37, 43-44 (Douglas, J., dissenting) (“The Court has worked hard to define obscenity and conceded has failed. . . . To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process.”).

202. Henry, supra note 186 (discussing the challenge for the prosecution in Florida v. Diana was to prove the first prong of the Miller Test).


204. Id. at 505.

205. Id.

206. See id. at 508.

207. Id. at 509.
his work to be arousing. The prosecution was able to prove this point with expert testimony from a psychologist who testified that people “of questionable personality strengths” could be aroused by the [art],” as opposed to producing a witness who could testify to actually being aroused.

The CBLDF filed two separate appeals of the Diana trial court decision. They achieved only limited success, with the appellate court reversing the conviction for “advertising obscene material,” but allowing the production and distribution convictions to stand. The courts refused to accept an amicus brief submitted by the American Civil Liberties Union (“ACLU”), and a subsequent final appeal to the United States Supreme Court was denied. Mike Diana moved to New York City with the consent of the Florida court and fulfilled his “community service obligation [by doing] volunteer work for the CBLDF.” The Fund spent in excess of $50,000 on his unsuccessful defense.

B. Oklahoma v. Planet Comics: The Threat of Criminal Penalties Compels the Abdication of a First Amendment Defense

Michael Kennedy and John Hunter were the co-owners of Planet Comics, a comic book store in Oklahoma City, Oklahoma. In the first days of September 1995, Oklahoma City police raided Planet Comics in response to a complaint from an unidentified woman who was a member of the Christian Coalition, a local religious group. She had complained to Oklahomans for Children and Families (“OCaF”), a non-profit “obscenity watch-dog group,” about the comics available in the store, notably a comic titled Verotika #4. In turn, OCaF delivered a copy of the comic to the police department, triggering the raid.

208. Henry, supra note 186.
209. Id.
211. Alston, supra note 188, at 25.
212. CBLDF Case Files—Florida v. Mike Diana, supra note 187.
213. Id.
215. Id.
217. Alston, supra note 188, at 26; CBLDF Case Files—Oklahoma v. Planet Comics, supra note 216.
218. Alston, supra note 188, at 26; CBLDF Case Files—Oklahoma v. Planet Comics, supra note 216.
Verotika #4 is one of a series of comics published by Verotik Comics, a company operated by Glenn Danzig, a self-styled “radical, . . . revolutionary, and . . . direct descendant of renowned abolitionist John Brown.”219 The police searched the store while the owners were out of town and arrested them upon their return.220 They were handcuffed for the arraignment and charged with keeping for sale, trafficking,221 displaying obscene material deemed to be harmful to minors,222 and child pornography regarding Eros Comics’ The Devil’s Angel, illustrated by well known comic book artist Frank Thorne.223 This last count was particularly ridiculous, since the only “child” in Thorne’s work was a spawn of the devil and was a drawing neither depicting nor involving a human child.224

At the arraignment, the State argued that Kennedy and Hunter were “dangerous criminals,” and bail was set at $20,000.225 The combined charges they faced, if sustained, could result in a prison sentence of up to forty-three years.226 CBLDF posted bail and retained three well known defense attorneys—Mark Hendrichsen, James A. Calloway, and C.S. Thornton—whose initial efforts were successful in getting the state to drop

219. Peter David, But I Digress, COMIC BUYER’S GUIDE #1147 (Nov. 10, 1995), available at http://www.theroc.org/roc-mag/textarch roc-20/roc20-19.htm (explaining that unlike most other comics publishers, Danzig declined to offer support to CBLDF in their defense of the Planet Comics owners, arguing that CBLDF should do more in the way of advocacy and lobbying for a change in censorship laws on a proactive basis, rather than offering legal defense after charges are brought. However, CBLDF is not permitted to lobby because it would lose its tax-exempt status); see also Song and Name Information, MISFITS CENT., http://www.misfitscentral.com/ danzig/songname.php (last visited Apr. 8, 2012) (explaining that “Verotik” is a “combination of ‘violent and erotic’”).

220. David, supra note 219; see CBLDF Case Files—Oklahoma v. Planet Comics, supra note 216.

221. CBLDF Case Files—Oklahoma v. Planet Comics, supra note 216 (noting that the trafficking count was based on the display of Eros Comics’ SCREAMERS #2, SEX WAD #2, NEFARISMO #5, and BEATRIX DOMINATRIX #2); Alston, supra note 188, at 26; David, supra note 219.

222. CBLDF Case Files—Oklahoma v. Planet Comics, supra note 216 (stating that the displaying material harmful to minors count involved the comics VEROTIKA #4, Boneyard Press’s MIGHTY MORPHING RUMP RANGERS, and Japan Books’s THE VIPER SERIES OFFICIAL ART BOOK).


224. David, supra note 219 (referring to a statement made by Planet Comics’ attorney James A. Calloway).

225. Alston, supra note 188, at 27; see CBLDF Case Files—Oklahoma v. Planet Comics, supra note 216.

226. CBLDF Case Files—Oklahoma v. Planet Comics, supra note 216.
all charges against all titles except *Verotika #4*. The two remaining charges of felony trafficking as to that comic did, however, still carry a potential prison sentence of three to five years—a substantial reduction from forty-three years, but still a significant, life-altering penalty.

The raid and arrest had other consequences. Planet Comics was evicted by the owner of the premises and was forced to relocate to a less visible location. Sales dropped by as much as eighty percent as many customers assumed the store was out of business. The police raided John Hunter’s home and seized 250 disks and the store computer. Someone threw a brick through the glass door to the store. In March 1996, Hunter and Kennedy gave up and closed Planet Comics for good.

On April 12, 1996, at a preliminary hearing on the case, the Judge reduced the three felony counts to misdemeanors, based on his view that the materials seized did not warrant felony charges. The following Monday, the state prosecutors filed a notice of intention to appeal the judge’s decision, seeking to reinstate the felony charges. Thereafter, the State delayed hearings on this motion for a year, and in April 1997, two of the felony counts were reinstated, and one was reduced again to a misdemeanor. Trial was set for September 8, 1997.

On September 5, 1997, an exhausted Hunter and Kennedy accepted a plea deal and agreed to plead “guilty to two felony charges of trafficking in obscenity for selling . . . *Verotika #4* to consenting adults.” Their plea bargain resulted in a “three-year deferred prison sentence and a fine of $1,500 each.” Hunter and Kennedy did not consult with the CBLDF before they accepted the plea. In fact, the CBLDF’s policy is to take cases only when the accused has agreed not to take such plea deals. However,
the pressure on the defendants in these types of cases is enormous, and af-
ter two years of unrelenting attacks that cost them their homes, their livel-
hood, and in some cases their families, it was not surprising that the Planet
Comics’ owners accepted the plea deal.\footnote{Id.}

The situation faced by the defendants in the \textit{Planet Comics} case is not
one usually faced by criminal defendants.\footnote{See \textit{CBLDF Case Files—Oklahoma v. Planet Comics}, supra note 216.} The defendants had to choose
to either proceed with the First Amendment defense of the right to distrib-
ute these expressive works and accept the risk that the failure of the defense
would result in jail time, or take a plea despite the strong legal arguments in
their favor, knowing the impact an adverse decision would have on the in-
dustry in which they have chosen to work.\footnote{See \textit{id.} (stating that Kennedy and Hunter took the plea because it was in their best in-
terest despite the fact that prosecutors would then be motivated to prosecute other retailers of such comic books).}

When drafting the First Amendment, the Framers did not intend to
force parties to choose between defending their rights of expression and a
jail sentence.\footnote{See \textit{id.} (quoting the then-executive director of CBLDF as saying, “In human terms, we all share a sense of relief that Kennedy and Hunter’s ordeal is over. But that in no way diminish-
es the fact that they were convicted in violation of their rights as Americans under the First Amendment. Their conviction will have a chilling effect on what retailers choose to display and sell in ‘high risk’ jurisdictions.”).}
The decision to assert free speech rights should not depend
on the length of a potential jail sentence.\footnote{See \textit{id.} (indicating that Kennedy and Hunter settled to avoid a three- to five-year jail
sentence).} The courts have not yet made a
reasoned determination that distribution of sexually explicit materials that
do not involve the exploitation of real people but instead are limited to il-
lustrations of fictional characters, warrants incarceration as its penalty. The
First Amendment issues that arise in the context of CBLDF cases, where a
defendant accepts a plea deal and thereby waives a First Amend-
ment right, are discussed in detail in Part IV of this article.\footnote{See \textit{infra} Part IV.}

\subsubsection*{C. Texas v. Castillo: The State Invokes the “Protect the Children”
Argument in Response to Expert Testimony That a Comic Is Not Obscene}

Keith’s Comics had the bad luck of being located on East Mocking-
bird Lane in Dallas, Texas, near an elementary school.\footnote{Castillo v. State, 79 S.W.3d 817, 820 (Tex. Crim. App. 2002).} The store primar-
ily sold mainstream superhero comic books, but also had a section in the

\begin{itemize}
\item \footnote{Id.}
\item \footnote{See \textit{CBLDF Case Files—Oklahoma v. Planet Comics}, supra note 216.}
\item \footnote{See \textit{id.} (stating that Kennedy and Hunter took the plea because it was in their best in-
terest despite the fact that prosecutors would then be motivated to prosecute other retailers of such comic books).}
\item \footnote{See \textit{id.} (quoting the then-executive director of CBLDF as saying, “In human terms, we all share a sense of relief that Kennedy and Hunter’s ordeal is over. But that in no way diminish-
es the fact that they were convicted in violation of their rights as Americans under the First Amendment. Their conviction will have a chilling effect on what retailers choose to display and sell in ‘high risk’ jurisdictions.”).}
\item \footnote{See \textit{id.} (indicating that Kennedy and Hunter settled to avoid a three- to five-year jail
sentence).}
\item \footnote{See \textit{infra} Part IV.}
\item \footnote{Castillo v. State, 79 S.W.3d 817, 820 (Tex. Crim. App. 2002).}
\end{itemize}
back of the store, clearly marked “No One Under 18 Allowed Past This Point.” In 2000, Craig Reynerson, a Dallas Police Department detective operating undercover, went into the adult section of Keith’s Comics and purchased a copy of a comic book titled Demon Beast Invasion, The Fallen (“Demon Beast”). The cover of the book depicted a nude female. The book had a warning label, “Absolutely Not For Children.” The detective left the store and reviewed the comic book. Detective Reynerson determined the book’s contents were obscene, returned to the store, and arrested Jesus Castillo, the clerk who sold him the book, on two counts of obscenity under Texas law.

The CBLDF provided legal counsel and expert testimony in Castillo’s defense. Scott McCloud was one of two experts who offered testimony in support of the defense. An award-winning author, artist, and comic book authority, McCloud testified that although Demon Beast contained sexually explicit illustrations, it was representative of Japanese manga and that the themes found in the entire four-book series had serious literary and artistic merit, thereby meeting one of the Miller v. California elements needed to establish that a work was not obscene. On cross-examination, he was asked whether a particular scene the State alleged as obscene “was ‘perverted,’ [he] replied, ‘I think it’s disturbing . . . . And it’s meant to be.’”

The second expert witness provided by CBLDF was Susan Napier, then an associate professor in Asian Studies at the University of Texas at Austin. Based on her expertise in Japanese literature, and in particular

250. Id.
253. Id.
254. Id. at 821.
255. Id. at 820–21.
256. CBLDF Case Files—Texas v. Castillo, supra note 251.
257. Id.
258. Castillo, 79 S.W.3d at 821.
259. Id. at 820–21.
261. Id. at 822.
262. Id.
263. Id.
manga and anime, she testified that the bizarre creatures and related themes of apocalypse and metamorphosis found in *Demon Beast* were typical of the manga genre of Japanese works and offered her opinion that they were “beautifully drawn” in this comic.

The State only offered the testimony of Detective Reynerson, whose conclusion that in his opinion, the work was obscene, was admitted over defense objections that he was not qualified to offer such an assessment. In response, the defense offered the testimony of a private investigator that “sexually explicit materials [were] ‘prevalent’ in North Texas.” He stated that, within one mile of Keith’s Comics, he was able to buy a Penthouse magazine that had photos “of men and women performing sex acts and a story of two women having sex with a grasshopper. At a nearby adult boutique, [he] bought three other magazines that depicted oral sex, anal sex, sex with multiple partners, and bondage.

The testimony from both the CBLDF’s experts and the State’s witnesses actually sounds like compelling evidence that the sale of this one sexually explicit comic book, from an “adult only” section of the store, with an “adults only” warning label, to a consenting adult, could not be illegal. However, what the CBLDF defense team did not anticipate was the approach the prosecutor would take in summarizing the case in closing arguments. Prosecution Attorney Rex Anderson presented the following argument to the jury:

I don’t care what type of evidence or what type of testimony is out there; use your rationality; use your common sense. Comic books, traditionally what we think of, are for kids. This is in a store directly across from an elementary school and it is put in a medium, in a forum, to directly appeal to kids. That is why we are here, ladies and gentlemen. We’re here to get this off the shelf.

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264. See Izawa, supra note 251 (defining Anime generally as animated films and television shows based on manga work); Castillo, 79 S.W.3d at 822.
265. Castillo, 79 S.W.3d at 822.
266. Id. at 819.
267. Id. at 822.
268. Id.
269. Id.
270. See CBLDF Case Files—Texas v. Castillo, supra note 251.
271. Id.
272. Id.
The closing statement did the trick. Despite the fact that neither the charges in the case nor the facts of the case had anything to do with children being exposed to allegedly obscene material, the jury returned a guilty verdict; the judge sentenced Castillo to “180 days in jail, a $4,000 fine, and one year probation.”273 Outraged by this result, the CBLDF appealed.274 The Court of Appeals of Texas, Fifth District, affirmed the trial court in a 2-1 decision.275 An appeal to the Texas Court of Criminal Appeals was subsequently denied, as was CBLDF’s petition for a writ of certiorari to the United States Supreme Court.276 Thereafter, “Castillo served a period of unsupervised probation.”277

In their next major obscenity case, the CBLDF would again deal with the fear of comics influencing the moral education of youth — this time with a surprising result.

D. Georgia v. Gordon Lee: Is Picasso’s Nude Body Obscene?

It is more than a little bit ironic that Gordon Lee’s personal nightmare began on Halloween in 2004.278 Lee, the owner of the Legends Comics store in Rome, Georgia, participated in a community free giveaway activity for merchants, as part of a traditional trick or treat program for local businesses on Broad Street.279 In his case, he was giving away free comics.280

Lee passed out thousands of comics that day, including Alternative Comics #2, which was a sampler comic with ten separate graphic novel excerpts of a few pages each.281 One of the ten stories featured in Alternative

273. Id.

274. See generally id.

275. Castillo, 79 S.W.3d at 817. Contra Castillo, 79 S.W.3d at 828 (James, J., dissenting) (arguing that though the Judge, himself, agreed that the book was obscene, the evidence, nonetheless, did not sustain a finding that Castillo knew that the contents of the book were obscene).

276. CBLDF Case Files—Texas v. Castillo, supra note 251.

277. Id.


279. Id.

280. Id.

281. Sampler comics are used by publishers to generate interest in an array of different comic books and/or graphic novels they publish. By including a short excerpt of different works, they hope to whet the appetite of the reader in the hope that the reader will then buy the entire book. See generally Free Comic Book Day, Alternative Comics #2, ALTERNATIVE COMICS, http://www.indyworld.com/fcbd/fcbd04.html (last visited Apr. 8, 2012).
Comics #2 was an eight-page excerpt from a full-length graphic novel by Nick Bertozzi, titled *The Salon*.

This is a wildly imaginative story. Amazon.com, quoting a Publisher’s Weekly review of the book, describes the storyline of *The Salon* as follows:

In the Paris of 1907, a salon of later famous Modernists—including Gertrude Stein, Georges Braque, Erik Satie and their sawed-off, potty-mouthed, frequently naked, hilariously arrogant acquaintance Pablo Picasso—discover a stash of secret blue absinthe that allows its drinkers to travel inside paintings, which may hold the key to the demonic creature who’s been dismembering avant-gardists.

On one of the excerpted pages of *The Salon* in the *Alternative Comics* #2 sampler, Picasso came to the door of his studio, having been interrupted while allegedly masturbating, and greeted his visitors while naked. The words “penis” and “masturbation” are found in the text; however, Picasso’s penis is not erect, and no sexual conduct between him and the nude model he was painting is shown on any of the excerpted pages.

That fateful Halloween afternoon, Brandy Bishop and her mother Barbara, were out taking Mrs. Bishop’s sons, Blake Bishop and Brandon Bishop trick-or-treating on Broad Street. One of the boys received a copy of *Alternative Comics* #2 as a giveaway in front of the Legends Comics Store. Later that day, while driving in their car, Blake passed the comic to Brandon, who saw the panel from *The Salon* and showed it to his mother, reportedly saying, “Momma, I don’t think this is something we’re supposed to have.”

Mrs. Bishop stopped the car, inspected the book, and called her brother, Floyd County Deputy Sheriff James Womack, to register a complaint.

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283. CBLDF Case Files—Georgia v. Gordon Lee, supra note 278.
285. Hearing on Motions to Dismiss, supra note 282, at 17.
286. Id. at 17–18, 21.
289. Transcript of Record I, supra note 287, at 24.
Deputy Womack obtained the copy of the book from his sister and went immediately over to Legend Comics to discuss the matter. Mr. Lee explained that he had not screened all of the sampler’s pages before the book was added to the stack of free books being given away. He also allegedly disclosed to the officers that he had “been through this before and had beat it.” He offered to make a public apology to the community; an offer which was rejected. Several days later Gordon Lee was arrested.

Lee was charged with two felony counts of Distribution of Material Depicting Nudity or Sexual Conduct, and five misdemeanor counts of Distribution of Material Harmful to Minors. One of the felony counts and two of the misdemeanor counts listed the recipient of the materials as JOHN DOE.

CBLDF funded counsel to represent Lee. In May 2005, Lee’s defense team filed motions to dismiss the felony counts on lenity grounds and on the additional grounds that the statutes were unconstitutional on their face, that they operated as a prior restraint on free speech, that they violated due process, and that they were vague, overbroad, and violated equal protection laws. They also filed to dismiss the misdemeanor counts on similar constitutional grounds.

At a December 2005 hearing on the motions to dismiss, the prosecution voluntarily dismissed the felony counts and the two DOE counts on the basis of the lenity argument; the Court consolidated the remaining misdemeanor counts. This left for trial two counts of distribution of sexually explicit material to minors under Official Code of Georgia 16-12-103, which provides:

(a) It shall be unlawful for any person knowingly to sell or loan for monetary consideration or otherwise furnish or disseminate to a minor:

291 Transcript of Record I, supra note 287, at 24.
292 Id.
293 Id. at 25.
294 Gordon Lee: The Road to Trial, supra note 288.
295 Id.
296 Id.
297 Id.
298 CBLDF Case Files—Georgia v. Gordon Lee, supra note 278.
300 Id.
301 CBLDF Case Files—Georgia v. Gordon Lee, supra note 278; Transcript of Record II, supra note 299.
(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors; or

(2) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors. 302

Subsection (e) of the statute similarly bans this kind of material from public display at newsstands or in other public places. 303

Having obtained the dismissal of the two felony counts and reducing the five misdemeanor counts down to two, counsel for Lee next addressed the remaining two misdemeanor counts. 304 They noted that the State had charged Lee with two counts of sale of sexually explicit materials to nine-year-old Brandon Bishop, based on the fact that subsection (a)(1) of section 103 prohibits sale of material with visual images, and subsection (a)(2) prohibits the sale of material with verbal descriptions or narrative accounts. 305 Counsel for CBLDF argued in response: “This is a single magazine which we have here. It contains words and pictures which is not uncommon. And it is taken as a whole as one item that is being alleged. We would submit that it should all be put in one count . . . .” 306

A review of the court file in this case leads to the conclusion that once again, as occurred in the Mavrides case, law enforcement authorities failed to understand the nature of the comics medium. They took the position that a comic work is two separate components—art and text—when the simple truth is that this is a medium in which the two components are blended.

Judge Salmon denied this motion and further denied that the Georgia statute was unconstitutional, thereby setting the case for trial on the remaining two misdemeanor counts. 307 Judge Salmon offered little in the way of explanation of his decision on the constitutional questions, except to note,

303. Id.
304. Hearing on Motions to Dismiss, supra note 282.
305. Id.
dismissively, that “[t]his is not an obscenity case; it is simply a case of furnishing and distributing prohibited materials to a minor.”

Judge Salmon also made clear, at this hearing, his attitude toward his obligation to review the excerpted pages from *The Salon*. His attitude suggests a lack of willingness to bring an open mind to the process:

MR. CADLE [counsel for Lee]: . . . . This case involves the instance of a comic book being given out on Halloween of 2004. A free comic book, which we will introduce into evidence in Mr. Begner’s presentation, Your Honor. A single—

THE COURT: Well, I’ve got to look—I’ve got to make a threshold determination on that, don’t I?

MR. CADLE: Yes, Judge, we ask you to.


The court and the prosecution also reveal a disappointing lack of understanding of the concept of “community standards” to be applied in an obscenity case—a level of confusion that is disconcerting when considered in conjunction with the judge’s statement that this was not an obscenity case. If so, why would consideration of local community standards even be an issue? The court transcript reveals the discouraging exchange between the judge and the prosecutor:

THE COURT: [A]nd prevailing community standards—what is the geographical area that we are dealing with? You see, I live in Armuchee and someone that lives down here in high-fluting Forest Apartments might have a different—I shouldn’t say that. I don’t mean that in a disparaging—people who live in more

308. *Id.* Judge Salmon may have been sensitive to the lack of analysis offered in his ruling on the extensive constitutional arguments submitted by Lee’s counsel. In a later section of his Order on Motions, he reiterates his decision on both the constitutional argument and the issue of whether the indictment contains correctly pled prosecutable allegations, saying somewhat apologetically, “[t]he first two questions have already been answered in the affirmative after, it is hoped, a more than cursory analysis.” *Id.* Cursory is generous—the analysis offered in the Order on Motions barely touches on the constitutional arguments. The same is true for the challenge to the prosecutable allegations—here Lee’s counsel argued that the panels at issue do not show any “uncovered male genitals in a discernibly turgid state,” as required under the definition of “sexually explicit nudity” found in subsection 102(7). Judge Salmon ignored this argument. *Id.*

309. *Id.*


311. *Id.* at 28.
cosmopolitan parts of Floyd County may have a different perspective than some redneck that lives out in Armuchee.

MR. MCCELLAN: Yes, sir.

THE COURT: Now, does that—are we dealing with—what’s the geographical community that we’re dealing with?

MR. MCCELLAN: Your Honor, I haven’t found that addressed.

THE COURT: Okay. Well, I tried. All right. Go ahead.312

Following the decision on these motions, CBLDF counsel prepared for trial on the remaining two counts.313 On April 2, 2006, the eve of trial, the prosecution advised that they were going to dismiss all charges against Lee because they had the wrong victim—it was not Brandon Bishop, the nine-year-old boy; it was Blake Bishop, his six-year-old brother, who had received the book.314 The next day, the prosecution came before the court and declared the case nolle prose, meaning that the charges that were to go to trial were to be dismissed.315 Shortly thereafter, the government re-filed, and instead of substituting the younger brother as the victim/recipient of the book, they alleged that both brothers were the victims.316

Counsel for Lee responded with a flurry of renewed motions to dismiss the indictment on the same constitutional grounds that they had previously argued, adding motions for expedited discovery and a motion to quash the indictment on the ground that Georgia law precluded the bringing of an accusation on which the grand jury had previously considered and heard evidence.317 Lee’s counsel also filed a Motion to Dismiss Accusation

312. Id. Unfortunately, counsel for Lee missed an opportunity to argue that the “local community standards” doctrine from the Miller case was indeed a hopelessly confused concept, which the judge seemed to intuit. Instead, counsel for Lee correctly advised the Court later in the hearing that per recent case law: “The jury, I believe, under the law now, is told to determine the community.” Id. at 33. The jury is given no tools to make such a determination, and the result is that the local community standard in an obscenity case is determined by the personal views of the jurors—in this case six individuals from Floyd County.
313. Gordon Lee: The Road to Trial, supra note 288.
314. Id.
315. Id.
316. Id.
317. Motion to Dismiss on the Basis That O.C.G.A. § 16-12-103 Is Unconstitutional, Georgia v. Lee, No. 06-CR-009225CR28976 (Ga. Sup. Ct. May 2006); Motion to Dismiss Counts Three Through Seven of the Indictment on the Basis That O.C.G.A. § 16-12-103 Is Unconstitutional, Georgia v. Lee, No. 05CR28976-JFL001 (Ga. Sup. Ct. May 2005); Mem. in Support of Defendant’s Motions to Dismiss, Georgia v. Lee, No. 05CR28976 (Ga. Sup. Ct. May 2006); Motion to Require Prosecutor to Disclose Evidence Favorable to Defendant, Georgia v. Lee, No. 06-
Based on Prosecutorial Misconduct, arguing that it was prosecutorial misconduct to take eighteen months to realize the correct identity of the alleged victim.

Following oral argument on the defense team’s motions on October 26, 2006, Judge Salmon issued his Order on Pre-Trial Motions, which he began with the following somewhat caustic preamble: “The above styled case is in its’ [sic] third re-incarnation. It was previously indicted as Criminal Action No. 05-CR-28976 and Accused as Criminal Action No. 06-CR-00922. Same song. Third verse. Same Prosecution.”

Judge Salmon then proceeded to dismiss all of the defense’s motions and the case was finally ready for trial. In characteristic fashion, he declined to offer much in the way of reasoning behind his decisions; for example, he dealt with the prosecutorial misconduct issue by noting that he had heard from counsel for both sides on the record and found that the motion was “without merit,” offering no other explanation.

After another year of delays, the trial of Gordon Lee was finally set for November 5, 2007. On the day before the trial, a story ran in the Sunday Rome News-Tribune, the local paper, that Lee had a prior 1994 conviction for distributing obscene material. Alan Begner, Lee’s lead counsel, pointed this out to the Court on the first day of trial, arguing that during jury selection, any juror who had read that story should be excused since the prior conviction was irrelevant and prejudicial. The Judge agreed and thereafter dismissed several jurors for cause based on their admissions that they had read the article.

Also, Begner made an oral motion in limine asking the Judge to preclude any testimony from the detectives in the case regarding their conver-
sation with Gordon Lee about his prior conviction.327 While the Judge declined to entertain an oral motion in limine the morning of trial, he made it clear that any such reference would result in a mistrial, and Assistant District Attorney John Tully told the court and Begner that he had advised the detectives not to discuss the conversation with Gordon Lee.328

Then, in this case already marked by prosecutorial misconduct, an amazing incident followed. Tully began his opening statement to the jury by summarizing the events on October 30, 2004, when the comic was given to one of the Bishop boys.329 Describing the subsequent discussion between Lee and the police officers, Tully said: “Defendant also continues to get defensive with the deputies and at some point he tells the deputies that he had been through this before and had beat it. That’s what he tells the deputies.”330

Begner was flabbergasted.331 He objected, asked for the jury to be removed, and, when they were out of the room, moved for an immediate mistrial.332 Tully offered a lame excuse that the statement Begner referred to as having been made by Lee referred to a different claim Lee successfully brought against the police on a different matter.333 However, the Judge agreed with Begner and explained that in the context of the testimony, the jury was likely to believe that the statement referenced a prior obscenity claim against Lee.334 Accordingly, the Judge granted the motion and declared a mistrial.335

CBLDF Executive Director Charles Brownstein reacted to these incredible developments with a press release comment:

Never in the Fund’s history have we seen prosecutorial conduct of this nature . . . . We’re dumbfounded by prosecutors assuring the court that they weren’t going to do something, and then doing exactly that thing five minutes later. Every step of the way they have been adding further expense to Lee’s defense, first by changing their facts, then by entering new indictment after new indictment, and today by contaminating the jury. No-

327. Id. at 22.
328. Id. at 23.
329. Transcript of Record I, supra note 287, at 23–24.
330. Id. at 24–25 (emphasis added).
331. Id. at 25.
332. Id.
333. Id.
334. Id. at 26.
335. Transcript of Record I, supra note 287, at 26.
body, especially a small retailer, can bear this kind of expense on their own. Today’s action is clear evidence of why the Fund needs to be around to protect comics.\textsuperscript{336}

Now, the question became what would the State do: would it re-try Lee? Rome District Attorney Leigh Patterson vowed to do so on the next misdemeanor calendar; however, when that calendar came up for trials in February 2008, the case was not scheduled.\textsuperscript{337} Shortly thereafter, Patterson advised Begner that the State would drop the case if Lee wrote a public apology.\textsuperscript{338} Lee did so immediately, and although Patterson dragged his feet for several months, in April, the State dismissed its case against Gordon Lee, and Judge Salmon entered the dismissal of all charges.\textsuperscript{339} Gordon Lee’s long ordeal was over. The case encompassed three years of work and cost CBLDF over $100,000 in fees.\textsuperscript{340}

\textbf{E. United States v. Handley: Shades of Planet Comics; Another Obscenity Case, Another Plea Bargain}

On occasion, the Comic Book Legal Defense Fund is asked to provide expert witnesses for the defense in comics-related cases in which they are not initially involved, nor requested to provide counsel.\textsuperscript{341} The case of \textit{United States v. Handley} is one such instance.\textsuperscript{342} The statutory basis for his prosecution is alarming, and the outcome of the case is so unfortunate, that it merits discussion in this article.

Christopher Handley fits a classic definition of what is known as a “fanboy” in the comic world.\textsuperscript{343} At the time of his arrest in May 2006, he was a single, white, male virgin, living in a small town in Iowa in his mother’s home.\textsuperscript{344} Handley had served a term in the United States Navy and now worked as a computer programmer following a medical discharge from the Navy.\textsuperscript{345} His chief social outlets were his work and a Bible Fel-

\begin{footnotesize}
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\item \textsuperscript{336} \textit{CBLDF Case Files—Georgia v. Gordon Lee}, supra note 278.
\item \textsuperscript{337} Id.
\item \textsuperscript{338} Id.
\item \textsuperscript{339} Id.
\item \textsuperscript{340} Id.
\item \textsuperscript{341} \textit{See, e.g., CBLDF Case Files}, supra note 187.
\item \textsuperscript{343} Id.
\item \textsuperscript{344} Id.
\item \textsuperscript{345} Id.
\end{enumerate}
\end{footnotesize}
lowship. He spent most of his spare time at his house, taking care of his mother, playing online fantasy games, or reading comic books in the basement. He was an avid manga collector, owning several thousand manga comic books. A small subset of his collection included “hentai manga,” which is defined as sexually explicit manga that features drawings of characters that appear as young girls, known as “lolicon.”

In May 2006, Handley went to the post office to pick up a package containing a shipment of manga books from Japan. The Postal Inspector had obtained a search warrant to search the package, based on the belief that it might contain cartoon images of objectionable content. The Inspector’s review of the package contents confirmed this suspicion, and law enforcement officials then waited for Handley to pick up the package. As Handley drove away from the post office, he was followed by a small flotilla of law enforcement officers, with representatives from the “Postal Inspector’s [O]ffice, Immigration and Customs Enforcement Agency, Special Agents from the Iowa Division of Criminal Investigation, and officers from the [local] Glenwood Police Department.” The officers pulled Handley over and ordered him to proceed into his home. The officers then conducted a search of Handley’s home, seizing over “1,200 manga books or publications; and hundreds of DVDs, VHS tapes, laser disks; seven computers, and other documents.”

Handley hired well known local defense attorney Eric Chase to represent him. Chase enlisted the CBLDF to provide expert testimony in the case. CBLDF’s veteran Legal Counsel, Burton Joseph, explained why

346. Id.
347. Id.
349. Id. (explaining that of the tens of thousands of manga comics in his collection, only a handful were hentai manga, and of those, only seven books were the focus of the Government case); see Eric A. Chase, Esq., Christopher Handley’s Attorney Comments on His Case, COMICS J. ONLINE (Mar. 2, 2010), http://classic.tcj.com/news/christopher-handley’s-attorney-comments-on-his-case.
351. Id.
352. Id.
353. Id.
354. Id.
355. Id.
357. Id.
the CBLDF was willing to help in the case: “This prosecution has profound implications in limiting the First Amendment for art and artists, and comics in particular, that are on the cutting edge of creativity. It misunderstands the nature of avant-garde art in its historical perspective and is a perversion of anti-obscenity laws.” The relevant language of the statute at issue in Handley, known as the PROTECT Act, provides as follows:

(a) In General.—Any person who, in a circumstance described in subsection (d), knowingly produces, distributes, receives, or possesses with intent to distribute, a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that—

(1)(A) depicts a minor engaging in sexually explicit conduct; and
(B) is obscene; or

(2)(A) depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and

(B) lacks serious literary, artistic, political, or scientific value; or attempts or conspires to do so, shall be subject to the penalties provided in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.”

There are two important issues of concern regarding the enforceability of section 1466A of the PROTECT Act. The first issue is that the section

358. Id.
360. 18 U.S.C. § 1466A (2006). The PROTECT Act appears to be Congress’ response to the Supreme Court’s decision in Ashcroft v. Free Speech Coalition. Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002). The Court in Ashcroft found the Child Pornography Prevention Act of 1996 (“CPPA”) abridged the freedom of speech. Id. at 239–41. The CPPA attempted to extend the federal prohibition against child pornography to sexually explicit images that appeared to depict minors but were produced without using any real children—primarily through the use of digital techniques like morphing and using software (e.g., Photoshop) to create the impression that a photograph was one of a child, when in fact the body was of an adult with the head or face of a child. 18 U.S.C. § 2251, et seq. (2006). The Supreme Court found that by prohibiting child pornography that did not depict an actual child, the statute went beyond the decision in New York v. Ferber, which had allowed a ban on child pornography even if the work was not obscene, per Miller, because of the State’s interest in protecting children exploited by the production process. Free Speech Coal., 535 U.S. at 239–41 (citing New York v. Ferber, 458 U.S. 747 (1982)).
targets “visual representations” of the sexual abuse of children.\textsuperscript{361} It is not limited to photographs, film, or even drawings of actual children engaged in actual conduct.\textsuperscript{362} In fact, as subpart (c) notes, the minor depicted need not actually exist.\textsuperscript{363} Thus a drawing of a fictional person, who appears to be a child, can violate this law. The second issue is that although subpart (a) limits offenses to those involving distribution, creation, receipt, or possession with intent to distribute, subpart (b) allows a finding of a violation of the law for mere possession, regardless of the presence of an intent to distribute.\textsuperscript{364} Each of these issues presents serious constitutional concerns.

Turning to the first issue, the PROTECT act does not require an actual minor to be involved,\textsuperscript{365} thus determining that a violation has occurred based upon the age of the child involved is a real problem. The definition of a minor, for purposes of this statute, is “any person under the age of eighteen years.”\textsuperscript{366} However, in an illustration of a fictional character, a drawing is not a “person”; it is a drawing. As the famous Magritte painting of a pipe notes, “Ceci n’est pas une pipe,” “This is not a pipe”; it is a drawing of a pipe.\textsuperscript{367} The picture (of the thing) is not the thing it represents. This distinction begets the real question: how are we to determine the age of the minor if the picture depicts a representation of a person—who can say that the depiction is of a child below the age of eighteen, unless the text expressly states it is? It is difficult, if not impossible, to tell whether a person is under the age of eighteen based solely on his or her physical appearance or clothing, except in the case of an infant or a very small child. Once you depict a person in his or her teens, with obvious signs of having reached puberty, the actual age is very difficult to determine with any certainty. As a matter of law, this creates a terrible vagueness problem.

The second issue, that the law makes mere possession of the prohibited materials an offense, seems to be in direct contradiction with the time-honored precedent established by the Supreme Court in \textit{Stanley v. Geor-}

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\item \textsuperscript{361} See generally \textit{Ferber}, 458 U.S. at 765–74 (discussing whether language penalizing a sexual performance by a child results in a New York statute being unconstitutionally overbroad).
\item \textsuperscript{362} 18 U.S.C. § 1466A(a); \textit{see also} 18 U.S.C. § 1466A(c).
\item \textsuperscript{363} 18 U.S.C. § 1466A(c).
\item \textsuperscript{364} Id.
\item \textsuperscript{365} Id.
\item \textsuperscript{366} 18 U.S.C. § 2256(1).
\item \textsuperscript{367} See, \textit{e.g.}, Jody Zellen, \textit{René Magritte}, http://www.artscenecal.com/ArticlesFile/Archive/Articles2006/Articles1206/RMagritteA.html (last visited Apr. 8, 2012) (describing the 1929 painting by surrealist artist René Magritte of a tobacco pipe, with the words “Ceci n’est pas une pipe” written underneath it, indicating Magritte’s point that the painting is not the thing—only a representation of the thing).
\end{itemize}
\end{footnotesize}
In Stanley, the Court held that the possession of obscene materials in the privacy of one’s own home was not unlawful. Both of these arguments were submitted by Eric Chase in support of a motion to dismiss the charges against Christopher Handley. The District Court, engaging in some tortured logic, rejected both arguments.

With respect to the argument that the definition of what “appears to be” a “minor” is void language due to vagueness, the court, citing the Supreme Court’s decision in United States v. Williams, disagreed with Chase’s argument, holding:

The determination of what is, or appears to be, a minor does not require a wholly subjective judgment. The term “minor” has a statutory definition contained within the PROTECT Act and has a commonly understood meaning of being an individual under the age of eighteen. The phrase “appears to be” is not subject to differing interpretations, and the plain meaning of the phrase is clear.

Clear as mud, this portion of the Court’s Order simply ducks the difficult question posed by Chase—how was Handley supposed to know that the fictional characters depicted in the manga books he purchased were under the age of eighteen? How can anyone tell if a character is seventeen years, eleven months and twenty-nine days old, and thereby a minor, or two days older, and therefore no longer a minor and a lawful subject of illustration? As ridiculous as this distinction may seem, when we acknowledge that making this distinction is the determining factor in whether defendant spends five years in jail, its absurdity takes on a much more sinister cast.

Also, Judge Gritzner’s Order made short work of the Stanley v. Georgia argument on similarly shaky analysis. The Court found that Handley was not being charged with mere private possession of obscene materials—he was charged with receipt of obscene materials that were transported in

369. Id. at 559 (“[T]he mere private possession of obscene matter cannot constitutionally be made a crime.”).
370. Order on Motion to Dismiss, supra note 359.
371. Id.
373. Order on Motion to Dismiss, supra note 359, at 10.
374. Id. at 4–5.
interstate commerce. Judge Gritzner, citing decisions in several prior federal and Supreme Court cases, concluded:

Thus, while an individual has a limited right to possess obscene materials in the privacy of his own home, there exists no right to receive or possess obscene materials that have been moved in interstate commerce, and that is the illegal conduct with which Defendant is charged.

There are at least two problems with this analysis. First, if one is entitled to possess obscene material in the privacy of one’s own home, but may not receive such materials via interstate commerce, how is such content supposed to get into one’s home? Does this mean only locally, in-state created, obscene material may make its way lawfully into the home? How would law enforcement authorities be able to make such a distinction?

A second problem with this holding is that the language of Stanley does not appear to be as restrictive as the Court suggests it to be. In fact, the Supreme Court in the Stanley decision speaks repeatedly about the freedom of individuals to “receive” information and ideas. Justice Marshall wrote:

It is now well established that the Constitution protects the right to receive information and ideas. “This freedom [of speech and press] . . . necessarily protects the right to receive . . . .” This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person’s own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.

375. Id. at 4.
376. Id. at 5 (citing United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 126 (1973) (holding that Stanley was decided on privacy, and not First Amendment, grounds); United States v. Orito, 413 U.S. 139, 141 (1973) (rejecting the argument that Stanley created a correlative right to receive, transport, or distribute obscene materials in interstate commerce); United States v. Whorley, 386 F. Supp 2d 693, 695 (E.D. Va. 2005) (holding that the zone of privacy in Stanley was limited and did not extend to the receipt of legally offensive materials from the Internet)).
377. Id. at 4–5.
378. Stanley, 394 U.S. at 564.
379. Id. (citations omitted).
Justice Black made it clear in his dissent in *United States v. Thirty-Seven (37) Photographs*, that unless the Court was reversing *Stanley*, the Court had to allow people to receive obscene materials for private use:

> Since the plurality opinion offers no plausible reason to distinguish private possession of “obscenity” from importation for private use, I can only conclude that at least four members of the Court would overrule *Stanley*. Or perhaps in the future that case will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room.

Justice Douglas joined Justice Black in an expression of concern that the Court was abandoning “cherished freedoms,” perhaps in response to political pressures of the times; this was the era of the Nixon presidency, and the rejection of the findings of the President’s Commission on Obscenity and Pornography. Justice Black wrote:

> I do not understand why the plurality feels so free to abandon previous precedents protecting the cherished freedoms of press and speech. I cannot, of course, believe it is bowing to popular passions and what it perceives to be the temper of the times. As I have said before, “Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind that brings new political administrations into temporary power.” . . . . In any society there come times when the public is seized with fear and the importance of basic freedoms is easily forgotten. I hope, however, “that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amend-

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380. See *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 376–77 (Black, J., dissenting) (upholding a conviction for violation of the Tariff Act of 1930, 19 U.S.C. § 1305(a), against Milton Luros for bringing in his luggage 37 allegedly obscene photographs on a return trip into the United States from Europe. Luros argued that under *Stanley v. Georgia*, he was entitled to bring the photographs into the country for his personal use. The U.S. District Court for the Central District of California agreed with this argument, but when the Government appealed, the Supreme Court majority held that *Stanley* did not extend to bringing materials into the country.).

381. Id. at 382.

ment liberties to the high preferred place [sic] where they belong in a free society.”

Judge Gritzner was not the judge who was going to restore Justice Black’s cherished freedoms. While he did find one section of the PROTECT Act to be unconstitutional for failing to require a finding of obscenity as to certain materials prohibited by the Act, he also found that the remaining two subsections of the Act, which do require a finding of obscenity under the standards set forth in Miller v. California, were constitutional. Based upon these findings, he found that there remained sufficient evidence of a possible violation of the Act to allow the case to proceed to trial for violations of 1466A6(a)(1) and (b)(1).

Thus, Handley faced a criminal trial with the possibility of a felony conviction and a five-year prison sentence. Like Hunter and Kennedy in Planet Comics, this threat proved to be too much pressure. Mr. Handley accepted a plea bargain and pled guilty to possession of “obscene visual representations of minors engaged in sexual conduct.” On February 10, 2010, the Court sentenced Handley to six months in prison, plus a three-year supervised release (to receive psychological treatment) running concurrently with five years of probation. Handley forfeited his entire manga collection and the other property that was seized.

Commenting on the impact of this sorry result, CBLDF Executive Director Charles Brownstein noted:

From start to finish, the case against Christopher Handley was an appalling abuse of the justice system. Chris Handley is going to jail not because of anything he did, but because of what he

383. Thirty-Seven (37) Photographs, 402 U.S. at 388 (citations omitted).
384. Compare Order on Motion to Dismiss, supra note 359, at 14, with Thirty-Seven (37) Photographs, 402 U.S. at 363, 381.
385. Miller, 413 U.S. at 15.
386. Order on Motion to Dismiss, supra note 359, at 14 (finding subsections 1466A(a)(2) and (b)(2), which banned pornography without making a determination that the materials were either obscene or involved the use of actual minors, were overbroad and unconstitutional).
387. Id.
389. CBLDF Case Files—Oklahoma v. Planet Comics, supra note 216.
390. CBLDF Case Files—United States v. Handley, supra note 342; Order on Motion to Dismiss, supra note 359.
391. CBLDF Case Files—United States v. Handley, supra note 342.
392. Id.
393. Id.
reads and thinks. Putting Chris Handley in jail protects no one—he and his family are the only victims.

... Chris Handley could be any of us. He was prosecuted not because he had engaged in any actions that were a danger to members of his community, but because of his tastes in entertainment. ...

... When the government begins locking people up for the content of their intellect we are entering dangerous waters. Chris’ case is appalling. One hopes that it is not a harbinger of things to come. 394

Unfortunately, Mr. Brownstein’s hope remains unfulfilled. The CBLDF continues to represent and defend comic creators and readers, with no indication of any substantive change in prosecution efforts. 395


In the fall of 1977, former U.S. Supreme Court Justice Arthur Goldberg taught a class titled “Constitutional Issues Before the Supreme Court.” 396 In this small seminar-style class, students, including the author of this Comment, read cases pending before the Supreme Court that term, and presented mock oral argument on behalf of one of the parties. Justice Goldberg sat as Chief Justice, and the rest of the class offered commentary.

Justice Goldberg chose the cases each student would argue. The author was told to argue on behalf of the National Socialist Party, the American version of the Nazi party, that this group should be allowed the right to march through the neighborhood of Skokie, Illinois, to promote their anti-Semitic viewpoints. Skokie had a large population of elderly Jewish residents, many of whom were survivors of the Holocaust in Germany during

394. Id.
395. See CBLDF, supra note 116.
396. Justice Goldberg was a member of the Sixty-Five Club of distinguished faculty at Hastings College of the Law in San Francisco from 1974–1977. The author was a student in one of Justice Goldberg’s last classes at the law school. See generally The Era of the Sixty-Five Club, UNIV. CAL. HASTINGS COLL. L. (Feb. 26, 2003), www.uchastings.edu/about/history/sixty-five-club.html.
World War II. Justice Goldberg must have known the author was of the Jewish faith, and purposely assigned this case to teach him that one of the purposes of the First Amendment is to protect speech that we may personally find distasteful, even repugnant. Lesson learned.

A. The Fatal Fork in the Road: Separating Obscenity from the First Amendment

In its July 2011 decision in *Entertainment Merchants Association v. Brown*, the United States Supreme Court rejected a California statute banning violent video games on the ground that the statute violated the First Amendment. Justice Scalia, writing for the majority, noted that “[a]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” There are, he added, exceptions to this rule—citing incitement, fighting words, and obscenity as the traditional exceptions, and referencing the Court’s *Roth* decision as the source of the obscenity exception.

It is fairly easy to understand why expression that provokes immediate or imminent violence, such as fighting words, or speech intended to incite violent acts, would not be granted free speech protection—even though such speech communicates ideas. The effects of those types of communication are too destabilizing to society as a whole and present too high a risk of personal injury to allow it protected status. But, obscenity does not seem to fit into this same category. Accordingly, what is it about obscenity that gives rise to the claim that it is beyond First Amendment protection?

397. See Nat’l Socialist Party of Am. v. Skokie, 432 U.S. 43, 44 (1977) (reversing the Illinois Supreme Court’s denial of a stay of an injunction preventing the march, and thus allowing the march to take place on First Amendment grounds).


399. Id. at 2733 (citations omitted).

400. Id. (“These limited areas—such as obscenity, incitement, and fighting words—represent ‘well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.’”) (citations omitted); see Roth v. United States, 354 U.S. 476, 476 (1957).

401. See Brown, 131 S. Ct. at 2729 (Breyer, J., dissenting).

402. Justice Breyer addressed this issue in his dissenting opinion in *Brown*. He wrote about the inconsistency present in banning sexual depictions, but allowing violent ones:

I add that the majority’s different conclusion creates a serious anomaly in First Amendment law. *Ginsberg* makes clear that a State can prohibit the sale to minors of depictions of nudity; today the Court makes clear that a State cannot prohibit the sale to minors of the most violent interactive video games. But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video
An examination of the Court’s decision in Roth does not shed much light on this question. 403 In the majority opinion, Justice Brennan noted that the issue of whether obscenity is protected by the First Amendment was one of first impression. 404 He also asserted that the question of whether obscenity falls within the ambit of the First Amendment comes with a history of prior cases in which it was simply assumed that this was not a protected form of speech. 405

Justice Brennan acknowledged the broad scope of First Amendment protection: “All ideas having even the slightest redeeming social importance . . . even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties [sic], unless excludable because they encroach upon the limited area of more important interests.” 406 Obscenity, he argued, is one such excludable form of expression because it is “utterly without redeeming social importance.” 407 Citing the Court’s decision in Chaplinsky v. New Hampshire, 408 he explained that obscene works are of little “social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” 409

Then, Justice Brennan addressed the causation issue: does it violate constitutional guarantees to punish a party for material that may incite impure thoughts or produce overt antisocial conduct? 410 He essentially sidestepped this issue. 411 By comparing obscenity to libel, Justice Brennan as-

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403. See Roth, 354 U.S. at 480.

404. Id. at 481.

405. Id. (citing the following cases as examples in which this assumption that obscenity was not a protected form of speech was made: Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Winters v. New York, 333 U.S. 507, 510 (1948); Hannegan v. Esquire, Inc., 327 U.S. 146, 158 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Near v. Minnesota, 283 U.S. 697, 716 (1931); Hoke v. United States, 227 U.S. 308, 322 (1913); Pub. Clearing House v. Coyne, 194 U.S. 497, 508 (1904); Robertson v. Baldwin, 165 U.S. 275, 281 (1897); United States v. Chase, 135 U.S. 255, 261 (1890); Ex parte Jackson, 96 U.S. 727, 736–37 (1877)).

406. Roth, 354 U.S. at 484.

407. Id.

408. Chaplinsky, 315 U.S. 568.


410. See id. at 485–86.

411. See id. at 486.
asserted that since both forms of expression are outside of First Amendment protection, a showing of a “clear and present danger” is not necessary.  

How then is a jury to determine whether a particular work is obscene? Justice Brennan rejected the early test developed in the British case of Regina v. Hicklin, which defined obscenity based on the effect of any portion of a work on particularly susceptible persons. Instead, the Court held the jury must ask, “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.” Furthermore, Justice Brennan approved of the district court’s instruction on how to determine the “contemporary community standard”:

In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children. Before addressing the many problems this vague standard creates, it is important to step back and consider the rationale offered for removing constitutional protection for obscene works. The only rationale cited by Justice Murphy is “the social interest in order and morality.” These are two separate concepts, not necessarily or logically joined together. The idea that there is a social interest in the concept of “order” makes some amount of sense, although the nature and extent of that “order” is undefined. An argument could be made that if by “order” one means the sovereignty of a ruler or king, the founding of the United States was motivated by a rejection of “order,” and the social interest of the society may not fully embrace “order” as being in its interest.

Not only is the term “order” vague, but the concept of a social interest in “morality” lacks clarity. Whose morality? What constitutes moral conduct? How is “morality” to be defined? What happens when a person’s moral views are in conflict with moral views held by another? These are

412. Id. at 486–87 (quoting Beauharnais, 343 U.S. at 266).
413. Id. at 488–89.
414. Id.
415. Roth, 354 U.S. at 489.
416. Id. at 490.
hugely complex and difficult questions—the fodder of philosophers from the beginning of time.\textsuperscript{418}

Justice Douglas, in his dissent in \textit{Roth} eloquently summarized the problems with attempting to establish a rule of law based on the desire to protect this vague social interest:

I can understand (and at times even sympathize) with programs of civic groups and church groups to protect and defend the existing moral standards of the community. I can understand the motives of the Anthony Comstocks who would impose Victorian standards on the community. When speech alone is involved, I do not think that government, consistently with the First Amendment, can become the sponsor of any of these movements. I do not think that government, consistently with the First Amendment, can throw its weight behind one school or another. Government should be concerned with antisocial conduct, not with utterances. Thus, if the First Amendment guarantee of freedom of speech and press is to mean anything in this field, it must allow protests even against the moral code that the standard of the day sets for the community. In other words, literature should not be suppressed merely because it offends the moral code of the censor.\textsuperscript{419}

Justice Douglas also took issue with Justice Brennan’s casual dismissal of the need to show any causal link between viewing obscene materials and any anti-social conduct.\textsuperscript{420} The absence of any evidence establishing that link, he argued, meant that the legality of a publication under scrutiny would now “turn on the purity of thought which a book or tract instills in the mind of the reader.”\textsuperscript{421} And that, he argues, leads to the very real dan-


\textsuperscript{419} \textit{Roth}, 354 U.S. at 512–13 (Douglas, J., dissenting).

\textsuperscript{420} See \textit{id.} at 513 (Douglas, J., dissenting).

\textsuperscript{421} \textit{Id.} (Douglas, J., dissenting)

By these standards punishment is inflicted for thoughts provoked, not for overt acts nor antisocial conduct. This test cannot be squared with our decisions under the First Amendment. \ldots

The tests by which these convictions were obtained require only the arousing of sexual thoughts. Yet the arousing of sexual thoughts and desires happens every day in normal life in dozens of ways.

\textit{Id.} at 508–09.
ger that juries will punish the publisher of works that they simply do not like or which they find offensive:

Any test that turns on what is offensive to the community’s standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, juries can censor, suppress, and punish what they don’t like, provided the matter relates to “sexual impurity” or has a tendency “to excite lustful thoughts.” This is community censorship in one of its worst forms. It creates a regime where in the battle between the literati and the Philistines, the Philistines are certain to win. 422

Sixteen years after authoring the majority opinion in Roth, Justice Brennan concluded that Justices Douglas and Black, the dissenters in that case, were right—obscenity was simply too difficult to define, that the formulas attempting to define it were too vague, and that its suppression could no longer be justified under either the First or Fourteenth Amendment. Therefore, in 1973, Justice Brennan, joined by Justices Douglas, Stewart, and Marshall, wrote the dissent in Paris Adult Theatre I v. Slaton, a Supreme Court case that denied First Amendment protection to theater owners who showed obscene films to adults only. In the dissent, he explained that he had changed his opinion because he was

convinced that the approach initiated 16 years ago in Roth v. United States, . . . and culminating in the Court’s decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach. 426

Justice Douglas argued that the First Amendment does not permit the Courts to punish people for what people think, as opposed to what they do, and such a punishment would be unassailable in a free society. On the contrary, laws that attempt to control peoples’ thoughts have long been the

422. Id. at 512.
423. See id.
426. Id. at 73–74 (Brennan, J., dissenting).
427. Id.
hallmark of tyranny and repressive regimes. The Comic Book Legal Defense Fund (“CBLDF”) cases profiled in this article illustrate that the creators, distributors, and even the readers of comics and graphic novels are today still being prosecuted for creating expression that may stimulate thoughts that some in our society may find disturbing, but do not translate into antisocial conduct. Putting Christopher Handley in jail for what he might have been thinking down in his basement as he read his manga comic books is not the mark of a free society.

So what possible justification is offered for the prosecution of those involved in creating, distributing, and reading comic books and graphic novels with explicit sexual content? Sadly, the justification may be the same argument advanced by Dr. Wertham with respect to violence in comics: that it will cause, in some unspecified manner, harm to children’s innocence and moral development. Close scrutiny of this claim reveals this argument has little basis in fact.

B. The Missing Causal Link: Young People, Explicit Sexual Material, and Proof of Actual Harm or a Causal Link to Actual Misconduct

In his dissent in Roth, Justice Douglas squarely confronted and rejected the argument that the distribution of “sex literature” causes any effect on a community or its youth:

[i]f we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature. But it is by no means clear that obscene literature, as so defined, is a significant factor in influencing substantial deviations from the community standards.

The desire to avoid this morass is indeed understandable. The responsibility for conducting this assessment falls to the area of social science. One of the difficulties of social science is that there is always a survey or scientific experiment that will support either side of a debate. The question of whether a causal link exists between reading sexually explicit

428. See supra Parts I.C, II, III.
429. See e.g., CBLDF Case Files—U.S. v. Handley, supra note 342.
430. See WERTHAM, supra note 48, at 89–90.
431. Roth, 354 U.S. at 510.
432. HEINS, supra note 60, at 244.
or “deviant” material and behavior that is sexually harmful to one’s self or others is no exception to this principle.433

Heins points out that the methodology employed in many social science studies on the effect of violence and sexually explicit materials in the media is often subject to criticism for a variety of reasons.434 She notes that the three main types of studies, laboratory, field, and correlational, all have their separate strengths and weaknesses.435

In laboratory-based studies, researchers showed young men sexually violent pornographic films and then asked them about their feelings toward female rape victims or offered them an opportunity to administer electric shocks to females (who were actually lab workers posing as students); as a result, those young males showed more “aggressive” (an undefined term) behavior towards females and a greater acceptance of rape myths, such as the misbelief that women enjoy being raped.436 However, these results have been strongly criticized based on the evidence that the attitudes produced are not present in real-world contexts involving the same subjects—in other words, the artificiality of the lab environment produces results that are not applicable or relevant to actual conduct in society.437

Field studies have also failed to establish a link between viewing obscene materials and acting out in violent or other anti-social conduct.438 Children understand the difference between what is real and what is fictional, and, in general, the social science literature reflects the absence of any causal link found based on field studies.439

433. See id. at 247.
434. See id. at 244, 235 (citations omitted).
436. HEINS, supra note 60, at 243.
438. See id. at 244–46.
Lastly, correlational studies, which focus on the relationship between two or more facts or events in an effort to determine causality, are often criticized for making an unsupported leap from conduct that may be linked, but is not evidence of causation. For instance, the behavior of an aggressive person who likes violent media is not necessarily caused by the exposure to that media. The American Academy of Pediatrics, a long-time critic of the influence of television, has had to acknowledge that despite what it estimates as teenagers’ exposure of an “estimated 14,000 sexual references and innuendos per year on television, . . . there is no clear documentation” of a causal relationship between television viewing and sexual activity.

Law professor Bret Boyce, in an article attempting to make sense of the “community standards” test for obscenity, opines that the work of Dr. Harry Clor, Professor Emeritus of Political Science at Kenyon College, offers “the most comprehensive defense of the legal enforcement of public morality with regard to obscenity” prosecutions. Dr. Clor, Boyce says, “offer[s] a normative theory as to why pornography should be regarded as immoral and . . . [warrants] suppression.” According to Dr. Clor, the problem with pornography is that it “obliterates the distinction between human and subhuman sexuality,” it objectifies men and women, as “things to be used for the gratification of the user,” and it depicts “wholly loveless, affectionless sex.”

Professor Boyce suggests that Dr. Clor’s argument is not very convincing. Clor objects to pornography because “it fails to conform to a particular superhuman standard of morality,” not because it appeals to a subhuman (in other words, animal) aspect of our nature. Quoting H.L.A. Hart, Professor Boyce suggests that if society wants to denounce conduct that does not cause harm but is nonetheless considered immoral, a “solemn

440. HEINS, supra note 60, at 244–46.
441. Id.
442. Id.
443. Id. at 247.
445. Id.
446. Id.
448. Boyce, supra note 444.
449. Id. at 355–56.
450. Id.
public statement of disapproval,’ rather than the infliction of suffering, would seem the most appropriate course."\(^{451}\)

Returning to the issue of a causal link, Professor Boyce asserts that the empirical evidence of a connection is "weak and inconclusive."\(^{452}\) In support of that conclusion he cites to the conclusion of *The Report of the U.S. Commission on Obscenity and Pornography*, released in 1970, that determined that, "[o]n the basis of the available data . . . it is not possible to conclude that erotic material is a significant cause of sex crime."\(^{453}\) Based on this finding, the Commission “recommended that all statutes criminalizing the sale or distribution of sexual materials to consenting adults be repealed.”\(^{454}\) Then-President Richard Nixon, who created the Commission and appointed renowned constitutional scholar William Lockhart as its Chair,\(^{455}\) was angered by the conclusion reached, and quickly rejected the Report in its entirety, issuing a statement that included the following:

> I have evaluated that report and categorically reject its morally bankrupt conclusions and major recommendations.

> So long as I am in the White House, there will be no relaxation of the national effort to control and eliminate smut from our national life.

> . . . .

> American morality is not to be trifled with. The Commission on Pornography and Obscenity has performed a disservice, and I totally reject its report.\(^{456}\)

Sixteen years later, President Ronald Reagan tried to get a presidential commission to find that reading and/or viewing explicit sexual material leads to anti-social conduct.\(^{457}\) Rather than appoint a law professor or expert on the Constitution, President Reagan appointed the Attorney General,

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452. *Id.*
453. *Id.* at 363.
Edwin Meese, to chair the new commission. It was unsurprising that the Commission did find a causal link; however, the link claimed was between criminal behavior and sexually violent pornography—and even in this case, the claimed link focused on the degree of violence in the content, not the sexual elements.

The conclusions of the Meese Commission were roundly criticized, and as Professor Boyce notes, at least two members of the Commission “subsequently denied that the social science research has proven a causal link between exposure to pornography and the commission of sexual crimes.”

Professor Boyce finds further support for the lack of a causal link between obscenity and violence in the longitudinal and comparative studies of crime statistics, primarily of rape, in Northern Europe and the United States, both regions that have relatively liberal attitudes about the creation and distribution of sexual material, at least for adults. He notes that those studies reveal that the rate of reported rapes in these regions remains constant, or to the extent rape rates have increased, the increase is less than the overall increase in violent crime in general, and that the rates of other sexual offenses have actually decreased. This is not to suggest that a more tolerant attitude toward the dissemination of sexually explicit materials necessarily can be linked to a reduction in violent sexual crimes, but it does suggest that this kind of criminal activity is not enhanced or caused by the creation, distribution, and consumption of these materials.

Professor Boyce is joined by other scholars in pointing out that Japan, which has a long history of distribution of violent pornography, both of live models and in graphic manga and hentai manga books, also has a much lower rate of rape than the United States. Moreover, he notes that a research

458. See id. at 364.
459. Id.
461. Boyce, supra note 444, at 364 n.473.
462. Id. at 365.
464. See Boyce, supra note 444, at 365 (citations omitted).
study by Larry Baron and Murray Straus found that “gender equality was highest in” states where pornographic materials were widely circulated. 465

Despite the absence of any extensive, credible evidence that a clear causal link can be shown between viewing sexually explicit materials, non-violent or violent, with criminal sexual activity or any other kind of anti-social conduct, detractors continue to claim that the pornography business causes harm. 466 The gravamen of this complaint, when faced with the absence of a causal link, shifts to the claim that people, generally women, who work in the sex film or images industry are often subject to abusive treatment, including physical and mental abuse. 467

While it is no doubt true that there are instances of this nature that occur in the creation of these materials, it does not follow that the appropriate response is to ban the production of the books and films. In that case, the manufacture or sale of most of the clothing and food produced and consumed in the United States should be banned given that the working conditions of women in textile, meat, and agriculture plants in this country are terrible. 468 There are far more examples of sweatshops, underage workers, long hours for low pay, sexual harassment, and discrimination in textile, meat, and agriculture plants than in sex industry jobs. 469

The solution to poor conditions in the workplace should be, and has been, the enforcement of existing labor laws, aided in many instances by the unionizing of workers. 470 For example, in the adult entertainment industry, the dancers in the Lusty Lady strip club in San Francisco unionized and subsequently purchased the club from the owners and made it an employee-owned business. 471
C. Lastly, Why Pick on Comics, Their Creators, Distributors and Readers?

Is it valid to argue that comic books have been the focus of greater scrutiny about their content than other literary forms? While it is true that some non-comic books have been the focus of attack, such as *Fanny Hill*, *Tropic of Cancer*, or the works of Rabelais, books as a media form have not faced the same kind of attack that the comics genre has drawn. Perhaps one of the reasons comics generate so much scrutiny is because they are, as a medium, very effective at generating a response from readers. Editorial cartoons and comic graphics can be extremely powerful—examples being Art Spiegelman’s *New Yorker* cover for the Easter holiday, which depicted a crucified bunny set against an IRS 1040 tax form background; Spiegelman’s other *New Yorker* cover after the September 11, 2001 bombings, which was an all black cover, with the faint outline of the silhouette of the two towers visible; or the controversial Dutch comic depicting the prophet Mohammad that sparked the issuance of a fatwa against the artist; and finally the work of Garry Trudeau in his *Doonesbury* strip in which he took aim at Nixon during the Watergate debacle and George W. Bush during the Iraq war. These works are powerful—they convey strong messages in a few lines of text—and their message can be, and often is, threatening to those who want to control the flow of ideas and commentary in our society.

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473. HENRY MILLER, TROPIC OF CANCER (1934).
475. See, e.g., Menand, supra note 44, at 124.
476. See, e.g., Carlin, supra note 4.
481. Id.
V. Conclusion

From the Congressional hearings of 1954 to the prosecution of the case against Christopher Handley, the legal system’s attacks against the comic book and graphic novel have been a dark chapter in the saga of First Amendment jurisprudence. Supreme Court Justices Douglas, Black, and ultimately Brennan, were right that excluding sexually explicit expressive works under the First Amendment erodes the core of First Amendment protection and unduly restricts the free expression of ideas. Instead, these ideas must be protected under the First Amendment, no matter how difficult their subject, or how much they offend or contravene the boundaries of public morality.482

The goal should be to remove the artificial and unwarranted exclusion of these materials from First Amendment protection—and as a first step along the road to achieving that goal, law enforcement and the courts should put an end to the use of the PROTECT Act to prosecute the creators, distributors, and even the readers of graphic illustrated works that do not involve human models, children, or adults, in any way. The defendants in the cases of the Comic Book Legal Defense Fund profiled in this article put a very real human face on the consequences of these ill-starred prosecutions—offering a sad litany of lives ruined, businesses lost, and creativity suppressed.

482. See supra Section III.D.