Regulating Rap Music: It Doesn't Melt in Your Mouth

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Recommended Citation
Available at: https://via.library.depaul.edu/jatip/vol11/iss1/4
REGULATING RAP MUSIC: IT DOESN'T MELT IN YOUR MOUTH

Washington is a culture of legislation and policy. Asking the FTC ... or the Congress to analyze popular entertainment makes about as much sense as going to Hollywood to restructure Medicare.1

Eminem, born in Kansas City, Missouri as Marshall Bruce Mathers III, is a critically acclaimed rap music artist.2 He has released 4 albums since 1996, won two Grammy awards in 1999, and took home three awards at the 2000 MTV music video awards, including best male artist.3 Rolling Stone gave him a four star review4 and Newsweek has described him as the “... most compelling figure in all of pop music.”5 At the same time, however, he has earned a reputation of being a rash, violent, and vile performer and artist. Nonetheless, Eminem has sold 7 million copies of his latest issue The Marshall Mathers L.P., close to 2 million of which were sold in the first week making it the fastest selling rap album of all time.6

Despite, or perhaps because of, his tremendous success, Eminem is under fire. Both he and his lyrics have been attacked and

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2 Brian Blomquist, Cheney Wife Does a Rip-Hop Number on Eminem, N.Y. POST, Sept. 14, 2000, at 009; see infra. notes 4-6.


5 Id.

labeled as violent, racist, misogynistic, and homophobic.\textsuperscript{7} Eminem may rightly be labeled as a violent bigot who could well be the first person to succeed at hating everyone equally.

Eminem is not simply a name caller. Nor are his transgressions simply a case of "potty mouth."\textsuperscript{8} The public outcry against this young man is based on the proximity of his art to a textbook definition of a misanthrope.\textsuperscript{9} For Example, in \textit{Role Model}, Eminem raps:

\begin{quote}
Ok, I'm going to attempt to drown myself / You can try this at home / you can be just like me! / ... / Follow me and do exactly what the song says: / smoke weed, take pills, drop outta school, kill people / and jump behind the wheel like it was still legal / ... / Now follow me and do exactly what you see / Don't you wanna grow up to be just like me! / I slap women and eat shrooms then O.D. / Now don't you wanna grow up to be just like me! / ... / I've been with 10 women who got HIV / Now don't you wanna grow up to be just like me! / I got genital warts and it burns when I pee / Don't you wanna grow up to be just like me! / I tie a rope around my penis and jump from a tree / You probably wanna grow up to be just like me!\textsuperscript{10}
\end{quote}

To Eminem, nothing is sacred. He has written about the murder of his mother, the gang rape of his sister, and the violent death of his wife.\textsuperscript{11}

To add to the rapper's controversial professional life is his tumultuous personal life. Eminem was recently ordered to stand

\textsuperscript{7} Letter to the Editor from John M. McCarthy, Austin, \textit{CHICAGO SUN TIMES}, July 20, 2000, at 36.
\textsuperscript{8} See Michael Hoyt, \textit{An Eminem Expose: Where are the Critics?}, \textit{COLUM. JOURNALISM R.}, Sept. 2000, at 67 (noting that Eminem's is vile not because of his bad language, but because of the depth of his cynicism).
\textsuperscript{9} See id.
\textsuperscript{10} Eminem, \textit{Role Model}, on SLIM SHADY LP (Aftermath/Interscope 1999).
\textsuperscript{11} See Eminem, \textit{MARSHALL MATHERS LP} (Aftermath/Interscope 2000).
trial for assault with a dangerous weapon and possession of a concealed weapon as a result of a 1999 brawl outside a Detroit nightclub. Additionally, Eminem's mother, Debbie Mathers-Briggs, is currently suing him for $10 million; and Eminem has recently filed for divorce from his wife Kim, who in July 2000 was hospitalized for attempting suicide. All aspects of Eminem's life are surrounded by tempestuous seas.

Taking Eminem's success in the light created by his critics presents an out of focus problem that has continually faced the American Democracy since the signing of the Bill of Rights: Should America curtail the message that Marshall Mathers sends? And given the First Amendment, can America curtail his message?

I. BACKGROUND

The First Amendment prohibits the government from restricting speech or expression based on a message, an idea, subject matter, or content. Through this prohibition, the First Amendment maintains the public's uninhibited access to expression. Although the First Amendment's protection of political speech is the most closely guarded, free speech is far from limited to political expression and commentary. In fact, free speech "embrace[s] all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." It follows, therefore, that First Amendment protection extends to all creative and artistic

13 Id.
14 The First Amendment provides, "Congress shall make no law ... abridging the freedom of speech." U.S. CONST. amend. I; Accord Cohen v. California, 403 U.S. 15, 24 (1971).
expression, including music concerts, plays and books. Hence, music and entertainment, including rap music and violent entertainment, are protected by the First Amendment.

At the heart of the First Amendment is the protection of a free flowing exchange between a speaker and her listener. The First Amendment not only protects the artist’s expression, but also the hearer’s right to receive that information. Thus, the goal of the First Amendment’s shield is to “maintain free access of the public to the expression.” The scope of protectable free speech is neither thwarted nor hindered by speech which takes an unpopular or dangerous viewpoint.

The First Amendment’s protection, however, is not absolute. Specifically, the Court has sanctioned only limited protection for commercial expression. In addition, the court has afforded no

18 McCollum v. Columbia Broadcasting Sys., Inc., 249 Cal. Rptr. 187, 192 (1988) (quoting Schad v. Mount Ephraim, 452 U.S. 61, 65 (1981) (announcing that “entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee”)).

19 See Betts v. McCaugherty, 827 F. Supp. 1400, 1406 (W.D. Wis. 1993) (upholding a prison’s ban on rap music cassettes based on the state’s legitimate interest of controlling and protecting prisoners); Cinevision Corp. v. City of Burbank, 745 F.2d 560, 567 (9th Cir. 1984) (citations omitted).

20 Young, 427 U.S. at 77.

21 McCollum, 249 Cal. Rptr. at 192.

22 Young, 427 U.S. at 77.


24 Roth v. United States, 354 U.S. 476, 483 (1957); see also Harry T. Edwards & Mitchell N. Berman, Regulating Violence on Television, 89 Nw. U.L. Rev. 1487, 1490-1491 (1995) (commenting that “the age when courts and commentators could debate whether the First Amendment constituted an “absolute” barrier to government regulation of speech is long gone. In its place stands a complex set of rules that directs a reviewing court to consider such diverse factors as the form and effect of the regulation, the purposes of the regulators, the value of the speech regulated, and the type of media involved”).

25 See, e.g., Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 456 (1978) (clarifying that “commercial speech [enjoys] a limited measure of protection,
protection at all to certain categories of speech, viewed as having little or no social import, including obscenity,\textsuperscript{26} incitement,\textsuperscript{27} and fighting words.\textsuperscript{28} Although these doctrines are narrowly defined and strictly applied, they exist as permissible exceptions to the otherwise expansive protection free speech normally offers.\textsuperscript{29} It follows, therefore, that the first step of the Court's analysis in any governmentally imposed speech restriction is to identify the speech at issue as either commercial or non-commercial.\textsuperscript{30}

\textsuperscript{26}See \textit{Sable Communications of Cal., Inc. v. FCC}, 492 U.S. 115, 126 (1989); \textit{Paris Theatre I v. Slaton}, 413 U.S. 49, 69 (1973); \textit{Miller v. California}, 413 U.S. 15 (1973); \textit{United States v. Reidel}, 402 U.S. 351, 356-357 (1971) (noting that while obscenity does not fall within the protectable bounds of the First Amendment, the obscenity exception has only arisen because the states have continually tried to regulate obscene expression in an otherwise unconstitutional manner).

\textsuperscript{27}See \textit{Brandenberg v. Ohio}, 395 U.S. 444 (1969) (denying protection to speech which amounted to direct advocacy of imminent lawless action).


\textsuperscript{29}While this implies that the speech or expression which falls into these narrowly defined categories is "speech" excepted from the protection of the First Amendment, no court has ever referred to these doctrines as a per se exception to First Amendment protection. These classes of speech are more apt to be recognized as not rising to the level of speech. See generally \textit{R.A.V v. City of St. Paul}, 505 U.S. 377, 381-390 (1992); \textit{Davidson v. Time Warner, Inc.}, No. V-94-006 1997 U.S. Dist. LEXIS 21559, at *47 (S.D. Tex. 1997). For purposes of this paper, the term "exception" shall be used in a loose sense to refer to the categorical denial of First Amendment protection.

\textsuperscript{30}See generally P. Cameron DeVore, \textit{Advertising and Commercial Speech}, 582 Practising L. Inst. 715 (Nov. 1999). It is important to note that there is some debate over a proper definition of commercial speech that is not applicable here. \textit{Compare Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York}, 447 U.S. 557, 561 (1980) (broadly defining commercial speech as speech "related solely to the economic interests of the speaker and its audience") with \textit{Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.}, 425 U.S. 748, 762 (1976) (narrowly defining commercial speech as speech that does "no more than propose a commercial transaction"). Whereas, non-commercial speech is generally recognized as expression which is ideological, political, artistic or scientific. \textit{National Endowment for the Arts v. Finley}, 524 U.S. 569, 601 (1998) (citations omitted).
The characterization of speech as either commercial or non-commercial is imperative, as the level of First Amendment protection is contingent on this classification. While a restriction of non-commercial speech is subject to strict scrutiny, a restriction of commercial speech is subject only to intermediate scrutiny. Accordingly, a restriction on non-commercial speech requires promoting a compelling governmental interest via narrowly tailored means; whereas, a restriction on commercial speech need only promote a substantial governmental interest via some direct means that is not more extensive than necessary to carry out the government's interest.

More specifically, a restriction on commercial speech will be analyzed by the Court according to the four factors laid out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*: the speech must concern lawful activity and not be misleading; the asserted governmental interest must be substantial; the regulation must directly advance the asserted governmental purpose; and the regulation or restriction must not be more extensive than necessary to serve that interest. While the government bears the burden of establishing these factors, the restriction need only rise to the level of reasonableness – the government need not utilize the least restrictive means available. Additionally, none of these factors is outcome determinative on their own, and the results of these considerations must be seen as interrelated.

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31 See *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 563.
32 See *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 557. Although the speech at the center of this article is undeniably non-commercial speech, it must be pointed out that the Court has considered the idea of scrutinizing some, if not all, restrictions on commercial speech with the strictest scrutiny. See *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (Stevens, Kennedy, Souter, & Ginsburg, JJ., plurality opinion & Thomas, J., concurring in part and concurring in the judgment).
33 *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 561.
34 Id. at 566.
36 Id.
Restrictions on non-commercial speech, as opposed to restrictions on commercial speech, are subject to heightened scrutiny, but may still be effected if the restriction meets certain criteria. In this analysis, the Court will characterize the restriction as content neutral or content based.

Content neutral restrictions hinder speech with no reference to the subject or viewpoint of the speech at issue. Governmental restrictions on the time, place, or manner of protected speech may be imposed, so long as those restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” While these permissive restrictions even extend to content neutral restrictions that incidentally limit the content of some speech, a content neutral restriction that has a disproportionate effect on the content of speech is invalid.

Content based restrictions, on the other hand, are aimed directly at penalizing free speech based on the subject matter or viewpoint of the speech at issue. These types of restrictions will be strictly scrutinized through the following considerations: whether the restriction serves a compelling governmental interest; whether the means chosen to effect that interest are narrowly tailored; and whether the government has employed the least restrictive means in effecting the regulation. Moreover, and specifically in the case of regulations affecting violence in the media, the Supreme Court has permitted a more relaxed standard of review when the

41 Ward, 491 U.S. at 791.
42 Turner Broad. Sys., 512 U.S. at 642.
regulation falls into a specific and well recognized category, such as obscenity, incitement, or fighting words.\textsuperscript{44} This paper will explore the conflict between regulating Eminem's speech and the First Amendment. Part I will explore curtailing Eminem's expression through traditional obscenity, incitement, and fighting words analyses. Part II will explore the possibility of invoking the protection of minors as a compelling state interest in an effort to offset a content based restriction; and Part III concludes with an examination of the political reaction to Eminem, his peers and a recent FTC report, which concludes that a majority of the entertainment industry undoubtedly markets violence directly at minors.

II. LOW VALUE SPEECH

The Supreme Court has created certain well-defined exceptions to the "absolutist" protection of the First Amendment – obscenity, incitement, and fighting words.\textsuperscript{45} The following section will first examine the failed attempt of one court to apply the obscenity doctrine to rap music, and then go on to investigate the life of a restriction as justified by the incitement or fighting words doctrines. Because the aforementioned exceptions are so well defined and the case law defining and explaining these exceptions is voluminous, it is doubtful that an effort to abridge Eminem's speech through any of these doctrines will be successful.\textsuperscript{46}

A. Obscenity

Sexually obscene material is "not within the area of constitutionally protected speech."\textsuperscript{47} In order for an act of

\textsuperscript{44} See Playboy Entm't Group, Inc., 466 U.S. at 804-805; see also Davidson, 1997 U.S. Dist. Lexis 21559, at *50.
\textsuperscript{45} See supra. notes 26-28.
\textsuperscript{46} See id.
\textsuperscript{47} Miller v. California, 413 U.S. 15, 23 (1973).
expression to be considered obscene, a court will employ the following analysis utilizing contemporary community standards: the average person must find the work, in its entirety, to appeal to the prurient interest, the work must depict or describe, in a patently offensive way, sexual conduct specifically defined by state law; and the work, taken as a whole, must lack serious literary, artistic, political, or scientific value. While Eminem's lyrics may rise to the level of vile, they cannot meet the heightened standards required to qualify as obscene.

In *Skyywalker Records, Inc. v. Navarro*, the Southern District of Florida concluded that 2 Live Crew's recording *As Nasty As They Wanna Be* was legally obscene according to the test announced in *Miller v. California*. In so holding, the court progressed

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51 *Skyywalker Records, Inc.*, 739 F. Supp. at 596. The reader should note that the District Court Judge made both of the contemporary community standard determinations according to his own "personal knowledge of the community and [the community's] standards to make a decision in this case." *Id.* at 590. Additionally, it must be noted that this case was expressly overturned by the eleventh circuit on the third prong of the *Miller* Analysis. *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 138 (11th Cir. 1992) (holding that *Miller v. California* requires consideration of each element of the obscenity test. Even though the district court might have been able to make the obscenity determination on the
through a full *Miller* analysis beginning with the recording’s appeal to the prurient interest. 52 In concluding that the recording did appeal to a prurient interest, the court pointed to a number of the Plaintiff’s lyrical references, including the artist’s references to genitalia, human excretion, oral-anal contact, group sex, masturbation, sexual intercourse, and sounds of moaning. 53 In addition, the court noted that the frequency of “the depictions of ultimate sexual acts [which were] so vivid that they [were] hard to distinguish from seeing the same conduct described in the words of a book, or in pictures in periodicals or films” indicated Plaintiff’s clear intent to “lure hearers into this activity.” 54 This factual evidence coupled with the Plaintiff’s commercialization, which was “calculated to make a salacious appeal,” forced the court to conclude that *As Nasty As They Wanna Be* appealed to the prurient interest. 55

The *Skyywalker* court also concluded that *As Nasty As They Wanna Be* was patently offensive. 56 Here the court pointed to the heightened specificity of the Plaintiff’s sexual lyrics, and concluded that the Plaintiff’s message was “analogous to a camera with a zoom lens, focusing on the diverse sights and sounds of

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52 *Skyywalker Records, Inc.*, 739 F. Supp. at 591-593. These abstract references are all of the detail the court supplies to the specific lyrics or titles of *As Nasty As They Wanna Be*.


54 *Id.*

55 *Id.* at 591-592. Additionally, the court noted that even though rap music, as a genre of popular music, focuses on the lyrics and the verbal message of the work, the Plaintiff’s own experts testified that the rap genre does not require vulgar lyrics to convey its message. *Id.* at 592.

56 *Id.* Although a portion of the court’s analysis relies on Florida’s statutory definition of obscenity, the district court also relies on the two examples of patently offensive cited in *Miller v. California*: (a) “patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.” *See Miller*, 413 U.S. at 25.
various ultimate sex acts.” The court found that the Plaintiff’s recording, with limited exception, abounded with explicit sexual lyrics. While reaching this conclusion, the court noted that the lyrics of the album contained “dirty words” and depictions of female violence, which on their own would not rise to the level of patently offensive, but are sufficient in this case because they are lyrics of a song. The court continued, “music must be played to be experienced” and an unsuspecting person’s privacy at a beach, a park, or waiting for a light to change may be interrupted upon hearing these lyrics. Thus, the potential for forcing the unwilling public to listen to potentially offensive material warrants the label of patently offensive.

In concluding its Miller analysis, the Skyywalker court concluded that 2 Live Crew’s recording As Nasty As They Wanna Be lacked serious social value. For this factor, the district court judge relied on his own experiences to make this determination — having listened to the Plaintiff’s recording with an ear to how he believed the average person of the relevant community would react to such a recording. The court rejected the Plaintiff’s expert testimony that As Nasty As They Wanna Be utilized literary and social techniques to invoke a comedic, a satirical, or a political message, and ultimately concluded that the emphasis of the verbal message in music, especially rap music, warranted an obscenity

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58 Id. In making this conclusion, the court referred to the Supreme Court’s holding in Jenkins v. Georgia, reversing the lower court’s obscenity determination of the film Carnal Knowledge. Jenkins v. Georgia, 418 U.S. 153, 161 (1974). In Jenkins, the Court concluded, even though the film’s ultimate subject matter was sex and complete sex acts were explicitly inferred, the camera never focused on the actor’s bodies at such times and there was no other lewd depictions during these scenes. Thus continuing the Skyywalker court’s camera analogy, it can be inferred from the district court that the 2 Live Crew’s lyrics “focused” in on the bodies and genitalia in such a lewd manner, the lyrics were patently offensive.
60 Id.
61 Id.
62 Id. at 596.
63 Id. at 587-590, 593-596.
finding based on the offensiveness of the lyrics. As an aside, the district court was chastised on appeal for making this determination without any serious investigation into the work’s social or literary value.

In light of the reasoning in the Skywalker case, Eminem’s music, while violent, cannot rise to the level of obscenity. First, in applying the Miller factors to Eminem’s lyrics, even assuming a balance of community standards, one cannot conclude that the music is legally obscene because they do not appeal to the prurient interest. Eminem does indeed make reference to specific sexual acts, genitalia, rape, and moaning noises, and these references most definitely utilize “dirty words” as expletives and as derogatory phrases, and granted, these types of references are frequent at times. However, they cannot rise to the level of “salacious appeal” because in this context these words and phrases, unlike the 2 Live Crew recording, are used primarily as shocking references and not as the focus of any one song. Moreover Eminem’s lyrics do not focus heavily on actual sexual acts. His references are more abstract than the explicitness of the 2 Live Crew recording. Thus, Eminem’s lyrics do not appeal to the prurient interest.

64 Id. at 596. Again, at this point, it is important to note that the 11th Circuit Court of Appeals reversed the Skywalker decision on this point. Luke Records v. Navarro, 960 F.2d 134, 138-139 (11th Cir. 1992). In so doing, the court did not question the district court judge’s ability to sit as both the trier of fact and law, but concluded that the record of the lower court was insufficient “to assume that the fact finder’s artistic or literary knowledge or skills to satisfy the last prong of the Miller analysis, which requires the determination of whether a work lacks serious artistic, scientific, literary or political value.” Id. at 138. Particularly, the court noted that the Sheriff had failed to admit any evidence other than a copy of As Nasty As They Wanna Be and the trier of fact was unqualified to so quickly dismiss the 2 Live Crew’s expert testimony that attempted to add credence to the social and artistic value of their recording. Id. at 136-137. In addition, the court cited Pope v. Illinois for clarification of Miller’s third prong, “just as the ideas a work represents need not obtain a majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won.” Id. at 138 (citing Pope v. Illinois, 481 U.S. 497, 500-501 (1987)).

Furthermore, it is questionable whether Eminem’s songs may be labeled as patently offensive. The *Skywalker* court concluded that 2 Live Crew’s recording was patently offensive because of the explicit nature of the lyrics, the depictions of sexual and female violence, and the focus on ultimate sex acts. While Eminem’s lyrics depict vivid instances of violence and contain a constant use of profanity and derogatory terms, the *Skywalker* court expressly noted that these types of references on their own do not rise to the level of patently offensive. In so concluding, the *Skywalker* court did note that such references were contained in a song, and therefore, could easily offend an unwilling listener at a park, the beach, or while stopped at a traffic light. Nevertheless, the Supreme Court has expressly rejected this type of “captive audience” reasoning in making the patently offensive determination.

Specifically, in both *Cohen v. California* and *Ernoznik v. Jacksonville*, the Court required members of the public to “avert their eyes” from an offensive slogan on the back of a jacket and a pornographic movie showing at a drive-in movie theater. Here, the analysis at hand involves song lyrics and is thereby arguably different from the reasoning in *Cohen* and *Ernoznik* cases, invoking an auditory offense and not a visual one. The Supreme Court’s reasoning, however, stands as good First Amendment law today. Hence, the Court is likely to extend this reasoning to music, allowing the marketplace to ferret out any unfavorable or unpopular music.

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67 See id. at 593 (noting that the use of profanity and other pejorative language is not enough on its own to classify speech as patently offensive).
69 See *Ernoznik v. Jacksonville*, 42 U.S. 205 (1975) (invalidating a Jacksonville, Florida ordinance declaring it a public nuisance for a drive-in theatre to display a motion picture that depicted bare buttocks, bare female breasts, or bare human pubic areas); *Cohen v. California*, 403 U.S. 15 (1971) (requiring those in the Los Angeles County courthouse to “avoid further bombardment of their sensibilities simply by averting their eyes” from Mr. Cohen’s jacket bearing the slogan “Fuck the Draft”).
70 Id.
Other suggestions for expanding the obscenity doctrine to violent entertainment have been made. For example, Representative Henry Hyde has proposed that the violence depicted in musical lyrics like Eminem's, gratuitous violence accessible to children, is its own kind of obscenity, and can be legislated against just like any other obscene form of communication. However, while Representative Hyde's intention of shielding children from evil is good at heart, the Constitution does not permit extending the protective shield this far. Violent speech, which is not otherwise sexually obscene, is protected speech. Specifically, the courts have recognized that videos, television, and books that depict violent episodes are protected speech. Also, The Federal Communications Commission has noted that government regulation to limit violent television “programming which is neither obscene nor indecent is less desirable than effective self-regulation, since government-imposed limitations raise sensitive First Amendment problems.”

There is little doubt that Eminem's lyrics repeatedly depict violence, but these depictions are protected by the First Amendment. For example, in Amityville, we hear, “We don't do drive-bys; we park in front of houses and shoot / And when the police come, we fuckin' shoot it out with them / That's the
mentality here, that’s the reality here." This type of depiction is no different, sans the expletive, than material which appears on prime time network television. This type of speech, offensive or not, is protected by the First Amendment and cannot be legislated against. Thus, Eminem’s music is not legally obscene.

B. Incitement

The Supreme Court has placed speech which incites in an unprotected and narrowly defined class. To qualify as incitement the speech or expression in question must be “directed to inciting or producing imminent lawless action and [be] likely to incite or produce such action.” Furthermore, the Court has placed heightened emphasis on the imminence of the threat. In order to properly support an allegation of incitement, the speech must order or command an individual to concrete and lawless action immediately. Although Eminem suggests particular lawless actions in his lyrics, it cannot be said that these propositions rise to the level of imminent.

In Davidson v. Time Warner, Inc., the court found that while Tupac Shakur’s recording 2Pacalypse Now is “insulting and outrageous,” the author did not intend to incite imminent and illegal conduct as a result of his recording. While the court noted that Ms. Davidson did not point to a specific track on Mr. Shakur’s recording, it did allude to at least one title on the album, Crooked

75 Eminem, Amityville, on MARSHALL MATHERS LP (Aftermath/Interscope 2000).
81 Davidson, 1997 U.S. Dist. LEXIS 21559, at * 65. The reader should note that this civil action followed the criminal prosecution of Ronald Howard where Howard, in an attempt to defend himself, claimed that he was incited by the lyrics of 2Pacalypse Now. Id. at *5 n.3. Nonetheless, the jury refused to believe Howard’s defense and sentenced him to death. Id.
Ass Nigga, which describes violent acts targeted at police officers. Specifically, the court cited, "Now I could be a crooked nigga too ... I got a nine millimeter Glock Pistol ... My brain locks, my Glock's like a f–kin mop, // The more I shot, the more mothaf–ka's dropped // And even cops got shot when they rolled up." Ms. Davidson brought her action against Time Warner and Tupac Shakur for, inter alia, inciting Ronald Howard ("Howard") to shoot her husband after Officer Davidson pulled Howard over for a routine traffic stop. Unbeknownst to Officer Davidson, at the time of the arrest, the car Howard was driving was stolen. Upon being pulled over, Howard panicked and fatally shot Officer Davidson. Ms. Davidson brought this action against Time Warner and Mr. Shakur ("Shakur") for inciting Howard's action based on the fact that Howard was listening to a tape of Shakur's music at the time of the murder.

In the end, the court denied Ms. Davidson's incitement allegations since they failed to meet both prongs of the incitement analysis. First, the court noted that it was doubtful that Shakur intended to cause anything but violence at some point after the listener comprehended Shakur's message. The court acknowledged that Shakur described his own music as revolutionary. However, the court recognized that this

82 Davidson, 1997 U.S. Dist. LEXIS 21559, at * 5 n.4.
83 Id. (citing the lyrics from Tupac Shakur's Crooked Ass Nigga).
85 Id.
86 Id.
87 Id. Although it is unclear from the record which song Howard was listening to at the time of the arrest, Davidson’s claim is based on the entirety of Shakur’s 2Pacalypse Now. Id. at *5 n.4.
88 Id. at * 65.
89 Id. The court pointed out that Shakur had classified his own music as "revolutionary" with the purpose of angering the listener. Specifically, Shakur was quoted as having said, "I think of my music as revolutionary because it's for soldiers. It makes you want to fight back. It makes you want to think. It makes you want to struggle, and if struggling means when he swings you swing back, then hell yeah, it makes you swing back." Id. at *65 n.24.
90 Davidson, 1997 U.S. Dist. LEXIS 21559, at * 64.
characterization places too much emphasis on the artist’s own rhetoric. Ultimately the court concluded that the Constitutional guarantee of free speech protects advocating illegal or forceful action so long as that advocacy is not aimed at inciting or producing imminent lawless action and is not likely to produce such action.

The court went on to note that a mere broadcast of the Defendant’s music was not likely to incite Howard since the album had already sold over 400,000 copies without any other claims of incitement. The court also noted that the mere broadcast of 2Pacalypse Now was not enough on its own to show that Shakur intended to incite, especially since Ms. Davidson’s claim was the first in relation to the recording. Additionally, the court relied on other courts’ refusal to find incitement simply because certain acts happened after the broadcast or playing of a recording. Finally, the court pointed to the fact that Howard, a gang member driving a stolen car, was much more likely to have shot officer Davidson out of fear of capture than out of incitement from Tupac’s recording.

Ms. Davidson’s claim, according to the court, also failed Brandenberg’s imminence requirement because Howard’s actions did not come until after he had listened to a recorded version of Shakur’s music which was not specifically addressed to him.

91 Id.
92 Id. (citing Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969)).
93 Id. at * 66; see also DeFilippo v. Nat’l Broad. Co., 446 A.2d 1036, 1041 (R.I. 1982) (granting summary judgment based in part on the fact the Plaintiff’s son was the only one to emulate the stunt hanging performed on the Tonight Show); Harry T. Edwards & Mitchell N. Berman, Regulating Violence on Television, 89 Nw. U. L. Rev. 1487, 1526 (1995) (concluding that “the violent fare on television does not explicitly urge viewers to commit the evils with which the legislature may be concerned”).
95 Id. (citations omitted).
96 Id.
97 Id. at * 67-68 (S.D. Tex. 1997). Additionally, the court pointed out that Davidson’s own evidence undermined her claim. Id. at 68-69. There was testimony and evidence offered at trial that Howard had played and rewound various rap music recordings that were performed by a number of artists over the course of 45 minutes before shooting Officer Davidson. Id. at 69.
The court, in reliance on a California Court of Appeals decision, reasoned that, "no rational person would or could believe otherwise nor would they mistake musical lyrics and poetry for literal commands or directives to immediate action." Moreover, the court concluded that Howard's reactions to the recording ultimately revealed him to be a weak willed individual who was susceptible to persuasion. Unless it may substantially be shown that "a number of citizens were standing ready to strike out physically at [whomever] may assault their sensibilities with..." speech similar to that expressed by Shakur, the First Amendment's protection extends to such speech. Hence, Howard was not incited by Tupac's recording 2Pacalypse Now.

In light of the above analysis, Eminem's music is not capable of incitement. As a recording artist, Eminem is analogous on all counts to Tupac Shakur, and thus, cannot be liable for incitement under ordinary circumstances. At best, Eminem intends to cause people to think. "I do say things that I think will shock people," he says. "But I don't do things to shock people. I'm not trying to be the next Tupac, but I don't know how long I'm going to be on this planet. So while I'm here, I might as well make the most of it." Essentially, Eminem's music is revolutionary in the same sense as Tupac's. In Who Knew, the listener is instructed, "Fuck that. Take drugs. Rape Sluts / Make fun of gay clubs. Men who wear makeup." No matter the legality of the lyrics, this speech is not removed from the scope of the First Amendment's protection because it lacks the requisite intent to qualify as inciting.

Second, as the Davidson court recognized, a simple broadcast of Eminem's music via the airwaves or a recording is not likely to

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98 Id. at * 68 (citing McCullum v. Columbia Broadcasting Sys., Inc., 249 Cal. Rptr. 187, 194 (1988)).
99 Id. at * 69-70 (citing Cohen v California, 403 U.S. 15, 22 (1975).
100 Id.
103 Id.
104 Eminem, Who Knew (Interscope 2000).
incite. As was the case with 2Pacalypse Now, there have been no incidents where Eminem’s music has been blamed for triggering action.\footnote{When Lyrics Attack Chat (Kurt Loder, MTV News, MTV television and Internet broadcast August 24, 2000) (transcript available at http://www.mtv.com/news/gallery/e/eminem000824.html (visited Nov. 8, 2000) (quoting, “Eminem contends there have been no documented instances of anyone acting on the message conveyed in his lyrics”).} This, in combination with the fact that the sales of his most recent recording now approximates ten million, makes it quite obvious that the likelihood of a serious claim of incitement is slim at best.

Third, a claim against Eminem for unlawful incitement also fails Brandenberg’s imminence requirement. Again as the Davidson court recognized, individuals who think that Eminem is actually talking to them makes an irrational mistake that cannot be attributed to a performing artist. Granted, Eminem’s case may differ from Tupac’s because of the instances where Eminem actually hurls insults at certain people in his private life and in the public limelight. For example, in Marshall Mathers, Eminem tells us about his mother, “My fuckin’ bitch mom suing for ten million / She must want a dollar for every pill I been stealin’ / Shit, where the fuck you think I picked up the habit / All I had to do was go in her room and lift up a mattress….\footnote{Eminem, Marshall Mathers (Interscope 2000).} While certain individuals, such as his mother and his ex-wife, may have an easier time in establishing imminence, they would still fail the incitement test. Quite simply, Eminem insults and mocks these people, he does not direct them towards lawless action that is likely to result in imminent lawless action. Additionally, courts have been unwilling to impose on an artist the liability connected with harming one hypersensitive member of his audience among millions.\footnote{See supra note 101 and accompanying text.} Thus, Eminem’s lyrics lack the imminence necessary for a successful claim of unlawful incitement.

Finally, the Davidson court did expressly point out that Howard’s listening to 2Pacalypse Now was incapable of satisfying Brandenberg’s imminency requirement because Howard
"responded" to recorded music, not a live performance. The latter seems to leave open the question of whether or not Eminem may be responsible for action at a live performance by an enraged or overexcited fan. Engaging as such a question may be, it can most likely be answered in the negative. Historically, the imminency requirement has been strictly adhered to since Brandenberg, where it was announced at the conclusion of a line of post World War II cases stemming from anti-communism legislation. These cases, in various forms, dealt with legislation which penalized certain advocacy of force or unlawful action towards "anti-American" goals, including membership in groups attempting to effect the same. These cases went so far as to penalize members of groups who, while agreeing with the group’s purpose, disagreed with the means adopted by the group’s majority to reach those goals. Brandenberg redirected the law in this area, thereby removing the possibility of punishing these types of attenuated connections, by requiring the intent to incite one to imminent lawless action that is likely to result, thereby placing pointed emphasis on the imminency requirement.

108 Davidson, 1997 U.S. Dist. LEXIS 21559, at *68.
109 See Brandenberg, 395 U.S. at 447 (criticizing prior Court’s decisions in regards to state syndicalism statutes).
110 See, e.g., Kinsley International Pictures Corp. v. Regents of New York, 360 U.S. 684 (1959) (holding that the First Amendment "protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax"); Dennis v. United States, 341 U.S. 494 (1951) (holding in order for advocacy to be actionable speech, it must present a "clear and present danger" in order to be actionable); Whitney v. California, 274 U.S. 357 (1927) (holding "[for an individual] to knowingly be or become a member of [an organization that advocates criminal syndicalism] involves such danger to the public peace and the security of the State [that] these acts should be penalized in the exercise of its police power"); Gitlow v. New York, 268 U.S. 652 (1925) (holding "a state may punish utterance endangering the foundations of organized government and threatening its overthrow by unlawful means").
111 Whitney, 274 U.S. 357 (holding "[for an individual] to knowingly be or become a member of [an organization that advocates criminal syndicalism] involves such danger to the public peace and the security of the State [that] these acts should be penalized in the exercise of its police power").
Additionally, the court is likely to adopt a position similar to that of the California appellate court cited by the Davidson court.\(^{113}\) That is, any person believing that an artist at a public performance, which the audience member undoubtedly paid to attend, would be acting wholly irrationally if he believed that the artist was speaking to him directly. Music is undeniably a form of recognized art that is open to interpretation by its critics and its audience. But one person thinking that Eminem is talking to him explicitly, out of the 60,000 other people in the stands and asking him to start a brawl with the guy standing next to him is wholly absurd. This is not to say that in some exclusive circumstance, which may border on the ridiculous, that Eminem could be held responsible for incitement. For instance, Eminem would not be shielded from liability for incitement if he pointed directly at two people standing in the front row and ordered them to start a battle royalé. The First Amendment’s protection would not extend to include this type of advocacy to “professional wrestlingesque” action. However, barring this type of inane conduct, the First Amendment’s protection should extend to a public performance.

\(\text{C. Fighting Words}\)

Eminem’s expression cannot be restricted under a “fighting words” justification. “The fighting words doctrine applies when an individual hurls epithets at another causing the latter to retaliate against the speaker.”\(^{114}\) Thus, the doctrine only applies to the use of provocative or insulting epithets that describe a particular individual and are addressed to that individual specifically in a face-to-face encounter.\(^{115}\) Even though true fighting words may possess expressive content, they cannot constitute an “essential part of any expression of ideas,” and thus they do not qualify for

\(^{113}\) See Davidson, 1997 U.S. Dist. LEXIS 21559, at *68 (citing McCullum, 249 Cal. Rptr. at 194).

\(^{114}\) See Davidson, 1997 U.S. Dist. LEXIS 21559, at *60; see also Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

the First Amendment’s protection. This is true even in light of the fact that fighting words have all of the characteristics of speech. The portion of any speech comprised of fighting words is effectively a “non-speech” element of communication. Thus, the regulation of fighting words is analogous to a noisy truck. Fighting words, just as a noisy truck, may not be regulated “because the ideas themselves are offensive to some of the hearers.” Given the above, although some of Eminem’s lyrics may be offensive to some of the hearers, they cannot be regulated on this distasteful character alone.

In Cohen v. California, Mr. Cohen wore a jacket bearing the words “Fuck the Draft” in the corridors of the Los Angeles County Courthouse. Accordingly, Cohen was arrested for violating a California statute which criminalized willful disturbance of the peace through offensive conduct. In striking down the statute in this instance, the Court expressly denied the State of California the latitude of the fighting words doctrine. In so holding, the Court instilled on the fighting words doctrine a two part limitation: first, the expression must be directed at one person; and two, the expression must not be avoidable by viewers simply by “averting their eyes.” Additionally, in the Cohen case, the Court noted that there was no individual objection to Cohen’s speech. The Court concluded that restricting a disturbance such as Mr. Cohen’s would amount to suppression out of fear of disturbance, which is simply not enough to overcome the freedom of expression.

116 Chaplinsky, 315 U.S. at 572.
118 See id.
119 See Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in the result) (analogizing the regulation of fighting words with the regulation of a noisy truck).
122 Id.
123 Id. at 26.
124 Id. at 20-21.
125 Id. at 22.
126 Id. at 23.
In light of Cohen and the cases that follow, regulating Eminem’s expression through the fighting words doctrine is difficult at best, but not impossible. Eminem does direct some of his lyrics to specific people in his personal life and other public figures, but simple name calling is not enough. Eminem says, “I feel like I can use words as weapons against people.” “If I am thinking that much to write you down in a song, then you obviously did something, you know. I care about you that much.” It’s sort of a sick and twisted love thing. However, if he is mad at you, then look out. “My thoughts are so fucking evil when I’m writing a song. If I’m mad at my girl, I’m gonna sit down and write the most misogynistic fucking rhyme in the world.” For example, in the song, Kill You, Eminem raps about his mother, “I’m gonna pull you to this bullet and put it through you! / Shut up, Slut! You’re causing too much chaos / Just bend over and take it like a slut, ok Ma? / ... / Bitch, I’m gonna kill you / I ain’t done, this ain’t the chorus / I ain’t even drug you in the woods yet to paint the forest / A bloodstain is orange after you wash it three or four times.” Certainly these lyrics are epithets that are, at least in part, directed expressly at his mother, but still a broadcasted recording does not satisfy the fighting words doctrine because it cannot be directed at an individual person in a face to face discussion. There

127 See Cohen v. California, 403 U.S. 15, 20 (1971) (limiting the fighting words doctrine); Stephen W. Gard, Fighting Words as Free Speech, 58 WASH. U. L.Q 531, 536 (1980) (recognizing that the Court has not upheld a conviction on the basis of the fighting words doctrine since Chaplinsky; and that the doctrine is only a left over “of an earlier morality that has no place in a democratic society dedicated to the principle of free expression”); Barret Pettyman, Jr. & Lisa A. Hook, The Control of Media-Related Imitative Violence, 38 FED. COMM. L.J. 317, 372 n.228 (1987) (suggesting that musical recordings cannot rise to the level of fighting words because musical recordings, among other forms of entertainment, are not explicitly directed at an individual person thereby rendering Chaplinsky inapplicable to the debate surrounding violence in the media).


129 Id. (Eminem agreeing with a suggestion by Kurt Loder).

is no face to face encounter. Any portion of expressive speech that is not directed at a specific individual cannot be restricted vis a vis the fighting words doctrine.

As an aside, it might be possible to satisfy the fighting words doctrine in a public performance, assuming the target of the mud slinging is present. Yet, on its face the public performance is not a face to face encounter.\textsuperscript{131} Additionally, scholars have recognized that the Supreme Court has not upheld a conviction on the basis of the Fighting Words doctrine since \textit{Chaplinsky v. New Hampshire}, the case which establishes the framework for the Court's analysis.\textsuperscript{132} Today, these scholars indicate that the fighting words doctrine is only a left over "of an earlier morality that has no place in a democratic society dedicated to the principle of free expression."\textsuperscript{133} Fighting words, if applicable at all, does not seem to be a feasible alternative to confronting Eminem or any other violence in the marketplace. The requirements of the doctrine – that the insults be directed specifically at an individual in a face to face encounter – create significant barriers to a successful suit on this theory. Therefore, Eminem's music may not be regulated via the fighting words doctrine.

\section*{III. The Protection of Minors}

Under the eye of strict scrutiny, the Court has also permitted narrowly tailored content based speech restrictions that are pointed at a compelling state interest.\textsuperscript{134} However, this burden on free speech must also be the least restrictive alternative available to the legislature.\textsuperscript{135} Moreover, the Court has not been quick to approve

\begin{footnotes}
\footnotetext[133]{Id.}
\footnotetext[134]{United States \textit{v.} Playboy Entm't Group, Inc., 120 S. Ct. 1878, 1886 (2000); Sable Communications \textit{v.} FCC, 492 U.S. 115, 126 (1989).}
\footnotetext[135]{Reno \textit{v.} American Civil Liberties Union, 521 U.S. 844, 874 (1997); Sable Communications \textit{v.} Cal., Inc., 492 U.S. at 126.}
\end{footnotes}
permissible state interests. Nevertheless, the Court has found a compelling interest in protecting the physical and psychological well being of minors. Indeed this interest has been extended to effect a complete ban on children's access to particular material—a ban that would not survive Constitutional muster if applied to adults.

Like the First Amendment itself, however, the government's interest in protecting children is not absolute. For instance, the Court has gone past the state's asserted interest involving regulations requiring cable operators to either fully scramble or time channel sexually explicit channels. Furthermore, the Court has invalidated legislation grounded in the justification of protecting minors where the regulation criminalized the knowing transmission of obscene or indecent materials to minors over the Internet. Ultimately, the Court will not allow the government's interest in protecting children to "reduce the adult population ... to ... only what is fit for children."

In particular, the Court has repeatedly noted the importance of protecting minors from inappropriate materials broadcast over

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136 See Cohen v. California, 403 U.S. 15, 21 (1975) (holding that even a narrowly tailored restriction on speech may not be permissible where the state is only interested in protecting the sensibilities of the listeners; Americans are expected to protect their own sensibilities by simply "averting our eyes").

137 Sable Communications of Cal., Inc., 492 U.S. 115.

138 Ginzburg v. New York, 390 U.S. 629, 639-640 (1968) (noting that "the world of children is simply not part of the adult realm"); see also Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989); New York v. Ferber, 458 U.S. 747, 756-757 (1982). In Butler v. Michigan, the Court concluded that a statute which intended to protect the sensibilities of minors was overbroad because it also intruded on an adult's access to certain indecent materials thereby reducing adults to a child's sensibilities—certainly not a narrowly tailored end. Butler v. Michigan, 352 U.S. 380 (1957).

139 See Playboy Entm't Group, Inc., 120 S. Ct. at 1890; Reno v. ACLU, 521 U.S. at 875.

140 Playboy Entm't Group, Inc., 120 S. Ct. at 1890 (striking down a content based speech restriction grounded in a protection of minors justification).

141 Reno v. ACLU, 521 U.S. at 875.

142 Id. at 874 (citations omitted).
radio and television, including Cable TV. There are four reasons the Supreme Court has declined to treat regulations affecting the Broadcast Media with strict scrutiny: (1) children have unrestricted and frequently unsupervised access to the broadcast media; (2) broadcast media is an overly invasive force in every American's life that must be couched in a person's fundamental right to privacy in her own home; (3) non-consenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Essentially, the Court has permitted regulations restricting speech via a traditional broadcast medium because of the invasiveness of the broadcast and the substantial likelihood that a child could be easily affected by indecent material simply by turning on the radio or television.

In *United States v. Playboy Entertainment Group, Inc.*, the Court concluded that § 505 of the Telecommunications Act of 1996 violated the First Amendment even though the legislation was based on a compelling state interest—the protection of minors from signal bleed. Specifically, § 505 required cable television operators supplying channels “primarily dedicated to sexually oriented programming” to fully scramble or channel their transmission during hours when children were less likely to be

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145 *Pacifica Found.*, 438 U.S. at 748-749.
146 Id. at 731.
148 See *Playboy Entm't Group, Inc.*, 120 S. Ct. at 1886 (recognizing a need for restricting minor's access to sexually oriented programming); *Reno v. American Civil Liberties Union*, 117 U.S. 2329 (1997) (acknowledging the need for regulations on “traditional media” to protect minors from otherwise mature material); *Pacifica Found.*, 433 U.S. 726 (holding that a radio station could be required to divert “adult material” to a time of day when children are less likely to turn on the radio).
149 *Playboy Entm't Group, Inc.*, 120 S. Ct. at 1893.
viewing. In response to the legislation, most cable operators chose to time channel programming such as the Playboy and Spice channels between the hours of 10 p.m. and 6 a.m. because of the technological difficulties of fully scrambling programming, absent signal bleed, inherent in analog broadcasting. Playboy brought this suit seeking to defeat § 505 on the grounds that it violated the First Amendment because there was a less restrictive alternative available to effectuate the target of the statute. Playboy solely relied on § 504 of the same act, as that lesser restrictive means, requiring a cable operator, at the request of a customer, to fully block any programming the customer does not wish to receive. The district court held in favor of Playboy noting that as long as customers had adequate notice of their “rights” under § 504, then § 504 offered a less restrictive means to effectuate the same ends as § 505.

On direct appeal, the Court affirmed calling § 505 a “significant restriction of communication between speakers and willing adult

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150 Id. The Court assumed that many adults were likely to find the material offensive; this concern, taken together with the possibility that children may come into contact with such programming, added together to justify the statute as serving a legitimate state interest.

151 The programming of these channels belongs solely to Playboy, almost all of which is sexually explicit and subject to the statute’s restrictions. Id.

152 Id. The statute in this case was enacted to curtail the inherent problems of signal bleeding, the phenomenon occurring when a picture is effectively scrambled on an analog system, standard broadcasting technology, but allows some or all of the picture or audio portions of the broadcast to be heard or seen. Id. It was technologically infeasible for most operators to be sure that their broadcast was fully scrambled, and thus, most operators chose to time channel their broadcasts thereby removing this type of programming from two thirds of the day in all homes and cable service areas regardless of the presence of children or viewer preferences. Id. at 1886.

153 Playboy Entm’t Group, Inc., 120 S. Ct. at 1883.

154 Id. at 1883-1884.

155 Id. at 1884. The district court went on to explain what it meant by “adequate notice:” operators would be required to communicate to their subscribers that signal bleed may result on channels which primarily broadcast sexually explicit material and this created a scenario where children may view signal bleed without their parent’s consent, so the cable company was making available channel blocking devices free of charge. Id.
listeners, communication which enjoys First Amendment protection.”156 In so holding, the Court noted that § 505 effected a total ban on channels portraying primarily sexual material, an unacceptable result considering the availability of a less restrictive regulation, found in § 504.157 The Court continued noting that “all content based restrictions are [presumed] invalid,”158 and the burden remained on the government to overcome that burden.159 Hence, without a showing that signal bleeding is a recurring and persistent problem, the government is barred from making such a sweeping regulation.160 The problem, according to the court, had simply not been demonstrated in this case.161

In light of the above, Eminem’s speech broadcast via radio or television transmission may be restricted in order to protect the physical and psychological well being of children.162 Considering the legislature’s ability to effect speech restrictions on radio and television transmissions in order to protect minors, this is the best possible alternative for effecting a regulation on Eminem’s music. However, that restriction will be limited, as it is, to radio and television broadcasts. Furthermore, it follows from Playboy, that any speech limitation in this context will have to be the least restrictive available.

The same type of restrictions, however, are not available on the Internet, because the Internet is not a traditional broadcast

156 Id. 1885-1886.
157 Id. at 1888.
158 Id. (quoting R.A.V v. The City of St. Paul, 505 U.S. 377, 382 (1992)).
159 Playboy Entm’t Group, Inc., 120 S. Ct. at 1888.
160 Id. (referring, in part, to the district court’s opinion at 30 F. Supp. 2d 702, 708-709, 718 (Del. 1998)). The court noted that the Government had failed to present any evidence, with few exceptions, that there had been any complaints since 1982 when Playboy began broadcasting. Id. at 1890.
161 Id. at 1893.
162 Cf. id. at 1886 (permitting a total ban as a result of a content based restriction only where a total ban is the least restrictive available alternative, no matter that the content based restriction has been effectuated to shield children from inappropriate behavior); FCC v. Pacifica Found., 433 U.S. 726 (1978) (holding that the FCC may have required a New York radio station to delay a broadcast of George Carlin’s “dirty words” until a time when minors were not likely to be listening).
The reasoning for restricting speech in traditional broadcast media based on the state’s interest of protecting minors does not apply to the Internet for three reasons. First, users seldom encounter content on the Internet accidentally. Users are usually presented with a title, a description, or a warning before they encounter an actual web site on the Internet, thereby reducing the chances that users encounter potentially offensive material accidentally. Second, the process of actually accessing a web site involves a series of affirmative steps that do not have analogous counterparts in more traditional broadcast media. Third, parental control devices are available that help, at least in part, to block minor’s access to “undesirable” sites. A restriction on Eminem’s speech as “broadcast” on the Internet would not be as easily defensible.

Nevertheless, while some types of restrictions are available, their effectiveness is questionable. For example, even with this type of available restriction, minors can still buy the album in stores because of lax retail enforcement of the recording industry’s parental advisory label. Further, they can borrow albums from friends or download MP3 files from the Internet. Ultimately, there is no way to wholly shield minors in accord with the First Amendment from what is otherwise protected speech for adults.

Section III of this paper discusses more fully parental and industry responsibility in preventing Eminem’s music, and other forms of similarly situated entertainment from falling into the hands of minors. These types of voluntary actions, on the parts of industry and parents are probably the most realistic answer to restricting protected speech in a democracy that places speech at the pinnacle of freedom.

163 See Reno v. ACLU, 521 U.S. at 854 (limiting the legislature’s ability to justify content based speech restrictions on the protection of minors to traditional media).
164 Id.
165 Id.
166 Id.
167 Id.
While Eminem’s music may only be exemplary of the presence of violence and indecency that punctuates American culture, it is representative of a serious cultural concern which has even caught the ear of the President. Part A of this section will explore the recording industry’s efforts at self-regulation and the realistic effects of those efforts. Part B will look at the 2000 presidential election and the promises candidates have made in response to the concerns the public has regarding the content of today’s entertainment.

A. Self-Regulation: Labels Speak the Truth

In 1985 the Recording Industry of America unveiled its parental advisory program. This program consisted solely of identifying recordings with explicit lyrics or lyrics which contained strong graphic references to violence, sex, or drugs with a parental advisory label. The application of the label is left exclusively to the province of each recording company and their artists. This method of self-regulation is the recording industry’s attempt at curbing explicit speech from the ears of minors and delicate adults in accord with the First Amendment. While Eminem’s recordings do in fact bear this label, the effectiveness of the advisory label on Eminem’s music, or any other recording for that matter, is yet to be seen.

On June 1, 1999, President Clinton, echoing Congressional requests, asked the Federal Trade Commission to study certain

169 Id. at 21-22.
170 Id. at 22.
171 See id. at 27. Even though 74% off parents surveyed in a consumer survey conducted at the Commission's request in May and June 2000 reportedly were satisfied or very satisfied with the advisory label, only 9% of those who restrict their children's music use the labeling system at all. Id.
marketing and advertising practices of the movie, recording, and video game industries.\(^\text{172}\) Specifically, President Clinton requested that the Commission investigate whether those practices target material directly at children that the industries themselves find inappropriate for minors.\(^\text{173}\) Although all three of these industries have already undertaken efforts to “protect” their audience, violent episodes like the Columbine massacre in Littleton, Colorado continue to occur.\(^\text{174}\) Hence, both scholars and parents continue to point fingers at the entertainment industry as at least a partial cause of the omnipresence of sex and violence on Main Street.\(^\text{175}\)

Over a fifteen-month period, the one million dollar report treating each industry separately, examined the current state of self-regulation, the actual practices of the industry, and the ultimate effect on the consumer market.\(^\text{176}\) Utilizing this approach, the Commission concluded: (1) each industry should expand and/or establish trade practices prohibiting the marketing of violence to minors; (2) compliance with the self regulatory systems already in place at the retail level must be improved; and (3) the parental awareness of each industry’s labeling system should be increased.\(^\text{177}\) In specific regard to the recording industry, the Commission, paying particular attention to the industry’s labeling system, concluded that the industry’s attempt at self-regulation was deficient for failing to convey sufficient information to the consuming public.\(^\text{178}\)

The recording industry’s current labeling system is too generic a remedy.\(^\text{179}\) Besides being left to each recording company’s discretion, the parental advisory label covers a wide range of

\(^{172}\) Id. at 1.

\(^{173}\) Id.

\(^{174}\) Id. at 1-2.

\(^{175}\) Id.

\(^{176}\) Id. at 2-3; Talk of the Nation: Federal Trade Commission’s Report on the Entm’r Industry’s Marketing of Violent Products to Young Children (NPR radio broadcast, Sept. 12, 2000).

\(^{177}\) FTC report at 54-55.

\(^{178}\) Id. at 26-27.

\(^{179}\) Id.
content. There is no way for a discerning consumer to differentiate between material that has been labeled for violence, sex, drug use, or language. Furthermore, there is no indication, as distinguished from the electronic gaming industry's labeling system, of age appropriateness. Ultimately, the Commission concluded that the music industry does not provide enough information about the content (violent, sexual, or otherwise) of musical lyrics for parents to make intelligent decisions pertaining to which music their children listen.

In response to these conclusions about the insufficiency of the recording industry's labeling system, as well as the Commission's other industry specific findings, Senator John McCain organized a special hearing of the Senate Commerce, Science and Transportation Committee to discuss the results of the Commission's findings. Specifically, the Committee addressed the recording industry's "basically useless" labeling system, the industry's failure to provide any relevant information to parents

180 Id. at 26.
181 Id.
182 Id. The electronic gaming industry has developed a series of ratings, which has enjoyed some success, that attempts to classify its products by age appropriateness. See id. at 41-42.
183 Id. at 27. In so concluding, the Commission cited a consumer survey conducted at its own request that found less than half of the parents surveyed viewed the label as an effective medium for conveying information relating to the level of violence in music. Id. Furthermore, the Commission cites the American Academy of Pediatrics for the proposition that "the public, and parents in particular, should be made aware of sexually explicit, drug-oriented, or violent lyrics on compact discs, tapes, music, videos, and the Internet. The music industry should develop and apply a system of specific content-labeling of music regarding violence, sex, drugs, or offensive lyrics." Id. at 79 n.145 (citing Impact of Music Lyrics and Music videos on Children and Youth, 96 PEDIATRICS 1219 (Dec. 1996) (available at www.aap.org/policy/01219.html (visited July 31 2000)).
and consumers, and the complete absence of enforcement at the retail level.185

1. Music in Commerce

Although Senator McCain attempted to avoid free speech concerns by explicitly stating the hearings were in regard to "industry responsibility," and not "Government censorship," First Amendment concerns ran throughout the hearing.186 Senator Orin Hatch, connecting First Amendment guarantees with the notion of responsibility and accountability, remarked, "you cannot regulate decency or legislate taste."187 Senator Hatch, in setting the framework for the remainder of the hearing, outlined a generalized solution that not only placed a burden of disclosure on the shoulders of the entertainment industry, but also imposed the ultimate responsibility for entertaining children on America's parents.188 In particular, Senator Hatch demanded: first, the entertainment industry stop hiding behind a "shibboleth of censorship" by asserting the puritanical notion that any regulation, even self-regulation, is violative of the First Amendment; and second, parents must take responsibility for entertaining their children, even if this means turning off the television or unplugging the CD player.189

186 See id. at 4 (statement of Sen. John McCain (R-AZ)).
187 Id. at 17 (statement of Sen. Orin Hatch (R-UT)).
188 Id. at 18.
189 Id. at 18-19. Senator Hatch also demanded that society recognize the importance of faith and the necessity of a strong moral code for the success of society. Id. at 19. Although this may raise other First Amendment concerns, it is outside the scope of this discussion.
a. A Conservative Call to Arms: Stop Hiding and Label!190

Conservative members of the panel discussion were quick to point fingers at the entertainment industry for hiding behind the veil of the First Amendment and not acting out of a sense of moral responsibility, and particularly, for maintaining a deficient labeling system.191

The entertainment industry should be chastised for failing to take responsibility for its own actions! “With freedom comes responsibility,” Senator Hagel asserted, “freedom of expression is not freedom from accountability. Each of us is accountable for our own actions, everything we say and do, and yes, we are also accountable for what we create.”192 Senator DeWine furthered this sentiment, noting that the entertainment industry has ignored its moral responsibility long enough.193 Adopting some sort of moral responsibility for what entertainers create is not a First Amendment violation, it’s just the right thing to do, so “just do it.”194

The entertainment industry has asserted an inability to adopt uniform labeling standards because of the inequities of community standards in American cities and regions, but there is no “difference between those who live in Boston or Bismarck about whether they think a 12-year-old would not be harmed, in the opposite, by listening to a CD that talks about murdering and raping your mother.”195 Finally, Lynnee Cheney issued a call to

190 Although the terms “conservative” and “liberal” are used throughout this discussion in a generalized sense, the terms are used only to refer to the two sides of the debate which emerged at the Commerce Committee’s hearing.
191 See Senate hearing at 18 (statement of Sen. Orin Hatch (R-UT)).
192 Id. at 31 (statement of Sen. Chuck Hagel (R-NE)).
193 See id. at 27 (statement of Sen. Mike DeWine (R-OH)).
194 Id. at 28 (statement of Sen. Mike DeWine (R-OH)).
195 Id. at 66 (Sen. Byron Dorgan (D-ND)). Senator Dorgan’s reference to song lyrics about raping and murdering your mother is a direct reference to
arms: people of stature should ask their friends who run the corporations that produce these recordings to stop funding these types of projects. 196

The recording industry should adopt a meaningful labeling system, similar to nutritional labeling, so that parents may more readily identify specific content. 197 Not only must recordings bear these labels, but the music industry must also adopt a uniform procedure making all lyrics available to parents, so that parents may make individualized decisions. 198

b. The Liberal Stronghold: A First Amendment Standoff

Danny Goldberg, CEO and co-owner of Artemis Records, responded to allegations that the entertainment industry lacked responsibility: "[there has] always been entertainment that's very offensive to some people and very popular with others." 199 At some point Americans have to trust their own conscience and the sensibility of the people around them. 200 The reality remains that the sales of controversial recordings at issue are in demand by millions of people. 201 Thus, the best battleground for these decisions is the marketplace. 202 At the end of the day, lyrics,

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196 Senate hearing at 41-42 (statement of Lynne Cheney, former chairperson of the National Endowment for Humanities).
197 Id. at 83 & 89 (Dr. Daniel B. Borenstein, President of the American Psychiatric Association & Mr. Jeff McIntyre, Legislative and Federal Affairs Officer for the American Psychological Association).
198 Id. at 43 (statement of Lynne Cheney, former chairperson of the National Endowment for Humanities). Neither side of the debate disagreed with making lyrics more available to parents so that they make decisions on a case by case basis. See id. at 112.
199 Id. at 68 (Danny Goldberg, CEO and co-owner of Artemis Records).
200 Id.
201 Id. at 59.
202 Id. at 66.
above all else, are functions of art.\textsuperscript{203} Thus, this type of self-regulation, regulation by political intimidation, is the equivalent of censorship.\textsuperscript{204}

The "call to label" runs afoul of values at the heart of American democracy. Senator Inouye commented:

\begin{quote}
All we do in this free and loving land is to try to give people some advance information about what it is they eat, what it is they do, what they see, what they read. And then let them make those judgments, much as we do in an election booth …. It is imperfect. It is clumsy and awkward. And sometimes it causes frustration, makes us vexed. That is part of being a free republic.\textsuperscript{205}
\end{quote}

It is important to note, at the outset of this response, that both sides agreed that lyrics should be made available to the parents and the public in general, so that consumers may make an informed decision.\textsuperscript{206} Nonetheless, Jack Valenti, president of the Motion Picture Association of America, concluded, labels or ratings only work if people use them,\textsuperscript{207} and the FTC’s study shows that 45\% of parents use the labels to make a purchase decision.\textsuperscript{208} Mr.

\begin{flushleft}
203 \textit{Id.} at 45. As a pertinent illustration, Mr. Goldberg referred to a love song by Roberta Fleck entitled “Killing Me Softly with His Song.” \textit{Id.}
204 Senate hearing at 46 (Danny Goldberg, CEO and co-owner of Artemis Records).
205 \textit{Id.} at 101 (Sen. Daniel K. Inouye (D-HI)).
206 \textit{See id.} at 112. \textit{See also id.} at 60 (Danny Goldberg, CEO and co-owner of Artemis Records) (noting that providing lyrics is the best methodology to aid parents in their decision making process).
207 \textit{Id.} at 99 (Jack Valenti, President and CEO of the Motion Picture Association of America).
\end{flushleft}
Goldberg added, it is nearly impossible to rate words -- words and pictures are completely different mediums.\(^{209}\) Quite frankly, the criteria for labeling art is difficult -- not all fourteen-year-olds are the same.\(^{210}\) Thus, there cannot be an easy way to label music, it is not a breakfast cereal, criteria cannot and will not be broken down into a simple one sentence or one paragraph explanation.\(^{211}\) Any additional information consumers seek about the content of musical recordings, which cannot be ascertained from the public dissemination of lyrics, will be available through other media outlets.\(^{212}\)

Quite simply, labels are only effective if parents use them.\(^{213}\) Despite the FTC's conclusions, parents are refusing to help themselves, and so, they have chosen to cop out by turning to Congress to solve their inherently personal problems.\(^{214}\)

c. Parents, Entertain your Children!

The second prong of Senator Hatch's proposed solution, which began the hearing, looks to parents to take more control of their children's entertainment.\(^{215}\) Along these lines, the more liberal of the two groups in attendance at the hearing challenged today's parents to do more.\(^{216}\) According to a Garin-Hart study, today's children look to their parents first and then to their teachers and their churches for proper guidance on the types of moral responsibility the conservative side would place on the

\(^{209}\) Senate hearing at 45 & 69 (Danny Goldberg, CEO and co-owner of Artemis Records).

\(^{210}\) Id. at 60.

\(^{211}\) Id. at 57 & 60.

\(^{212}\) Id. at 58 (citing Crime and Punishment and Native Son as historical examples of disseminating information / warnings about the content of art to consumers through the media).

\(^{213}\) See id. at 119 (Sen. John Breaux (DE-LA)).

\(^{214}\) See id. (citing a Kaiser Foundation study concluding that 97% of Americans do not use the resources, mainly the v-chip, available to them).

\(^{215}\) See supra. note 189 and accompanying text.

\(^{216}\) Senate hearing at 22 (statement of Sen. Joseph Lieberman (D-CT)).
entertainment industry. Thus, according to Strauss Zelnick, President and CEO of BMG entertainment, the best methodology is to give parents the responsibility of entertaining their children.

d. Family Values

In response to placing more responsibility on the shoulders of America’s parents, the conservative side of the discussion asserted the proposition that the entertainment industry is at war with today’s parents. The entertainment industry, Senator DeWine pointed out, like the tobacco companies previously, are trying to come between parents and their children. Representative Hyde added, even responsible parents need help from Congress. Furthermore, Senator Hollings added, parents are not willing to chase their children throughout the house every day all day to monitor the television they watch, the music they listen to, and the video games they play.

B. 2000 Presidential Election: Politics and Entertainment

While campaigning, both Al Gore and George W. Bush proffered their individual opinions as to the current state of the entertainment industry, and in particular Eminem. On one hand, Al Gore and Joseph Lieberman, the Democratic candidates for
president and vice president respectively, seek to confront the entertainment industry and force them into self-regulation. On the other hand, however, George W. Bush and Dick Cheney, the Republican candidates for president and vice president respectively, tend to favor drafting a coexistence agreement with the entertainment industry.

Specifically Al Gore pledged, "Joe and I are going to establish a six-month period to hold the industry accountable. If, at the end of that six-month period, there is not yet an acceptable industry response, then we are prepared ... to evaluate whether additional legislation is needed." In another instance, Mr. Gore recommended that the FTC should step in and penalize the industry under the FTC's false advertising regulations if the entertainment industry failed to take sufficient action at the end of its six-month honeymoon. This is not a new stance for either Gore or Lieberman. A decade ago Gore and his wife Tipper lead the original crusade against the recording industry which produced the current self-administered labeling system. In addition, Lieberman has issued warnings to the leaders of the entertainment industry that they would "invite legal restrictions on their freedom" if something was not done to deter minors' access to violent entertainment.

This, of course, is not to say that the Democratic candidate's actions are not without question. Although Gore and Lieberman appear to have taken a hard line stance on the issue of self-regulation in the entertainment industry, during the 2000

223 See infra. notes 226-229.
224 Mark Hornbeck & Charlie Cain, Morals Key in Picking President, Voters Say Clinton Scandal has Many Taking Tougher Look at Values, THE DETROIT NEWS, October 2, 2000, at 1.
presidential election, the presidential candidates also received $10.2 million from entertainment related fundraisers over the course of two days.\textsuperscript{229} Additionally, on the day after the Senate Hearings and only three days after the release of the FTC report, Tipper Gore, Al Gore’s wife who formerly championed a “labeling” cause in the recording industry and a long time advocate of voluntary labeling, in responding to a reporter’s question had no idea who Eminem was or that Lynnee Cheney had testified the previous day before Congress on the subject of musical lyrics.\textsuperscript{230} Only later that same day did she respond to a more generalized question regarding rock lyrics, “Our position then and our position now is that we don’t want censorship. It’s great that the music industry has been doing voluntary labeling.”\textsuperscript{231}

George Bush, on the other hand has pledged “a return to decency,” and promises to “work with entertainment leaders, advertisers and others to encourage less violence, substance abuse, foul language and sexuality.”\textsuperscript{232} Bush has even joked in answering a question on his opinion of Eminem by responding that he prefers Snickers or Three Musketeers.\textsuperscript{233} Ironically, Bush’s campaign promise echoes that of the liberal faction of participants in the Senate hearing. Bush has called for parents to exercise more control and discretion over the movies, video games, and CD’s that entertain their children.\textsuperscript{234}

\textsuperscript{231} \textit{Id.}
\textsuperscript{232} Mark Hornbeck & Charlie Cain, \textit{Morals Key in Picking President, Voters Say Clinton Scandal has Many Taking Tougher Look at Values}, \textit{THE DETROIT NEWS}, October 2, 2000, at 1.
\textsuperscript{233} \textit{Laugh Lines}, \textit{SOUTHERN CALIFORNIA LIVING}, Sept. 28, 2000, at 6 (quoting a submission by Ira Lawson).
what their children buy and watch on TV,” and the entertainment industry needs to be responsible for the products it puts out.235

C. The End

“Top Democrats and Republicans [have] threatened to legislate and regulate!”236 Throughout the Commerce Committee’s hearing Hollywood was called names, including “indecent, deceptive, vulgar, obscene, crass — in short, a menace attacking the minds and souls of America’s youth,” but members from both sides of the issue stuck closely to their original arguments and defenses.237 In the end, the entertainment industry agreed to make lyrics available for public dissemination, but refused to adopt or even discuss criteria for a more specific labeling program. Where does this leave the consuming public?

One suggestion came from Robert Pitofsky, Chair of the Federal Trade Commission, who asserted that legislation should be a definite consideration if self-regulation does not work.238 Is this a viable solution? Parts I and II of this article concluded that any legislation on this matter, if at all possible, would be subject to intense scrutiny from the Supreme Court. Even so, could a statute be drafted narrowly enough to both affect its purpose and still fit within the confines of the Constitution?

During the Commerce Committee’s hearings, Senator Hollings made mention of drafting narrowly defined legislation directed specifically at “excessive, gratuitous violence.”239 While all of the testimony at the Committee’s hearings was intended for the benefit of Americans and developing our culture, who is to say what

237 See id (noting that both sides if the debate were strong willed).
238 See Senate hearing at 35 (Robert Pitofsky, Chair of the Federal Trade Commission).
239 See id. at 98 (statement of Sen. Fritz Hollings (D-SC)).
“excessive gratuitous violence” is? Should we adopt an approach similar to Justice Stewart’s approach to pornography – “I know it when I see it” – or, in this case hear it?\(^{240}\) Either way, any statute attempting to define violence would ultimately face an arduous task in defining violence and sufficiently differentiating between thematic and gratuitous violence in order to avoid a successful overbreadth challenge.\(^{241}\)

The legal analysis of such legislation or legislation effecting a labeling system is likely to begin with the threshold determination of commerciality. If the legislation were determined to affect non-commercial speech, as it most likely would be, the court would have to go on and consider the basis of that restriction. Is it content based or content neutral? Most scholars agree that this type of restriction is undoubtedly content neutral, and therefore subject to the strictest constitutional scrutiny.\(^{242}\) Whereas, if the court determines that the speech at issue is commercial, the factors from *Central Hudson* must be applied.\(^{243}\) Nevertheless, because of the instability surrounding the level of scrutiny to be applied to commercial speech, the Court is likely to look at any restriction on speech, commercial or non-commercial, through the *Central Hudson* filter.\(^{244}\) Thus, the Constitutionality of such legislation would depend on the government’s ability to establish: (1) a compelling or substantial (non-commercial or commercial respectively) state interest for requiring the entertainment industry to provide appropriate information to parents and consumers

\(^{240}\) See id. at 99 (statement of Jack Valenti, President and CEO of the Motion Picture Association of America). Mr. Valenti refers to Justice Stewart’s definition of obscenity from his opinion in *Jacobellis v. Ohio*: “I know it when I see it.” 378 U.S. 184, 197 (Stewart, J., concurring).

\(^{241}\) See, e.g., Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U.L. Rev. 1487, 1490-1491 (1995) (asserting the trouble that a legislature would have in differentiating between “thematic” violence and “gratuitous” violence based in the “grave difficulty in drawing the appropriate lines [and that this difficulty] would turn any such inquiry into a jurisprudential quagmire”).

\(^{242}\) See id. (noting that a even a benign governmental intent in affecting such a compelled labeling system would be irrelevant).

\(^{243}\) See supra. note 34.

\(^{244}\) See supra. notes 31-34 and accompanying text.
The problem with this area of proposed self-regulation is that it just cannot work within the framework of our government as established by the Constitution. The First Amendment grants a wide scope of protection to a virtually indefinable spectrum of expression. The First Amendment protects this “disparaging” music and these “evil” lyrics.

As an aside, it seems unusual that the wife of the Vice-President of the United States (also the Democratic candidate for President) and the wife of the Republican candidate for Vice-President seem to have adopted the viewpoints of the wrong spouse. Tipper Gore thinks that the recording industry’s doing great at voluntary labeling, while her husband thinks that the record labels should be given six months to clean up their act because their current practices are despicable. Lynnee Cheney, on the other hand, has issued a call to her wealthy friends at Interscope and other labels to stop funding projects that are deplorable, whereas her husband’s platform endorses voluntary negotiations with the recording industry. If the leaders of our country cannot even be consistent with the public actions and statements of their own wives, why should we believe that either side has any bona fide intent to correct a problem that may or may not really exist? At the end of the day, especially with the thought of the dollar amounts that the entertainment industry has contributed to both parties looming on the back burner, this type of gouge in the credibility of both sides leads one to believe that this is nothing more than an election year buzz. Politicians know, especially from recent experience with the Communications Decency Act and the Telecommunications Act of

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245 See supra. notes 225-229, 232-235 and accompanying text.
246 See supra. notes 200, 232-235 and accompanying text.
1996, that they will be the first to be burned by the First Amendment for trying to legislate in an arena where they have no business playing ball.\textsuperscript{247}

Is it possible for Congress to mobilize according to whatever consensus may be derived from Senator McCain's hearing? Is it possible for either Gore or Bush to effectuate what they promise? The answer is clearly no. While the First Amendment's prohibition on restricted speech most certainly applies to governmental action, it is recognized that the government is only restricted from enacting legislation and promulgating regulations that impede on free speech.\textsuperscript{248} The First Amendment's prohibition does not extend to governmental action absent an "actual or threatened imposition of governmental power or sanction."\textsuperscript{249} Furthermore, the Constitutional prohibition does not extend to self-regulating activity except where a nexus can be established between the private action and the governmental action.\textsuperscript{250} Assuming that legislation is not passed, but instead, the industry begins to begrudgingly adopt practices that it would not ordinarily adopt but for the threat of legislation, the Supreme Court has implied that this looming threat is not enough to establish a First Amendment violation. Yet, Mr. Goldberg indicated that this type of de facto censorship effected through a threat of legislation is just as illegal as direct action taken by the legislature. This thought bears further consideration. Can Congress legislate without actually passing legislation? The Supreme Court has said yes, so long as the Government has exercised sufficient coercive power.\textsuperscript{251} The entertainment industry could very easily establish

\textsuperscript{247} See Playboy Entm't Group, Inc., 120 S. Ct. 1878; Reno v. ACLU, 521 U.S. at 874.

\textsuperscript{248} Penthouse Int'l Ltd. v. Meese, 939 F.2d 1011, 1017 (D.C. Cir 1991).

\textsuperscript{249} Id.

\textsuperscript{250} See Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982); Blum v. Yaratsky, 457 U.S. 991 (1982). The requisite nexus to state action is established either through: one, showing the private actor in a traditionally defined state role; or two, establishing that the government has exercised sufficient coercive power or rewards for the self regulation that the action is easily assignable to the government. See id.

\textsuperscript{251} See id. The requisite nexus to state action is established either through: one, showing the private actor in a traditionally defined state role; or two,
any requisite nexus between future self-regulation and the pending political threats. The government today treads on thin ice.

The best answer is voluntary action. Although the entirety of the entertainment industry is quick to put up the First Amendment’s shield, this knee jerk response is not a cop out. It is the law. It is true that all industry, not just the recording industry, should produce responsibly. It is also true that parents should rear their children responsibly. However, it is strange that politicians are forcing this type of responsibility onto these companies; while at the same time the shareholders of the same companies are pushing for increased profits. Perhaps it is important to note that the Interscope label, Eminem’s producer, produced seven out of the twenty best selling albums of 2000. Additionally, all but one of those recordings bears the parental advisory label. Are Congress and the 2000 Presidential hopefuls looking to impose restraints, voluntary or otherwise, on America that Americans have not asked for? It seems trite to acknowledge the fact that Americans speak through the wallets. However, we, as Americans, “speak” in the marketplace and we “speak” to affect political activity. Therefore, one can only assume that since we are speaking from our wallets in favor of these products which are purported to be so despicable and offensive, then officially restricting or curtailing these products any more starts to appear like a de facto restraint on the speech of the people. The people have spoken – put your money where your mouth is!

PART V. CONCLUSION

It is clear to me that not a great deal could be done consistent with the Constitution beyond some

establishing that the government has exercised sufficient coercive power or rewards for the self regulation that the action is easily assignable to the government. See id.

253 Id.
efforts to jawbone the industry itself to be more honest in what it is doing.\textsuperscript{254}

There is not much more of a Constitutional answer to the American issue Eminem exemplifies other than to ask the entertainment industry nicely to curtail its production of violent and sexual products according to its own self-regulation. However, what is so bad about letting an industry whose success and failure pivots on consumer spending control what it releases to the public? What is so bad about letting parents make individual decisions about what they believe their own children should and should not see and hear? What is so bad about letting the marketplace of ideas ferret this problem out?

Parents have a constitutional right to decide what’s best for their children.\textsuperscript{255} So why will Congress not let them? Ironically, even Eminem makes this assertion in his music. In \textit{Who Knew}, Eminem wonders why there are three kids with their seventeen year old uncle at a Schwarzenegger movie, “Ain’t they got the same moms and dads who got mad / when I asked if they like violence?”\textsuperscript{256} In another instance, he questions the parent’s role in the Columbine massacre. “When a dude’s getting bullied and shoots up your school / and they blame it on Marilyn and the heroin / where were the parents at?”\textsuperscript{257}

Becoming a \textit{good} parent is obviously no small or easy feat. Nonetheless, parents must be able to handle the basic responsibilities of raising their own children, including instilling the framework of a value system. Yes, it is difficult in this day in age when the divorce rate has exceeded 50%, and millions of kids let themselves into their own house after school. But none of this

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{255} Id.
\item \textsuperscript{256} Eminem, \textit{Who Knew}, on MARSHALL MATHERS LP (Aftermath/Interscope 2000).
\item \textsuperscript{257} Eminem, \textit{The Way I Am}, on MARSHALL MATHERS LP (Aftermath/Interscope 2000).
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removes the original decision parents make to bring a child into this world. At some point, parents have to be able to trust their children. Parents must be able to teach their own children between right and wrong. An ancient maxim concludes, give a man a fish, and he eats for a day; teach a man how to fish, and he eats for a lifetime. Children must be able to eat for a lifetime.

The Davidson court, as a final note in its First Amendment analysis, points to a fear that a holding in Ms. Davidson's favor would likely lead broadcasters down a road of self censorship out of fear of the consequences of legal liability.\(^2\)\(^5\)\(^8\) In other words, a finding of liability against an artist under one of the established "exceptions" to the First Amendment for atrocities that result after the broadcast of her work would start an uncontrollable slide down the mythical slippery slope. This result has long been thought to create a substantial chilling affect speakers and listeners.\(^2\)\(^5\)\(^9\) The court continued on in dicta, however, to make the following commentary on the facts of the case:

2Pacalypse Now is both disgusting and offensive. That the album has sold hundreds of thousands of copies is an indication of society's aesthetic and moral decay. However, the First Amendment became part of the Constitution because the Crown sought to suppress the Framers' own rebellious, sometimes violent views. Thus, although the Court cannot recommend 2Pacalypse Now to anyone, it will not strip Shakur's free speech rights based on the evidence presented by the Davidson's.\(^2\)\(^6\)\(^0\)

Tupac Shakur and Eminem have their own right to speak as do Larry King or Lynne Cheney. Our own democracy was founded on ideals that grew out of individualized liberties, like the freedom to speak your mind – the freedom to express yourself. Why then do we, as Americans, give so much flack to people who present

\(^2\)\(^5\)\(^8\) See Davidson, 1997 U.S. Dist. LEXIS 21559, at * 70.
\(^2\)\(^5\)\(^9\) Id.
\(^2\)\(^6\)\(^0\) Id.
unpopular ideas? Should we not welcome the weird and the unusual? Eminem has put the answer rather colloquially in justifying his own non-acceptance:

... it seems that the media immediately / points a finger at me / so, I point one back at 'em but not the index or the pinky / or the ring or the thumb. It's the one you put up / when you don't give a fuck when you won't just put up / with the bullshit they pull cause they full of shit too.261

Americans cannot point fingers at the entertainment industry for producing more of what we, as Americans and as consumers, are spending our money on. We cannot count on a profit based industry to shy away from making money, nor should we want the industry to provide anything other than what we spend our money on.

Forcing the recording, or the entertainment industry on a whole, either by legislation or public threat to start instilling their own virtues on what is and what is not appropriate for consumers to receive is wholly inappropriate. Consumers now have available to them the lyrics of recording artists as well as the traditional forms of marketplace communication – praise and criticism. These are all the tools needed to be able to eat for a lifetime.

At the end of the day, what drives artists like Eminem to produce such controversial material that borders on wholly offensive? Eminem is a critically acclaimed artist, but why? “For everybody who likes to laugh at all the wrong things, this album is for you.”262 “…Eminem is simply expressing his creative impulses – putting on disc all the forbidden thoughts and scandalous scenarios that accompany adolescence and just

watching the fallout.” When Eminem is sticking his raised middle finger up our nose, he’s having so much fun that you can’t help but laugh – even as you’re horrified.” The artist’s goal is to entertain, to confuse, and to satirize. Eminem says, “I say things that people might laugh at and then go, I can’t believe I just laughed at that. I’m sicker than he is! But you were laughing at it.” So, laugh along or at least pay attention, you might actually learn something.

David Germaine

264 See id. (citing Alona Wartofsky of the Washington Post).
265 Eminem: No Holds Barred (MTV television broadcast (transcript available at http://www.mtv.com/news/gallery/e/eminem00/index2.html (visited Nov. 8, 2000)).