

OBSCENITY, ART, AND THE FIRST AMENDMENT¹

SKYYWALKER RECORDS, INC. v. NAVARRO

738 F.Supp. 378 (S.D. Fla 1990)

Homework:

Read Background Materials(Handout):

SKYYWALKER RECORDS, INC. v. NAVARRO, 738 F.Supp. 378 (S.D. Fla 1990)

Lyrics from six current rap albums, including *Nasty*

Current Articles with Opposing Arguments:

Obscenity: an Elusive Definition ..."

"The Importance of Being Nasty"

A Parent's View of Pop Sex and Violence

2 Live Crew just too nasty to tolerate

Quickly evolving rap music may be getting a bum rap

Define:

prurient

lascivious

homophobia

misogyny

penumbra

Briefly outline the legal standard for obscenity *as it now exists*

What case did it come from? When was that case decided?

What rights should parents have in deciding what their children read, watch or listen to? Should this be decided by parents, the courts, the legislature, or all three?

¹ Students will already have been introduced to the First Amendment through a prior lesson covering *Tinker* and *Frazer*. This mini unit follows the *Frazer* lesson, as an in-depth study of the *Miller* standard.

Lesson Plan, Class I

Anticipatory Set: The Hook

Play video of
"Anything Goes" from Boys in the Band
Jim Morrison (banned, just like 2 Live Crew, in Dade County, back in the
early Seventies)

Objective:

To remind students that
 their bill of rights guarantees are not absolute
 interpretation of the law, either by statute or of prior case law, will have
serious impact on what they, as individuals, may or may not do
To analyze and evaluate the *Miller* standard, and clarify their personal views
on the availability of "obscenity"

Presentation:

Play the video, and ask if there's anything unsettling or obscene

First, ask the class to define the words assigned in their homework
Does the class think that obscenity should be limited to sexual issues?
What about violence apart from sex?

Then, parse the Miller Standard:

"substantial literary, artistic, political, or scientific value";

"an average person applying contemporary community standards would find
that the work, taken as a whole, appeals to the prurient interest."

Ask for examples of substantial value, v. worthless trash
What would be a fair way to decide the area covered by "community"?
Who is an average person?
Should children's (i.e. minors) opinions be included?
Where, if anywhere, do parents' rights come in? Should they?
Is there a proper place in our society for outraging our parents?

Pass out Assignment II, and go over the *Skywalker* issues; leave LOTS of
time to answer questions, as the students will have to use their entire second
class period for their Appeal.

Emphasize: *brainstorming* this will produce the best arguments and answers
Have several students recap back just what they think the assignment is.

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Facts

Last February the Broward County Sheriff's Department, responding to complaints of South Florida citizens, began an investigation of the recording *As Nasty as They Wanna Be* by 2 Live Crew. After transcribing the lyrics(?) to eighteen of the songs, Deputy Wichner prepared an affidavit detailing his investigation, and requested that the Broward County Circuit Court find probable cause that the *Nasty* recording was legally obscene. Deputy Wichner attached lyrics to six of the songs to his affidavit, and also sent along a copy of the *Nasty* tape. On March 9, Judge Grossman issued an order, explicitly finding probable cause that the recording was legally obscene under Florida statutes.

The Sheriff's department circulated this order to record stores "as a courtesy" warning, and also specifically warned two stores that further sales would result in arrests.

Within two days, *Nasty* was no longer available in Broward County, even from stores whose policy precludes sale of such music to minors.

Skywalker Records, Inc. (Skywalker) and the four members of 2 Live Crew, Luther Campbell, Mark Ross, David Hobbs, and Chris Wongwon, filed this civil lawsuit against Sheriff Navarro for "unlawful deprivations of federal rights including those liberties guaranteed under the United States Constitution" *Skywalker Records*, 739 F. Supp. at 582

The Federal District Court (Southern District of Florida) held in June, 1990, that *As Nasty as They Wanna Be* was legally obscene, and thus did not fall under First Amendment protection.

Assignment II: Take *Skywalker v. Navarro* up on appeal

Divide class into two teams:

Appellant: Skywalker Records, Inc.

Respondent: Navarro

Prepare and argue the appeal for this Federal District Court case. Each team should divide into three groups; two groups will argue the two *strongest* issues for their side, and one group will then provide a closing summary of the argument.

You will need to limit your total argument including the closing, to 20 minutes. **The judge will stop your argument at the end of 20 minutes.**

Remember, many lower court decisions get overturned on appeal. Just because Navarro won at the first level does not mean that the Eleventh Circuit won't reverse. If it decides that the lower court misinterpreted the standard set out by the Supreme Court, it could

(a) find in favor of Skywalker, Inc. OR

(b) remand back to the District Court to redecide the case based on the corrected interpretation..

Analysis of possible issues on appeal:

DO NOT work on any of the "Constitutional Law" headnotes--they are beyond the scope of this exercise.

Headnote 6: Have the three required obscenity factors been established? That:

(1): average person, applying contemporary standards, would find that the work, taken as a whole, appeals to the prurient interest;

(2) measured by contemporary community standards. the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law;

(3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value

Headnote 11: Should community standard be decided by judge, or upon evidence of actual community values?

If *actual community values* should be considered, court is in error.

Headnote 19: Does this holding conflict with the standard?

If it *does* conflict, the court is in error

Other: (Note: In the real world, issues not raised "below" will not be considered on appeal. If you want to make one of these arguments instead, or make another argument suggested to you by the materials, please feel free to do so!)

Privacy

Can an argument be made that restricting access to entertainment violates a Constitutional right to privacy?

Remember, Justice Douglas held that the *right to privacy* is *implicit* in the specific rights granted by several amendments, including the First. Right of personal privacy has been held to be an independent right, implicit in the First, Third, Fourth, Fifth and Ninth Amendments. "[S]pecific guarantees in the Bill of rights have penumbras, formed by emanations from those guarantees that help give them life and substance Various guarantees create zones of privacy." *Griswold v. Connecticut*, 381 US. 479 at 484 (1965) (Douglas, J.)

"Without doubt, [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to

Artistic Freedom:

"A creator is not in advance of his generation, but he is the first of his contemporaries to be conscious of what is happening to his generation."

Gertrude Stein

No one can predict whether, looking back a decade from now, today's raunch will be considered of artistic value. Remember: Benjamin Franklin was considered obscene; so were Shakespear, Walt Whitman, Elvis, Jim Morrison and portions of *The Bible*.

Obscenity: An Elusive Definition . . .

The Supreme Court has never considered obscenity protected by the First Amendment. Obscenity is one of the categories of expression that is unprotected because it is "no essential part of any exposition of ideas, and [is] of . . . slight social value as a step to truth."¹

But to place obscenity outside the protection of the First Amendment does not end the matter. It only shifts the focus of judicial effort to the problem of defining what is obscene. The problem has proved frustrating; the only criterion the Court has consistently agreed upon is that to be obscene, material must deal with sex.

Blasphemous or sacrilegious expression is not considered obscene, nor, generally, are scatological profanities. Violence has been found obscene only when linked with sex.

As Justice John Marshall Harlan explained when the Court ruled that the phrase "Fuck the Draft" on a jacket in a courthouse was not obscene: "Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic."²

Most state laws restricting the dissemination of obscene materials date back to the Victorian era. The early standard for obscenity was stated by a British court in the case of *Regina v. Hicklin* (1868): "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences."³

As Professor Thomas I. Emerson observed, the *Hicklin* test "brought within the ban of the obscenity statutes any publication containing isolated passages that the courts felt would tend to exert an immoral influence on susceptible persons."⁴

By the 1930s that standard was being rejected as too rigid. In 1934 Appeals Court judge Augustus Hand proposed a new standard:

While any construction of the statute that will fit all cases is difficult, we believe that the proper test of whether a given book is obscene is in its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence.⁵

The Roth Standard

Not until 1957 did the Supreme Court begin to define obscenity.

Roth v. United States concerned a federal statute making it a crime to mail materials that were "obscene, lewd, lascivious or filthy," while *Alberts v.*

California concerned a state law making it illegal to publish, sell, distribute or advertise any "obscene or indecent" material. Relying heavily on Hand's test, the Court developed what became known as the "Roth standard."

Obscene matter, declared the Court, has no First Amendment protection. Justice William J. Brennan, Jr., wrote:

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.⁶

Brennan then proposed a definition of obscenity:

[S]ex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.⁷

The standard for this determination, Brennan said, was "whether to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to the prurient interest."⁸

Finding that the trial courts in both *Roth* and *Albert* had applied this standard to hold the material in question obscene, the majority upheld convictions under both the federal and state laws.

After *Roth* the Court grew increasingly fragmented on this issue. Seldom did a majority agree on applying a single standard to the material in question. Nonetheless, several important refinements of the *Roth* standard gained a measure of acceptance.

In the 1962 case of *Manual Enterprises v. Day*, Justice Harlan wrote that obscene material must not only appeal to prurient interest but also be patently offensive, "so offensive on their face as to affront current community standards of decency."⁹

Two years later in *Jacobellis v. Ohio* (1964), Justice Brennan added the requirement that the materials in question must be found "utterly without redeeming social importance."¹⁰

The height of confusion over a definition of obscenity was reached on one day in 1967 when the Court, in deciding three obscenity cases, issued four separate opinions.

In one case the Court ruled that the book *Fanny Hill* was not obscene. The test applied, the prevailing opinion held, was that the dominant theme of the

...And a Changing Standard

book must appeal to prurient interest, that the book must be found patently offensive when judged by contemporary community standards and that it must be found utterly without redeeming social value.

Since the trial court had found that the book might have "some minimal literary value," it was not obscene.¹¹

In a second case, the Court came up with a fourth test. This test held that material that might not be obscene on its own might become so if it was placed "against a background of commercial exploitation of erotica solely for the sake of their prurient appeal."¹²

After this point the Court retreated, indicating in a 1967 *per curiam* opinion in *Redrup v. New York* that it would sustain obscenity convictions only to protect juveniles or unwilling adults from exposure to obscene materials or in cases of pandering.¹³

The Miller Standard

Then in 1973 a slim majority of the Court endorsed a standard for determining what was obscene. This new standard gave government much more latitude to ban obscene materials than did the *Roth* test.

Writing for the five-justice majority in *Miller v. California* (1973), Chief Justice Warren E. Burger held that states could regulate:

works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law. . . . A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value.¹⁴

With this standard, Burger said, the Court excluded only hard-core materials from First Amendment protection. As a guideline, he suggested that such materials were those that included "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and "patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."¹⁵

The majority specifically rejected the *Jacobellis* test that to be obscene, materials must be "utterly without redeeming social value." It also rejected the idea that the community standard must be national in scope. "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City," Burger wrote.¹⁶

The following year, the Court made clear that

local juries did not have "unbridled discretion" to determine what was obscene, overturning a Georgia jury's finding that the movie "Carnal Knowledge" was obscene.¹⁷

Subsequently, the Court upheld state laws prohibiting the promotion of sexual performances by children, but struck down a state law banning material just because it incited lust. That covered material that did no more than "arouse 'good, old-fashioned, healthy' interest in sex," said the Court.¹⁸

In 1982 the Court held that the First Amendment limited the power of public school officials to take books off the library shelves because some parents found the contents objectionable.¹⁹

But four years later, the Court held that the First Amendment was not offended when school officials suspended a student for a lewd speech at a school assembly. "It is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," the Court declared.²⁰

In a ruling expected to make it more difficult for local communities to hold material obscene, the Court in 1987 declared that local community standards—used in determining whether a book or film appealed to the prurient interest and was patently offensive—should not be used in deciding whether an allegedly obscene book or film had any scientific, literary, or artistic value. Instead a more objective, national standard should be used, ruled the Court in *Pope v. Illinois*.²¹

1. *Chaplinsky v. New Hampshire*, 315 U.S. 568 at 572 (1942).
2. *Cohen v. California*, 403 U.S. 15 at 20 (1971).
3. *Regina v. Hicklin*, L.H. 3 Q.B. 360 at 371 (1868), quoted in Thomas I. Emerson, *The System of Freedom of Expression* (New York: Random House, Vintage Books, 1970), 469.
4. Emerson, *System*, 469.
5. *United States v. One Book Entitled "Ulysses"*, 72 F. 2d 706 at 708 (2d Cir. 1934).
6. *Roth v. United States*, *Alberts v. California*, 354 U.S. 476 at 484 (1957).
7. *Id.* at 487-488.
8. *Id.* at 489.
9. *Manual Enterprises v. Day*, 370 U.S. 478 at 482 (1962).
10. *Jacobellis v. Ohio*, 378 U.S. 184 at 191 (1964).
11. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 at 419 (1966).
12. *Ginzburg v. United States*, 383 U.S. 463 at 466 (1966).
13. *Redrup v. New York*, 386 U.S. 767 (1967).
14. *Miller v. California*, 413 U.S. 15 at 24 (1973).
15. *Id.* at 25.
16. *Id.* at 32.
17. *Jenkins v. Georgia*, 418 U.S. 153 (1974).
18. *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades*, *Eichenberry v. J-R Distributors*, 472 U.S. 491 (1985).
19. *Board of Education, Island Trees Union Free School District #26 v. Pico*, 457 U.S. 853 (1982).
20. *Bethel School District No. 403 v. Frazer*, 478 U.S. 675 (1986).
21. *Pope v. Illinois*, — U.S. — (1987).