

# THE CENSORSHIP OF MISOGYNISTIC RAP MUSIC - A CONSIDERATION OF GENDER-BASED HARMS AND FREE SPEECH

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*The lyrics of gangster rap music have created a storm of controversy in the United States and elsewhere. This article considers the censorship of misogynistic rap music, analysing both the harm which it may do to women, and the way in which free speech principles apply to rap music. The criteria for works to be censored in New Zealand and the United States are analysed. Comments are made about how the New Zealand Classification Office should treat rap music works and it is argued that censorship of rap will rarely be justified. The article concludes by examining an interesting and fundamental difference between the free speech principles of the two jurisdictions. American free speech doctrine treats censorship based on the work's viewpoint with hostility, whereas New Zealand law advocates censorship of this kind.*

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## I INTRODUCTION

Most of the legal literature on the subject of censorship of misogynistic rap music has consisted of attacks on *Skywalker Records v Navarro*,<sup>1</sup> the one American case, since overruled,<sup>2</sup> to find a rap work obscene and thus unprotected by the First Amendment. The work in question was an album by 2 Live Crew called "As Nasty As They Wanna Be." Critics have attacked the judgment on various grounds including that it failed to properly consider the artistic merit of the album, that it wrongly found that the album appealed to the

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\* This article was submitted as part of the LLB (Honours) programme at Victoria University of Wellington.

1 739 F Supp 578 (SD Fla 1990).

2 *Luke Records, Inc v Navarro* 960 F 2d 134 (11th Cir 1992).

prurient interest, that the prosecution was racially motivated, and that the judgment ignored the cultural value of the album which has its roots in black oral traditions.<sup>3</sup>

Although the criticisms of the decision are justified in a legal sense,<sup>4</sup> they fail to address deeper concerns. It is possible that misogynistic rap causes real harm to women, similar to those advanced by "radical feminists"<sup>5</sup> as harms attributable to pornography. This article will examine two harms which may flow from misogynistic rap: the possibility that it causes sexual violence against women, and the possibility that it establishes or reinforces negative attitudes towards women.<sup>6</sup>

This paper will first identify the philosophical perspectives which influence this article. The misogyny in rap and its likelihood of causing harm will then be examined. Following this the Black feminist critique of rap, which is vital to a consideration of possible gender-based harms of rap, will be considered. Part II of the article considers how misogynistic rap is likely to be dealt with under New Zealand's censorship legislation, the Films, Videos, and Publications Classification Act 1993. It will be argued that principles of free speech should be applied where possible to censorship decisions, even though these are not expressly given as censoring criteria. The argument that because misogynistic rap embodies an ideology of misogyny it should therefore qualify as highly protected political speech will be examined and rejected. On the other hand, other, non-misogynistic political messages which exist in most rap should be protected in this way. It will be found that the self-fulfilment and market place of ideas justifications for free speech are applicable to rap music. Then two factors which are expressly mentioned in the Act, artistic merit and cultural merit, will be examined with regard to rap and it will be argued that these factors count strongly against rap censorship. Some comments will also be made about how these criteria should be applied to rap.

Part III will consider the possibility of rap being censored in the United States, where greater deference is paid to freedom of speech.<sup>7</sup> It will be argued that there is little potential for rap to be suppressed there and that current First Amendment jurisprudence does little to recognise gender-based harms, mainly because of its commitment to neutrality. Finally, part

3 See below, nn 175-179 and accompanying text.

4 Indeed the criticisms are to some extent vindicated by the Appeal Court's reversal of the District Court's decision. See below n 174.

5 This is the term which Professor Catherine MacKinnon and Andrea Dworkin use to describe themselves. J L Caldwell "Pornography - An Argument for Censorship" (1992) 5 *Canta L Rev* 171, 176.

6 It is also possible to argue that women are caused emotional harm from listening to misogynistic rap. This raises philosophical issues of its own and will also not be dealt with here.

7 See Part IV.

IV will briefly examine one major difference between the philosophical perspectives of the two jurisdictions on the topic of free speech which has been raised by this analysis: that of state neutrality. It will be shown that the United States Supreme Court is strongly opposed to the state choosing between ideas in any way, while in New Zealand, this is made compulsory by the Films, Videos, and Publications Classification Act 1993, which is biased against messages which run counter to equality. It will be argued that state intervention in suppressing messages promoting inequality is justified.

### A *Philosophical Perspectives*

This article is strongly influenced by liberal principles, which the Ministerial Committee of Inquiry into Pornography found to be "an essential and powerful influence in our kind of society."<sup>8</sup> In essence, liberals believe that individuals should be free to shape their own lives and hold whatever beliefs they wish to without undue coercion from the state. In the context of speech this means that people should be free to hold and express any views they wish, and the market place of ideas will decide which ideas are true. Power over the individual may only be exercised to prevent harm to others.<sup>9</sup>

This article is also influenced by the radical feminists' critique of pornography.<sup>10</sup> Radical feminists reject morality-based justifications for suppressing sexually explicit material. They take instead a civil rights approach that focuses on harms that sexually explicit materials which subordinate women may do to women as a class. These harms are the two listed above (causation of sexual violence against women and establishing or reinforcing negative attitudes towards women) as well as the harms to women who are coerced or brutalised during the production of pornography.<sup>11</sup> The radical feminist critique will be applied to misogynistic rap music.

Because Black women are the subject of the misogyny in rap music and are uniquely affected by it,<sup>12</sup> the Black feminist critique of misogynistic rap and of the move to censor gangsta rap will also be considered.

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8 *Report of the Ministerial Committee of Inquiry into Pornography* (Wellington, 1989) 56. The Committee found merit in the liberal tolerance for diversity, but on the debate of pornography, placed itself in the middle of feminist thought (60).

9 Above n 8, 55-56.

10 The Indianapolis anti-pornography ordinance, which was created by the radical feminists, defined pornography as "the graphic sexually explicit subordination of women," which contains at least one of the activities listed below n 200.

11 LA Tribe *American Constitutional Law* (2 ed, Foundation Press, Mineola, New York, 1988) 920-921. This third harm will not be considered here as it is not relevant to rap music.

12 See below n 34 and accompanying text.

Conservative philosophies which hold that the state should act to prevent immorality which offends against the majority's sense of decency and morality will not be examined.<sup>13</sup>

### **B *The Misogyny in Rap***

Misogyny is fairly pervasive throughout rap, and it is especially pervasive and intense in the sub-genre of gangsta rap.<sup>14</sup> This article is mainly concerned with gangsta rap, but will use the term 'misogynistic rap' to refer to all rap manifesting a misogynistic ideology. Male rappers in misogynistic rap exude male dominance and an attitude towards women which, in its mildest form, objectifies women and reduces women to their sexuality<sup>15</sup> and, at its worst, is aggressive, hateful, and violent. Misogynistic rap demeans and is abusive towards women and constantly refers to women as "bitches" or "hos" (whores). It is sometimes rape-myth affirming<sup>16</sup> and it occasionally depicts sexual violence towards women in a non-condemnatory or even glorifying manner.<sup>17</sup>

### **C *Does Misogynistic Rap Cause Harm to Women?***

The psychological and sociological studies examining whether pornography negatively affects male attitudes and behaviour towards women are still controversial. However, there is some evidence that violent sexually explicit material may increase the chance of such negative behaviour and attitudes, and there is a possibility that non-violent, yet degrading material may also have some negative influence.<sup>18</sup>

It is debatable how much pornography's potential to cause negative attitudes and behaviours towards women can be analogised to misogynistic rap's potential. Apart from being less graphic than written or visual pornography, the messages about women in misogynistic rap subordinate and demean women in a similar way to pornography. Unlike pornography however, rap is generally not sexually arousing to the target audience.<sup>19</sup> It is highly debatable how much difference this makes in terms of its influence on the receiver of

13 See above n 8, 56-57 for a fuller discussion of the conservative position.

14 A hard-core style of rap dealing with themes such as sex, crime, drugs and violence from a gangster perspective.

15 For instance it often refers to women's body parts in crude language, or refers to women by their body parts. Many rap songs consist of rappers bragging about their sexual prowess, their exploits with women and how they use and discard women.

16 For example NWA's *She Swallowed It*, on EFIL4ZAGGIN (Priority Records, 1991) includes the lyrics "the bitch will let you rape her."

17 See below nn 59-72 and accompanying text.

18 Above, n 8, 38-41.

19 Below nn 176, 181-184 and accompanying text.

the message.<sup>20</sup> If pornography's potential to arouse does lead its misogynistic ideology to be more powerfully absorbed, it could be argued that the power of music to influence mood could do the same.<sup>21</sup> The fact that many rappers are role models who influence fashion and style gives further weight to the possibility of rap influencing attitudes towards women.

A number of studies have been done on the effect of music on behaviour and attitudes, but this author has found no studies specifically on the effect of misogynistic rap music. The studies on the effect of music have been inconclusive. One study, which attempted to examine the extent to which destructive rock lyrics may influence adolescent listeners' behaviour in a negative way, found that it was "difficult to establish cause-effect relationships between the preference of adolescent rock fans for violent and destructive rock themes and their violent and destructive behaviour, and any causal links are unlikely to be simple, direct, and linear in nature."<sup>22</sup> Jeffrey B Kahn argues that no one has established that rap has caused injury.<sup>23</sup>

Nonetheless, there is some anecdotal evidence that rap music may influence behaviour. In Texas in 1992, state trooper Bill Davidson was shot dead by the driver of a car he had pulled over in a routine traffic stop. The car was stolen and its driver, Ronald Ray Howard, had just been listening to Tupac's rap song *Sister Souljah*,<sup>24</sup> which contains the lyrics:<sup>25</sup>

Cops on my tail....  
They finally pull me over  
and I laugh.

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- 20 Indeed there seems to be some debate within feminism about how much difference the sexual explicitness and arousal of pornography makes. Some feminists believe that the eroticisation of violence and rape in pornography is actual violence against women; that pornography is the theory and rape is the practice. Some feminists, however, put pornography on a different continuum and regard the negative representation and rape-myth affirming nature of pornography as merely being more obvious than the similar messages portrayed in other, more accepted, images of women. See B Brown "Debating Pornography: The Symbolic Dimensions" (1990) 1 *Law and Critique* 131, 136-139.
- 21 See JB Kahan "Bach, Beethoven and the (Home)Boys: Censoring Violent Rap Music in America" (1993) 66 *Southern Cal L Rev* 2583, 2583-2588 for an excellent discussion of the power of music and its association with violent, provocative emotions and political thought throughout history.
- 22 Indecent Publications Tribunal decision 100/92, 10, citing the study Hannelore, Miller and Stevenson "Factors Affecting Adolescents' Behaviour and Attitudes Toward Destructive Rock Lyrics" (1989) 13 *Death Studies* 287.
- 23 Above n 21, 2588.
- 24 On 2PACALYPSE NOW (Interscope Records, 1991).
- 25 J Talerman "The Death of Tupac" Will Gangsta Rap Kill the First Amendment?" (1994) 14 *BC Third World LJ* 117, 117.

Remember Rodney King,  
And I blast his punk ass.

In his criminal trial, Howard pleaded that Tupac had made him pull the trigger. After over forty hours of deliberation, this was rejected as a mitigating factor by the jury. The jury believed that the recording played a role in the crime, but did not diminish Howard's moral blameworthiness.<sup>26</sup> The wife of the slain trooper, Linda Davidson, had planned to bring civil action against Tupac, his record label, and its distributor for gross negligence in distributing the album.<sup>27</sup> Powerful though it may seem, anecdotal evidence of this nature does not prove as much as it might at first seem. Howard may have killed Davidson even if he had never heard the song. It will also be very difficult to predict whether a particular work will influence someone's behaviour to this extent.<sup>28</sup> Michelle Munn argues that there has been a shift in sociological thinking away from the theory that audiences are extremely vulnerable to speech and that people are affected in the same, immediate way (the "bullet theory") towards "recognizing audiences as more powerful entities able to ignore or selectively interpret messages that might incite dangerous or illegal conduct".<sup>29</sup>

More research needs to be done in this area before claims as to the influence of rap can be more than speculative. However, it does seem reasonable to assume that the misogynistic messages in some rap may lead to the creation or reinforcement negative attitudes towards women. Whether misogynistic rap can increase the likelihood of sexual violence against women is perhaps more debatable.<sup>30</sup>

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26 Above n 25, 118.

27 Above n 25, 117. At the time this paper was written, this suit had not been brought and it seems likely that Linda Davidson has dropped the suit.

28 As David Toop notes,

if one record is censored, where does the suppression of music stop? We all know that Charles Manson was inspired by The Beatles and "Helter Skelter". Should we have banned that? Music was cited in two recent murder cases in America. In one of them, the killer was obsessed with a U2 track. In the other, the mass murderer who wiped out the diners in a Texas restaurant listened to a non-stop soundtrack of shitkicking badass country and western. Ban all of it, and some psycho will track down a Richard Clayderman album and discover his own personal incentive to eliminate humanity.

"Takin' the Rap" *The Face* 43, 44.

29 M Munn "The Effects of Free Speech: Mass Communication Theory and the Criminal Punishment of Speech" (1994) 21 *Am J Crim L* 433, 435.

30 The Indecent Publications Tribunal noted that "[w]hile it is reasonably clear that no research has yet been able to draw a causal link between rock lyrics and subsequent negative behaviour, we are nonetheless aware that they may in theory be a contributing factor to such behaviour." Above n 22, 13.

## ***D A Black Feminist Critique of the Movement to Censor Gangsta Rap and Misogynistic Rap***

### **1 *What is the Black feminist position?***

Bringing together the different aspects of an otherwise divided sensibility, Black feminism argues that racial and sexual subordination are mutually reinforcing, that Black women are marginalized by a politics of race and of gender, and that a political response to each form of subordination must at the same time be a political response to both.<sup>31</sup>

Kimberlé Williams Crenshaw describes the position of Black women in terms of intersectionality. She states that "by tracing the categories [of race and gender] to their intersections, I hope to suggest a methodology that will ultimately disrupt the tendencies to see race and gender as exclusive or separable categories".<sup>32</sup> She argues that as a group, Black women are subordinated on the grounds of both race and gender and that through structural, political and representational intersectionality, their subordination is greater than the sum of its racial and gender parts. She also argues that the movements which seek to redress the inequalities in these two areas (feminism and anti-racism or Black awareness movements) fail to adequately address the particular plight of people at the intersection. In the context of misogynistic rap, this means that feminists focus on the misogyny and fail to recognise the pro-Black effects while people fighting for equality for the Black race see the attack on rap music as a manifestation of racism<sup>33</sup> and fail to recognise the harms it may do to women, especially women amongst their ranks. As much of gangsta rap refers to life in the ghetto, the women represented may also be afflicted with class inequalities.

### **2 *The critique***

Michael Dyson writes "There is no doubt that gangsta rap is often sexist. It is doubly wounding for black women: how painful it is for them, many of whom have fought valiantly for black pride, to hear the dissonant chord of disdain carried in the angry epithet "bitch."<sup>34</sup> Williams Crenshaw sees Black women as the primary victims of misogynistic rap. This must be correct because as well as the harm, identified by Dyson, which Black women suffer by being the subject of the misogyny in rap, Black women are also more likely to suffer from the perpetuation or creation of negative attitudes towards them. The reason for this is that

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31 K Williams Crenshaw "Beyond Racism and Misogyny: Black Feminism and 2 Live Crew" in MJ Matsuda *Words that Wound* (Westview Press, Boulder, Colorado, 1993) 111, 121.

32 Above n 31, 114.

33 For a well-reasoned argument that the overall pattern of suppression of music seems tainted with racial discrimination, see generally above n 21.

34 ME Dyson "The Nation; Gangsta Rap; The Art of Representin' the Afflicted's Story" *Los Angeles Times*, Los Angeles, United States, June 18, 1995, 2.

although many white people do listen to rap, its influence is probably more profound on Black culture as its messages are aimed at, and more relevant to, Black culture.

The position of the Black woman with respect to misogynistic rap captures the real issue at the crux of the debate. She will celebrate the increased Black pride and social commentary that rap provides, recognise its links to Black oral cultural traditions; she may well enjoy the music itself and recognise it as a valid art form. However at the same time she is being insulted and objectified and possibly having negative attitudes against her reinforced or created. Dyson criticises the hypocrisy of "rap lyrics that denounce the racist dominance of white men while glorifying without irony black male material dominance and sexual mastery of black female life."<sup>35</sup>

A possible explanation for the belittling treatment of Black women by Black male rappers is that they are attempting to increase their own sense of power in a hostile, racist world by putting down women. Another possible reason for male hostility towards females is that suggested by Tricia Rose, drawing on an interview with misogynistic rapper Ice Cube. She suggests that Black men resent the sexual power of the Black female embodied in "women's capacity for sexual rejection or manipulation of men".<sup>36</sup>

Michelle Wallace, who identifies herself as a Black feminist, considers the sexism in rap to be a "necessary evil".<sup>37</sup> She looks upon rap as a "welcome articulation of the economic and social frustrations of black youth". Wallace quotes Bell Hooks who sees rap as a rebellion against all attempts to control Black masculinity. "That rap should be anti-domestic and in the process anti-female should come as no surprise."<sup>38</sup> Wallace points out that much of the Black community considers feminism part of a hostile white culture. She further states that a Black feminist who criticised rap's misogyny would be viewed as "divisive and counterproductive". She considers that the solution to sexism in rap may lie in female rappers attacking the sexist images in rap, or at least presenting alternatives to them.<sup>39</sup>

Williams Crenshaw describes the difficulty she had as a Black woman choosing between the polarised arguments in the 2 Live Crew debate. On the one side was the charge

35 ME Dyson "The Politics of Black Masculinity and the Ghetto in Black Film" in C Becker (ed) *The Subversive Imagination; Artists, Society, & Social Responsibility* (Routledge, New York, 1994) 154, 159.

36 T Rose *Black Noise; Rap Music and Black Culture in Contemporary America* (University Press of New England, Hanover, 1994) 171-172.

37 M Wallace "When Black Feminism Faces the Music, and the Music is Rap" *New York Times*, New York, United States, 29 July 1990, 6.

38 Above n 37, quoting Bell Hooks.

39 See below part IIC2(iii).



that the *Nasty* album "objectified Black women and represented them as suitable targets for sexual violence".<sup>40</sup> On the other side of the debate stood people like Professor Henry Louis Gates, Jr. Gates, testifying at the criminal trial as an expert witness for the defence, emphasised 2 Live Crew's utilisation of African American oral traditions and argued that they were exploding the popular racist stereotype of the oversexed Black man by comically exaggerating it.<sup>41</sup>

Williams Crenshaw states that she was torn between both arguments, but fully convinced by neither. In the end she adopts the Black feminist position and decides that while she agrees that on a legal level *Nasty* should not have been found obscene,<sup>42</sup> she considers that a Black feminist critique must also fully acknowledge the misogyny of the album. Williams Crenshaw identifies the following harms in misogynistic rap: the possible connections between the images it creates and violence against women; its anti-women imagery possibly broadening the acceptable range of behaviour; the message that women's and men's value lies in their sexuality along with the unequal result that boys using their sexuality will become men and women using theirs will become whores; and finally that misogynistic rap may encourage self-hatred, disrespect and subordination. She criticises the arguments that rap should be supported despite its misogyny because it contributes to anti-racist politics or that it is necessary to the cultural integrity of the community, arguing that both these arguments "call on Black women to accept misogyny and its attendant disrespect in the service of some broader group objective".<sup>43</sup> Williams Crenshaw argues that none of the impetus that led to the prosecution of 2 Live Crew stemmed from a concern for Black women; indeed, although harm to women was given as a superficial justification of the prosecution, Black women were injured by the racist nature of the prosecution which selectively prosecuted 2 Live Crew when there were arguably many bands or acts with similar or worse content.

## II THE CENSORSHIP OF RAP IN NEW ZEALAND

Censorship in New Zealand is controlled by the Films, Videos, and Publications Classification Act 1993 (FVPCA). Section 3 of the FVPCA provides the criteria under which publications may be deemed "objectionable" by the Office of Film and Literature Classification (the Classification Office), and thereby banned.

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40 Above n 31, 121, describing the position of political columnist George Will.

41 Above n 31, 121.

42 For criticism of the decision, see below nn 175-179 and accompanying text.

43 Above n 31, 131.

## A Relevant Censorship Decisions

Rap music has been the subject of censorship decisions on two occasions to date in New Zealand, the *Bodycount*<sup>44</sup> and *Doggystyle*<sup>45</sup> decisions. Both were considered by one of the previous censoring bodies, the Indecent Publications Tribunal,<sup>46</sup> under the previous statutory criteria, the Indecent Publications Act 1963. The decisions do not create binding precedents on the Classification Office,<sup>47</sup> but they do provide useful discussions of some of the issues involved. The Classification Office's *Cannibal Corpse*<sup>48</sup> decisions deal with "death metal"<sup>49</sup> rather than rap music. They are the first sound recordings to be banned, and provide useful examples of musical works being considered under s 3(2) of the Act.

### 1 The *Bodycount* decision

The album "Bodycount" by the band Bodycount, which features the controversial song "Cop Killer", was classified as "not indecent".<sup>50</sup> The Tribunal reasoned that although it contains violent, aggressive, misogynistic and sexually explicit lyrics, it also has social importance because it "forces listeners to hear a plea from a hard, violent world [that of disadvantaged African-Americans in Los Angeles] and asks them to assess the degree to which they may be responsible for the creation of that world".<sup>51</sup> In deciding whether the album was "injurious to the public good," the Tribunal judged that the likelihood of listeners being corrupted by the album as a whole would be negligible. Their reasons for this finding

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- 44 Indecent Publications Tribunal decision 100/92. The album in this decision, Bodycount's BODYCOUNT album, is not pure rap but a mixture of heavy metal and rap. As Michael Walls argued in his submission to the Tribunal for this decision, the rapper Ice-T is the leading member of the band, and the attitudes expressed owe much to a rap background. The decision is therefore relevant to this paper.
- 45 Indecent Publications Tribunal decision 113/94.
- 46 The Act replaced the former censoring bodies, the Indecent Publications Tribunal, the Video Recordings Authority and the Chief Film Censor, with the Classification Office, which is responsible for all types of publication. See G Stanish "The Films Videos and Publications Classification Act 1993" (1994) 7 AULR 719, 720-721.
- 47 This is due to the fact that the statutory criteria have changed and that the structure of censoring bodies has changed so that the Indecent Publications Tribunal is not on the same hierarchy as the Classification Office.
- 48 *Inspector of Publications v Electric City Music Ltd* (Auckland District Court NP 3360/95, 12 March 1996). Office of Film and Literature Classification Reference Numbers 9501954 and 9501956.
- 49 A sub-genre of heavy metal, "characterised by songs that focus upon death and the afterlife, often with Satanic or demonic overtones". Above, n 48, OFLC Ref 9501954, 2 and 9501956, 2.
- 50 This term's equivalent under the new Act is unrestricted in s 23(2)(a).
- 51 Above n 44, 13.

included the fact that the album does not exhort listeners to commit crime, and that a link between lyrics and behaviour has yet to be shown.<sup>52</sup>

## 2 *The Doggy Style decision*

Snoop Doggy Dogg's album "Doggy Style" was also found not indecent. The album is misogynistic, refers to women as "bitches" and "hos," is sexuality explicit and deals with violence and crime. It is also of great artistic value; it is very original, has been hugely influential and has received good critical reviews. This was one reason why the Tribunal classified it as not indecent.<sup>53</sup> The Tribunal noted that the album was "somewhere in between" a "reflection of pre-existing negative attitudes" and a "contribution to, or even a creation of, disruptive negative attitudes."<sup>54</sup>

## 3 *The Cannibal Corpse Decisions*

Two sound recordings by the band Cannibal Corpse, "The Bleeding" and "Hammer Smash Face", were ruled objectionable by the Classification Office. "The Bleeding" features song titles such as "Fucked with a Knife", "Stripped, Raped and Strangled", and "Force Fed Broken Glass". It was ruled objectionable under s 3(2)(f) of the Act as it was found to promote and support acts of torture, the infliction of extreme violence and extreme cruelty.

"Hammer Smash Face" was ruled objectionable under ss 3(2)(a), 3(2)(c) and 3(2)(f) of the Act, as it was found to promote and support the exploitation of children for sexual purposes, sexual conduct upon the body of a dead person, and extreme acts of violence. It contains vivid descriptions of necrophilia with children, body mutilation and extreme sexual violence.

These decisions will be referred to again throughout the paper.

## B *The First Tier*

Under s 3(2) of the Act, publications must be deemed "objectionable" if they "promote or support or tend to promote or support" one of the factors listed, without any chance to examine any merit or principles of free expression which may apply, or even whether the publication is likely to cause harm. Stanish reasons that it would be possible to argue that any representation of one of the listed activities promotes it.<sup>55</sup> However it is submitted that the words should not be interpreted in this way. Admittedly, any representation may lead to injury of the public good by making people more likely to perform one of the activities, but

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52 Above n 44, 14.

53 Above n 45, 7.

54 Above n 45, 6.

55 Above n 46, 722.

the words "promote or support" can be distinguished from this as requiring something further, some active encouragement to perform the acts specified. At the least this should involve a representation in a positive light.<sup>56</sup> This interpretation is implicitly supported by the reasoning of the Classification Office in the *Cannibal Corpse* decisions. The Office does not merely rely on the description of the s 3(2) acts as showing promotion and support, but instead cites the manner of presentation.<sup>57</sup>

The requirement that the work "promotes or supports" one of the acts would appear to be premised on the assumption that a positive portrayal of an activity would be more likely to encourage people to engage in that activity than a neutral or negative portrayal.<sup>58</sup> Additionally, a neutral representation of an activity may be useful to an open discussion and a negative portrayal may serve to discourage performance of the activity.

There is certainly potential for rap music to be caught by the first tier. Some rap does depict "the use of violence or coercion to compel any person to participate in, or submit to, sexual conduct" (s 3(2)(b)). For instance NWA's "One Less Bitch" tells of a woman being gang raped then murdered.<sup>59</sup> In "Mind of a Lunatic" by the Geto Boys, the narrator tells of raping then murdering a woman then having sex with her dead body, thus also potentially activating s 3(2)(e) which deals with sexual conduct with or upon the body of a dead person.<sup>60</sup>

The crucial part in the Classification Office's decision on whether an album featuring songs like these will be caught by the first tier will be whether that album "promotes or supports, or tends to promote or support" the activity depicted. One issue will be how dominant any promotion of a prohibited activity is in the publication. For instance depictions of the use of coercive sexual conduct make up a relatively small part of the NWA album which includes the song mentioned above. Thus, although the section does not include the words "the publication *as a whole*," there still must be a point at which the small

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56 It may still be debatable whether a positive portrayal of a listed activity means that the publication is promoting that activity. The film *Pulp Fiction* is illustrative of this point; the film in places glorifies violence and links it with humour and yet it is highly debatable whether the film actually supports or promotes violence. However, if the publication is considered to be pornography it is possible that the mere depiction of activities will constitute promotion because of the context of sexual arousal.

57 See text at n 62.

58 This point was not discussed in any of the bill's readings before the House

59 From the album EFILAZAGGIN (Priority Records, 1991). The Geto Boys' *Murder Avenue* on TILL DEATH DO US PART (Rap-A-Lot Records, 1993) is similar, depicting a woman being raped, then murdered.

60 From the album THE GETO BOYS (Rap-A-Lot Records, 1990).

part the depiction of a prohibited activity plays in the album means that the publication does not promote or support or tend to promote or support that activity.<sup>61</sup>

### 1 *Whether a publication is an advocacy or a neutral / negative portrayal*

Of more importance will be interpreting whether the depiction is of a promotional or supportive nature as opposed to describing the activity in a neutral or condemnatory way. This issue will also be relevant to the consideration of a work under the second tier, as it will affect whether the publication is "likely to be injurious to the public good" and the "manner in which the publication" describes or represents one of the things listed in s 3(3).

The *Cannibal Corpse* decisions provide an indication of some factors which may indicate that a work promotes or supports an act. The Office, in holding the recordings promoted and supported the acts described, cited the sustained and gratuitous nature of the graphic descriptions; the sexually prurient, salacious and relished manner of the descriptions; and the fact that the narrative was in the first person.<sup>62</sup>

In *McCollum v CBS, Inc*<sup>63</sup> the court had to consider whether songs by Ozzy Osbourne had induced a teenager to commit suicide. The court considered that "[r]easonable persons" with "common sense" understand that music lyrics are figurative and should not be taken as "literal commands" and are not a "call to action".<sup>64</sup> It is hard to argue with this, but this does not remove the danger that impressionable individuals may be influenced.<sup>65</sup>

It is often claimed that negative messages and attitudes in rap are simply reflective of the society rap comes from rather than encouraging or contributing to such attitudes and behaviours.<sup>66</sup> Indeed gangsta rap is also often referred to as "reality" rap and has been called "unerringly precise" in its reflection of its community.<sup>67</sup> Ice-T has stated that "[i]f I felt it [violent lyrics] would push someone over the edge, I wouldn't do it".<sup>68</sup> Rap music

61 This issue does not preclude a finding of objectionable under the second tier.

62 Above n 48.

63 202 Cal App 3d 989 (1988), 249 Cal Rptr 187 (1988).

64 Above n 63, Cal Rptr 194.

65 The *McCollum* court, in the context of considering tort liability, was not prepared to find culpability for extraordinarily fragile individuals' actions. Above n 63, Cal Rptr 197.

66 This issue was dealt with in the *Doggystyle* decision and it was concluded that the DOGGYSTYLE album was somewhere in between a reflection and an encouragement of negative attitudes, above n 45, 6.

67 H Allen "Hip-Hop Madness" *Essence* April 1989, 78, cited in JC Wolfe "Sex, Violence, and Profanity: Rap Music and the First Amendment" (1993) 44 *Mercer L Rev* 667, 684.

68 From a speech he gave to Harvard Law School students. PD Csathy "Takin' the Rap: Should Artists be Held Accountable for their Violent Recorded Speech?" (1993) 24 *Uni of West LA L Rev* 43, 134.

often employs the device of hyperbole and this is probably something that most rap listeners realise. The violence and sex in many rap songs seems designed to shock and sensationalise; perhaps the censor is just one more member of the dominant community against who Black rappers want to show their defiance.

The Indecent Publications Tribunal found that lyrics being sung in the first person as opposed to the second person counted against a song being an incitement to listeners to perform the act described.<sup>69</sup> However, the Classification Office did hold that the first person songs of Cannibal Corpse promoted and supported the acts described, stating that "the first person nature of the narrative increases the impact as each song appears as a personalised account of violence".<sup>70</sup> Presumably, a song delivered in the third person would be less likely than either a second or first person song to be found to advocate doing the thing described.

The tone of the song will also be an important interpretative tool. For instance Stephen Holden argues that while gangsta rappers casually refer to topics like sex and drugs and freely express "defiance and rebellion", "they do so in a tone that is more despairing than gleeful".<sup>71</sup> Important things to consider when judging the tone include whether the beats, musical sounds and scratching are uplifting, laid back or create an angry, chaotic soundscape. The attitude with which the rapper delivers the lyrics will also be important. "One Less Bitch", mentioned above, is delivered in an aggressive, spiteful manner and the description of the rape-murder is delivered in a bragging way. The tone of the music, however, is despairing. "Mind of a Lunatic" is also delivered in a fairly dark tone and the lyrics and title recognise that the abhorrent acts and thoughts of the narrator are not those of a sane individual. "Assassins" on the same album, however, talks of killing women in a highly celebratory, if somewhat unreal and cartoon-like, tone.

It is quite possible that rap works could be caught under the first tier. This is in many ways unfortunate, as works of great artistic or cultural merit may be censored without these merits even being taken into account. As Stanish notes, "[n]o-one can doubt that the items listed are objectionable, but it seems regressive to ban them without considering their context".<sup>72</sup> The rationale behind the first tier may well be that works which promote or support the listed activities will be injurious to the public good, but the fact that, in contrast to the second tier, there is no potential to consider whether this is actually likely to be the

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69 Above n 44, 13-14.

70 Above n 48, OFLC Ref 9501956, 3; see also OFLC Ref 9501954, 4.

71 "How Pop Music Lost the Melody" *New York Times*, New York, United States, 3 July 1994, 1.

72 Above n 46, 722.

case for a particular publication is contrary to liberal principles of requiring harm to be shown before expression can be suppressed.

### C *The Second Tier*

In a consideration of a rap work's likelihood of being injurious to the public good, misogynistic rap may activate ss 3(3)(a)(ii), 3(3)(a)(iii), 3(3)(c), and 3(3)(e).<sup>73</sup> Depending on the work in question, a number of factors will probably count strongly against its deserving a classification of objectionable. It will be argued that although they are not expressly mentioned, free expression principles should be taken into account, and that these will usually count against censorship of a particular rap work. A number of factors expressly mentioned in s 3(4) of the Act must be taken into account and two of these, artistic merit and cultural merit will also usually count in rap's favour.

#### 1 *Incorporating free speech principles into the Films, Videos, Publications, and Classifications Act 1993*

Freedom of speech is recognised in New Zealand's constitutional law in s 14<sup>74</sup> of the New Zealand Bill of Rights Act 1990.<sup>75</sup> This right to free speech is not absolute and is subject, in s 5, "...to such reasonable limits as can be demonstrably justified in a free and democratic society". The High Court, in *Society for the Promotion of Community Standards Inc v Waverly International (1988) Ltd*<sup>76</sup> agreed obiter with the decision of a previous censoring body, the Indecent Publications Tribunal, in *Re "Penthouse US" Vol 19 No 5*<sup>77</sup> that:

the limitation on freedom of expression contained in the Indecent Publications Act 1963 [the previous censorship legislation], as judicially defined, is not inconsistent with the rights and freedoms contained in the Bill of Rights Act and can be demonstrably justified in a free and democratic society.

73 See text at nn 14-17.

74 Section 14 reads: "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice."

75 For a discussion of the application of the Bill of Rights Act to censorship decisions see WK Hastings "The New Zealand Bill of Rights and Censorship" [1990] NZLJ 384; above n 5, 179-180.

76 [1993] 2 NZLR 709, 727. See FM Brookfield [1993] NZ Recent LR 278, 293-294.

77 [1991] NZAR 289. See FM Brookfield [1991] NZ Recent LR 264 and [1992] NZ Recent LR 243.

FM Brookfield asserts that the new censorship guidelines provided by the Films, Videos, and Publications Classification Act 1993 are also saved by s 5 of the Bill of Rights.<sup>78</sup>

However, due to the necessarily vague and permissive criteria of the Act, whether these criteria are justified in terms of s 5 of the Bill of Rights depends to a large extent on how they are interpreted by the Classification Office. Section 6 of the Bill of Rights requires legislation to be interpreted consistently with the Bill of Rights where possible,<sup>79</sup> so principles of free speech should be read into the censorship criteria where possible.

For the following reasons it is submitted that there is ample room for free speech principles to be taken into account under a second tier censorship decision. Firstly, the whole structure for making a decision under the second tier as to whether the availability of a publication is "likely to be injurious to the public good" is open and permissive; matters are listed which must be taken into account, but the decision maker is not limited to considering only these matters or given guidance on how to balance competing factors. An assessment of what is likely to be injurious to the public good should take into account the harm done if free speech is encroached upon. Factors relevant to whether a publication deserves special protection under free speech principles, such as the political, propositional or cognitive nature of a publication (these will be discussed shortly) can be accommodated under the factors that the classification office must consider, even though they are not expressly mentioned. For instance "manner in which" under s 3(3), the "dominant effect" of the publication under s 3(4)(a), "other matters" under s 3(4)(c) and the "intended purpose" under s 3(4)(e) all allow a consideration of the above factors. Thus it would not be doing violence to the Act to incorporate free speech principles into such an assessment - indeed, s 6 of the Bill of Rights requires it.

## 2 *An analysis of free speech principles which have an impact on the treatment of rap music*

### (a) **Is music expression?**

Firstly it must be established that misogynistic rap music qualifies as expression as protected by s 14 of the Bill of Rights. The Indecent Publications Tribunal held that "[b]ooks, magazines, and *sound recordings* as defined in the Indecent Publications Act seem

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78 Brookfield, above 76, 293. However it is certainly arguable that the first tier, which provides that publications in support of certain actions will be banned without requiring a showing of harm and without regard to artistic or other merits, is not justifiable as an encroachment on free speech.

79 There is no question of the Bill of Rights overriding legislation which is contrary to it due to section 4 of the Bill of Rights.



to be protected by s 14 of the Bill of Rights".<sup>80</sup> The reasoning of the Classification Office in the *Cannibal Corpse* decisions appears implicitly to support this position also.<sup>81</sup> Music which is made up of lyrics and musical sounds is almost unquestionably expression,<sup>82</sup> as it conveys or attempts to convey meaning.<sup>83</sup>

**(b) Does rap music qualify for special protection?**

In the United States, the Supreme Court has held that "not all speech is of equal First Amendment importance".<sup>84</sup> It therefore classes some types of speech as attracting less First Amendment protection than that given to more deserving kinds of speech.<sup>85</sup> If the speech qualifies as political speech, the justification for suppressing it will have to meet very strict

- 80 *Re: "Penthouse" (US) Vol 19 No 5 and Others* (1991) 7 NZAR 289, 318 (emphasis added), relying on Canadian authority of *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983) 41 OR (2d) 583.
- 81 The Classification Office reasoned that s 14 of the Bill of Rights did not apply in the circumstances because s 3(2) of the Act - which overrides s 14 of the Bill of Rights - applied. This implies that when there is scope for s 14 of the Bill of Rights to apply (such as if music is being considered under s 3(3) of the Act), it will apply to music.
- 82 E Campbell "Obscenity, Music and the First Amendment: Was the Crew 2 Lively?" (1991) 15 Nova L Rev 159. [Page numbers are unavailable for this document on the Westlaw database]. In the American context, the Supreme Court has not explicitly stated that music is protected speech. However the courts in *Luke Records* above n 2 and *McCollum* above n 60, both treated music as protected speech. Campbell also convincingly argues that music should be considered protected speech. However she seems to be making arguments that music should not be considered low-value speech. It is submitted that this cannot be argued for *all* music, especially when the justifications she gives include the political nature and social importance of *some* music. It is interesting to consider whether music without lyrics would qualify as speech and thus deserve protection.
- 83 This is a minimum requirement for activity to qualify for expression applied by the Indecent Publications Tribunal in *Re Penthouse* above n 76 (adopting the test from *Irwin Toy Ltd v Attorney-General for Quebec* (1989) 58 DLR (4th) 577, [1989] 1 SCR 927). There was an issue in *R v Butler* [1992] 1 SCR 452; (1992) 70 CCC (3d) 129 as to whether sexually explicit material [which could include some rap music] conveyed a meaning. The Canadian Supreme Court decided that it did. Although sexually explicit material dealt with purely physical activity, the fact that it was a *depiction* of that activity meant that it had some meaning and could be interpreted. See SCR 486-490 (per Sopinka J). See also *FM Brookfield* above n 77 [1991] and [1992].
- 84 JM Shaman "The Theory of Low-Value Speech" (1995) 48 Smu L Rev 297, 298, citing *Dun & Bradstreet, Inc v Greenmoss Builders, Inc* 472 US 749, 758 (1985) (holding credit report matter of purely private concern and therefore of lesser constitutional value than matter of public concern).
- 85 Above n 84, 298.

guidelines before such suppression will be constitutional.<sup>86</sup> However if the speech is of low-value, it may be regulated on the basis of a far less powerful demonstration of harm.<sup>87</sup>

New Zealand does not explicitly have such a system for distinguishing between "high-value" and "low-value" speech, but it is submitted that the Classification Office should afford higher protection to speech which embodies one of the core free speech justifications,<sup>88</sup> especially the argument from democracy.<sup>89</sup> Barendt argues that the argument from democracy may be regarded as the "primary justification for free speech protection",<sup>90</sup> and that it has been "the most influential theory in the development of twentieth-century free speech law".<sup>91</sup> Briefly, the argument from democracy is that citizens in a democracy should be able to discuss freely and be involved in political matters, and challenge the opinions of the majority or status quo.<sup>92</sup>

(i) Is misogynistic rap music political speech?

In deciding whether rap music is political speech and thus qualifies for special protection, two issues must be addressed. First, are the misogynistic messages within rap themselves of a political nature? It will be argued that they are generally not. Second, if it is accepted that misogynistic messages in rap are not political, should a particular rap work be protected if it contains other messages which are of a political nature?

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86 Due to *Brandenburg v Ohio* 395 US 444 (1969) (per curiam), political speech cannot be regulated because of the harm it produces unless it is shown that the speech is directed at producing harm that is imminent and extremely likely to occur. This must be shown by linking particular harms to particular speech, rather than a class of harms to a class of speech, *Hess v Indiana* 414 US 105, 107-109 (1973). It would be very difficult to show that a particular rap or pornographic work satisfied these requirements. CR Sunstein "Pornography and the First Amendment" [1986] Duke LJ 589, 602.

87 Sunstein, above n 86, 602.

88 These are Mill's argument from truth, self-fulfilment, and the argument from citizen participation in a democracy. E Barendt *Freedom of Speech* (Clarendon Press, Oxford, 1985) 8-23. Sunstein argues that "it would be difficult to imagine a sensible system of free expression that did not distinguish among categories of speech in accordance with their importance to the underlying purposes of the free speech guarantee," and notes that if this is not done, either all speech will have to receive the same high level of protection as political speech, leaving the government powerless to regulate in areas now accepted, or political speech will be brought down to the more vulnerable position of other speech. Above n 86, 605.

89 For an argument that political speech should enjoy a preferred position, see Barendt, above n 88, 20-23, and 146-152.

90 Barendt, above n 88, 22.

91 Barendt, above n 88, 23.

92 See Barendt, above, n 88, 20-23. A chief proponent of this view is Alexander Meiklejohn. The principle has often been recognised judicially, see for example Brandeis J's judgment in *Whitney v California*: "Those who won our independence.....believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth." 274 US 357, 375-8 (1927).

## (a) Is rap's misogyny political?

One of the radical feminists' central arguments for regulating pornography is that pornography manifests an ideology of male supremacy and that it can strongly influence male attitudes and behaviour.<sup>93</sup> Paradoxically, it may be argued that for the very reason that pornography does manifest such an ideology it is highly political speech and thus should not be regulated.<sup>94</sup>

This is directly applicable to misogynistic rap music. This article has argued that misogynistic rap music may influence attitudes and possibly behaviour because of the male supremacist, woman-objectifying ideology it exudes. Any move to regulate it may thus be subject to similar arguments that this ideology may paradoxically make it political and thus elevate the level of protection it attracts.

Sunstein, however, contends that such an argument is "based on a misconception of what entitles free speech to the highest form of protection".<sup>95</sup> He argues that whether particular speech is entitled to higher protection does not turn on whether it embodies an implicit ideology as otherwise almost all speech would be highly protected. "The question turns more generally on the speaker's purpose and on how the speaker communicates the message".<sup>96</sup> He argues that pornography's misogyny should not be considered political speech as it "does not make an 'argument' (as we usually understand the term) in favour of its own ideological position".<sup>97</sup>

JL Caldwell notes that although Sunstein's analysis is made within the different American constitutional context, his arguments have a broader, philosophical significance which is helpful in the New Zealand context.<sup>98</sup> Sunstein's analysis will now be used to show that rap's misogyny is not deserving of special constitutional protection because it does not make "an argument in favour of its own ideological position." Three factors will be considered: (i) whether the topic which is dealt with is political, (ii) whether the topic is being dealt with in such a way as to assert a political proposition, and (iii) whether the viewpoint is one which should be protected.

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93 See generally CA MacKinnon *Feminism Unmodified* (Harvard University Press, Cambridge, Massachusetts, 1987).

94 Indeed, the Court decided this in *American Booksellers' Association, Inc v Hudnut* 771 F 2d 323 (7th Cir 1985) 331.

95 Sunstein, above n 86, 607.

96 Sunstein, above n 86, 607.

97 P Chevigny "Pornography and Cognition: A Reply to Cass Sunstein" [1989] Duke LJ 420.

98 Above n 5, 180.

## (i) Is the topic political?

Barendt acknowledges that it is difficult to delineate the scope of speech deserving special protection because of its political nature.<sup>99</sup> He argues "[a]ll that can be said perhaps is that the category is not exhausted by political publications and addresses which seek to influence electoral choices. Rather 'political speech' refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent person should think about".<sup>100</sup>

Emily Campbell argues that "the state should not be able to exclude discussions of sexual matters from public debate, even if we fear the further denigration of women or increased sexual promiscuity. Sexuality is a topic that is certainly relevant, if not critical, to 'social change.' Changing mores in society about the role of women, styles of clothing, and sexual behaviour itself come about through open debate on sexuality".<sup>101</sup> Misogyny is concerned with sexuality and power-relations between men and women. It is important to allow political debate on this topic,<sup>102</sup> especially as implicit in the argument from democracy is the importance of the potential to challenge existing laws and social mores.<sup>103</sup> This point can be emphasised by considering, for example, a feminist's fully reasoned speech attacking the inequalities of the patriarchal system. A speech of this kind is on the same topic as misogynistic speech and would almost unquestionably qualify for full constitutional protection.

## (ii) Is the misogynistic attitude in rap purporting to make an argument?

In regards to pornography, Sunstein considers that the pornographer's purpose is not political and not the communication of a message, but sexual arousal.<sup>104</sup> Shaman criticises this distinction, saying that the purpose of a lot of literature, film, and popular culture is also sexual arousal.<sup>105</sup> However this criticism does not detract from Sunstein's argument which is that a political motive should not be artificially imputed to give pornographers a higher level of protection from regulation than their true, non-political motive deserves. He

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99 Above n 88, 152.

100 Above, n 88, 152.

101 Above n 82, 159.

102 It may be arguable that discussions on this topic, if they relate to what is socially acceptable rather than analyses of law or political policy, need not be quite so vehemently protected as discussions on more core political areas, such as critiques of a government's laws or actions or a party's policies.

103 See Barendt, above n 88, 20-23.

104 Sunstein, above n 86, 607.

105 Shaman, above n 84, 344 .

is not saying that producing something for sexual arousal is inherently bad or even unprotected speech, just that if sexual arousal is the only aim, the speaker is not trying to communicate a misogynistic message and so the speech should not be given the highest level of protection for the communication of that message. Deciding what the speaker's purpose is will often be difficult, but the distinction is valid. Sunstein gives the analogy of someone burning a draftcard. If it was done as a war protest it should be protected more than if it was done as part of a general pattern of arson.<sup>106</sup>

The purpose of creating misogynistic rap music is less easy to ascertain. A particular work of rap music may be created to give aural pleasure, for dancing, to entertain, to give some sort of a message, or a combination of these things. With regards to the misogynistic ideology which some rap contains, the reasons why a rapper may incorporate this ideology may include bragging, empowering himself by disempowering women, or it may simply be a reflection of his reality and the power imbalance of the world in which he lives. The implication of Sunstein's analysis is that if a misogynistic rap song is created to attempt to influence peoples' thinking on the topic of the power relationship between men and women, this should point in favour of it being judged political speech or at least speech with a message. Deciding what a message-creator's purpose is will be a difficult task. It is submitted though that not many rap artists have some higher purpose of trying to make a political statement or influence social mores when their work manifests a misogynistic ideology.

Sunstein argues that "any implicit 'ideology' [contained in pornography] is communicated indirectly and non-cognitively".<sup>107</sup> The distinction between cognitive and non-cognitive communication is whether the message comes through via the intellect and is directed at reasoning (cognitive) or whether the message is communicated almost subconsciously and possibly without the mind being aware that a message of the underlying ideology has even been received (non-cognitive). Implicit in the distinction seems to be the idea that messages which are non-cognitive are somehow more dangerous and harder to guard against. Because such speech is taken in without awareness and involves no mental intermediation, the oft-cited antidote for bad speech - more speech - will be rendered ineffective.<sup>108</sup> Sunstein sees a lack of appeal to cognitive functions not as negating its value as speech altogether, but as a further factor negating the argument that the speech

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106 Sunstein, above n 86, 608.

107 Sunstein, above n 86, 607.

108 Sunstein contrasts non-cognitive, non-persuading speech to a situation in which antiwar speeches are made in the presence of soldiers. Regulation of such speeches would be impermissible, he argues, as the speeches employ persuasion appealing to cognitive faculties, and more speech may be used to counter possible harm. Above n 86, 616.

in question should be regarded as high-value because it is presenting an argument of a political nature.

The very distinction between cognitive and non-cognitive speech has been rigorously attacked. For instance Emily Campbell<sup>109</sup> argues, using psychological theories, that information cannot be understood without it being cognitively processed and that "without the cognitive capability, the music [or pornography] would be merely a series of meaningless sounds [or images] that conveyed nothing".<sup>110</sup> Paul Chevigny argues that the difficulty of distinguishing between cognitive and non-cognitive speech makes the distinction "dangerously incoherent".<sup>111</sup>

Sunstein replies that critics like Campbell misunderstand the distinction he is trying to make; he is not claiming pornography is not *processed* cognitively, just that it does not *appeal* to the intellect. He replies to Chevigny that he is willing to accept that the distinction is difficult to make, but that it can nonetheless be made, and polar positions can certainly be identified.<sup>112</sup> Sunstein is justified in making this point as the mere fact that it will be difficult to identify whether certain speech is cognitive or not is no reason to discard the distinction itself. A criticism that is harder to counter is that the whole distinction smacks of intellectual snobbery. To require an argument to be fully reasoned to qualify as protected political speech effectively limits those who can take advantage of such protection to intellectuals who possess the ability and means to make arguments in this form and denies people, such as artists, who would make arguments by way of appeals to the emotions or who would use representations to make their point.

If the distinction is accepted as valid, then most misogynistic rap music, like pornography, communicates its implicit misogynistic ideology non-cognitively. Rap songs in general certainly do not present reasoned arguments that women as a group should be subordinate to men. The message that women are inferior and can be treated poorly and with aggression is merely an implicit ideological assumption. Added to this is the fact that people may often listen to music without really focusing on the lyrics. Messages may be taken in almost subconsciously, and words like "bitch" and "ho" merely accepted and possibly repeated without any real thought.

In conclusion on the point of whether the misogynistic message in rap is political, it is submitted that it is generally not. Generally, no argument is made for male supremacy or

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109 Above n 82.

110 Above n 82.

111 Above n 97, 422.

112 CR Sunstein "The First Amendment and Cognition: A Response" [1989] Duke LJ 433.

female subordination, and it can be assumed that the rapper's purpose is not to make a political message in favour of these things. In many cases the sexist, objectifying language of rap is probably not being consciously selected by rap artists in order to make a statement, but merely reflects the street language of the everyday conversations which rap artists take part in. It seems likely that the depiction of violent or other bad treatment of women in some rap is usually not included in an attempt to influence public opinion on these things but is part of an overall attempt to shock, to show rebellion against all constraint, and in some cases to relate episodes that have happened and do happen in the ghetto underworld. To sum up, it is not contradictory to assert that rap embodies an ideology of misogyny and yet is not political speech. As MacKinnon argues, "[t]he fact that pornography [or rap], in a feminist view, furthers the idea of the sexual inferiority of women, which is a political idea, doesn't make the pornography [or rap] itself into a political idea. One can express the idea a practice embodies. That does not make a practice into an idea".<sup>113</sup>

However, this may not be the case for all misogynist rap and there is at least one example of a rap group attempting to justify their attitude to women which would qualify as speech making an argument under Sunstein's analysis.<sup>114</sup>

(iii) The viewpoint

If the above factors, the topic of the speech and whether an argument is being presented, are accepted as prerequisites for speech qualifying as highly protected political speech, then feminist political speech and a speech given by someone for the purpose of conveying a misogynistic message would both be protected.<sup>115</sup> However, even though both of these speeches are of the same form and on the same topic, it may be argued that it is justifiable to suppress the misogynistic viewpoint and not the feminist viewpoint.

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113 CA MacKinnon "Pornography, Civil Rights, and Speech" (1985) 20 Harv C R-C L Law Rev 1, 65.

114 NWA's *One Less Bitch* on EFILAZAGGIN (Priority Records, 1991) contains the following lyrics:

In reality,  
 A fool is one who believes that all women are ladies;  
 A nigger is one who believes that all ladies are bitches,  
 And that all bitches are created equal.  
 To me, all bitches are the same:  
 Money hungry scanners, groupie hos,  
 That's always riding on a nigger's dick,  
 Always in a nigger's pocket.  
 And when a nigger's out of money,  
 The bitch is gone in the wind.  
 To me, all bitches ain't shit.

115 This protection may of course be lost if a sufficiently great harm is shown, see above n 86. In New Zealand, it is submitted that the Classification Office should weigh the political value of these speeches in considering whether to suppress them or not.

In the United States such an idea is abhorrent to First Amendment jurisprudence which values neutrality and propounds the view that "there is no such thing as a false idea".<sup>116</sup> In New Zealand on the other hand, s 3(3)(e) of the Act provides that representing (directly or by implication) that women (or other groups) are inherently inferior counts in favour of it being found objectionable. This is an encroachment on free speech principles of the state not choosing between viewpoints, but it is arguably justified. This will be discussed in Part IV.

(b) Do some non-misogynistic messages in rap qualify as political speech?

"Don't these politicians realize the country was founded on the kind of revolutionary political thought expressed in my song?"<sup>117</sup>

Even though most of the misogynistic messages in rap should not be considered political, many gangsta rap works have political content independent of their misogynistic attitude, and so should be given extra protection on this ground.

Groups like Public Enemy are extremely political, their message of Black pride being strongly influenced by Malcolm X and Nation of Islam leader Louis Farrakhan.<sup>118</sup> Some rap explores inner city problems and their causes and solutions. For instance Ice Cube, in "Bird in the Hand"<sup>119</sup> criticises politicians for failing to alleviate employment problems, and outlines some of the temptations and reasons why people in the ghetto may resort to crime:

Do I have to sell me a whole lot of crack  
 For decent shelter  
 And Clothes on my back?  
 Or should I just wait for help  
 From Bush  
 Or Jesse Jackson and  
 Operation Push?

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116 Above n 94, 331, citing *Gertz v Robert Welch, Inc* 418 US 323, 339, 94 SCt 2997, 3006, 41 LEd 2d 789 (1974).

117 Ice-T, quoted in C Phillips "Uncivil War: The Battle Between the Establishment and Supporters of Rap Music Opens Old Wounds of Race and Class" *Los Angeles Times Calendar*, Los Angeles, United States, July 19, 1992, 6.

118 R Hilburn "Beyond the Rage: Rappers Documented the Anger of the Inner City Long Before the Riots; the Challenge Now is to Examine Ways to Educate and Heal" *Los Angeles Times*, Los Angeles, United States, May 24, 1992, 5.

119 From the album DEATH CERTIFICATE (Profile, 1993).



Even the anti-police message in much gangsta rap, dismissed by some as mere advocacy of violence against police,<sup>120</sup> is political. As Robert Hilburn argues, rap reflected the tension between inner city Blacks and police and complained of police brutality and victimisation long before the Rodney King incident led outsiders to treat these claims seriously.<sup>121</sup> This message should be granted protection<sup>122</sup> not only because it expresses dissatisfaction with a branch of government, but it can sometimes also be taken as a metaphor for anger against the system as a whole for the disadvantaged position African Americans find themselves in. For instance Ice-T claims that the street is a microcosm of the whole world and explains that one of the reasons he directs his anger at the system towards the police officer is that his audience, "Black kids," are not normally going to meet anyone higher up in government than a police officer.<sup>123</sup>

As many of the political messages in gangsta rap consist of caustic attacks on government or racism and oppression by white people, this should be the last sort of material that the government should suppress as it goes to the very heart of free speech protection.<sup>124</sup> In the United States it is likely that the courts would be very unlikely to allow suppression of rap with this sort of political message, as there would be suspicion of government motive.<sup>125</sup> In *New York Times v Sullivan*, Brennan J stated that "debate on public issues should be uninhibited, robust and wide open, and that may well include vehement, caustic, and sometimes vehemently sharp attacks on government and public officials".<sup>126</sup> It may be argued that the politics which rap deals with are not relevant in New Zealand,<sup>127</sup> but parallels may certainly be drawn with New Zealand and minority racial groups may well relate to some of rap's messages. Also, in this increasingly global world, it would be regressive for New Zealand to shut out these issues merely because they are not directly applicable to the New Zealand situation.

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120 See L Johnson "Silencing Gangsta Rap: Class and Race Agendas in the Campaign Against Hardcore Rap Lyrics" (1994) 3 Temple Pol & Civ Rts L R 25.

121 Above n 118.

122 There are obviously arguments that such messages should be suppressed to avoid violence against police officers and so on, but it is outside the scope of this paper to fully deal with these claims, limited as it is to focusing on misogynistic rap's possible harms to women as a group.

123 From an interview in the film *RAP, RACE AND EQUALITY* (Australian Film Institute, 1993).

124 Talerman argues that "rappers like Tupac and Ice-T must be allowed open channels of communication through which to voice their protests." Above n 25, 134.

125 See Sunstein, above n 86, for a discussion of suspicion of government motive.

126 376 US 254, 270 (1964).

127 See Lianne Dalziel's argument and the Tribunal's reply to it, above n 45, 6.

## (ii) The argument from self-fulfilment

Self-fulfilment is another justification for free speech. In essence this justification asserts that free speech is required to maintain individuals' rights to self-development and fulfilment, as restrictions on what an individual is allowed to say and write inhibit that individual's growth.<sup>128</sup>

In the context of pornography, it may be argued that the right to self-fulfilment is not being encroached upon in the censorship of pornography as pornographers are merely trying to sexually arouse their audience and make a profit, not enter into a meaningful discourse or be artistically creative.<sup>129</sup> The position of rap musicians can be contrasted to that of pornographers. Gangsta rappers, as members of a disadvantaged group may understandably want to communicate the struggle of ghetto and gangster life. They may want to tell their story and possibly apportion blame for the situation they are in and look for solutions.<sup>130</sup>

The self-fulfilment justification does not absolutely preclude censorship; there are some philosophical problems with the justification itself,<sup>131</sup> and individuals' rights to self-fulfilment through free expression may be limited by possible harms and by women's group rights to equality.

## (iii) The market place of ideas

Another justification for freedom of speech is that open discussion will lead to the discovery of truth more effectively than the majority merely asserting its view.<sup>132</sup> The

128 For a useful analysis of this justification, see Barendt, above n 88, 14-20.

129 However Ronald Dworkin argues that pornography censorship does violate the individual's right to moral autonomy. R Dworkin "Is There a Right to Pornography?" (1981) 1 Oxford J of Legal Studies 177.

130 Theresa Martinez identifies as a theme in rap "a need, almost a plea to be understood." T Martinez "Embracing the Outlaws: Deviance at the Intersection of Race, Class, and Gender" [1994] Utah L Rev 193, 199. For example, Body Count's *Freedom of Speech, on BODYCOUNT* (Warner, 1992), contains the lyrics:

I want the right to talk  
I want the right to speak  
I want the right to walk where I wanna  
Yell and I'm gonna  
Tell and rebel every time I'm on a  
Microphone on a stage cold illin'

(Ice-T, in an obvious display of intentional irony, chose this song to replace the controversial song *Cop Killer*, which he had been forced to remove from the album due to public pressure. See above, n 36, 183-184).

131 See Barendt, above n 88, 14-20.

132 Barendt, above n 88, 8, citing John Stuart Mill and Milton as major proponents of this theory.

government (which could have its own agendas and biases) is not required to exclude what it considers to be untruths or "bad" statements. Instead, society itself will be relied upon to select truths from the market place of ideas and to discard the untruths.<sup>133</sup> If this leads to true ideas being challenged by false ideas, this is a good thing because holders of a true belief "ought to be moved by the consideration that, however true it may be, if it is not fully, frequently and fearlessly discussed it will be held as a dead dogma, not a living truth".<sup>134</sup>

There are a number of difficulties with this theory that are relevant for present purposes. First, there is a problem with how well the misogynistic attitude in some rap fits into the market place of ideas theory, as it is debatable whether it includes coherent propositions capable of being negated. However, although misogynistic rap conveys its misogyny largely through representation and objectification, it can be answered in at least two ways: through presenting a contrary representation of women in the same medium, or by recognising and exposing the negative representation of women and criticising it. These two things have both been done to try to counter rap's misogyny.

Female rappers are growing in influence and many messages counter to the misogyny are emerging. Indeed, in contrast to the situation of pornography, the redemption for misogynistic rap may lie in female counter-speech within the same medium.<sup>135</sup> Michael Walls, in his submission to the Indecent Publication Tribunal for the *Doggy Style* decision, argued that there is "something of an ongoing dialogue within rap".<sup>136</sup> Female rappers often work against the sexist messages in rap.<sup>137</sup> For instance Queen Latifah's song *U.N.I.T.Y.* contains the lyrics "U.N.I.T.Y. - You gotta let 'em know, you ain't a bitch or a ho".<sup>138</sup> Some male rap groups, like The Disposable Heroes of Hiphopricy and Channel Live have also fought against sexism and reinforcement of stereotypes. Channel Live's *Cause and Effect* includes the lyrics:<sup>139</sup>

Time to make the switch

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- 133 Korengold criticises the attitudes of those who are sceptical of this principle working in practice as reflecting "a pessimism in a democracy's ability to reject destructive ideologies." MAG Korengold "Lessons in Confronting Racist Speech: Good Intentions, Bad Results, and Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination" (1993) 77 Minnesota L Rev 719, 732.
- 134 JS Mill, *On Liberty* (Everyman, 1972) 81. This view was accepted by the United States Supreme Court in *New York Times v Sullivan* 376 US 254 (1964), cited in Barendt, above n 88, 9.
- 135 Above n 37.
- 136 This argument was mentioned and implicitly accepted by the Tribunal, above n 45, 8.
- 137 For an excellent discussion of female rappers and their politics, see above n 36, 146-182.
- 138 (Tommy Boy, 1994).
- 139 On STATION IDENTIFICATION (Capital Records, 1995).

From the word "bitch"

... Consciousness separates a woman from a bitch;  
If you visualise your woman as a bitch,  
You'll treat her thus.

Misogynistic rap lyrics are also being attacked in the wider community. Very disparate groups, with different agendas and philosophies have attacked gangsta rap. The police have argued for its suppression on the grounds of its anti-authority and anti-police stance; the American National Political Coalition of Black Women have attacked its misogyny; and Black churches and conservatives have attacked it on conservative grounds.<sup>140</sup> Thus the issues of rap's lyrics are being put before the public and discussed.

A second, more telling criticism of the market place of ideas theory in the context of misogynistic rap or any other speech against a less powerful group is that the truths may not be selected because the minority's voice is less loud, or silenced. In essence, it is claimed that substantive equality is needed for the market place of ideas to function fairly. This claim will be more fully discussed in Part IV.

If, as is often argued, rap of this kind is simply reflective of the everyday dialogue in the urban Black community, perhaps it is a good thing to have this dialogue heard by a wider audience, where this misogynistic dialogue and message can be critiqued by the wider community. However this argument is patronising to the Black community, as it implies outside intervention is needed.

A related, non-patronising argument is that having this misogynistic attitude on display in the public sphere in a certain medium provides a vehicle for discussion. Rather than having a nebulous idea that misogynistic attitudes exist, misogynistic rap provides a concrete manifestation of this attitude which can be more readily analysed, interpreted and debated. Another related argument is that suppressing this type of speech will simply drive the attitudes underground and leave them unchecked; it is better to know people have these attitudes and so be able to confront them.<sup>141</sup> This must be weighed against the potential of the lyrics to influence listeners to accept these attitudes. Also this argument in no way addresses the direct harm done to women from hearing the lyrics.<sup>142</sup>

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140 Above n 118.

141 Shaman, above n 84, citing Daniel A Farber "Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of *Cohen v California*" [1980] Duke LJ 283.

142 This is the argument that misogynist rap may constitute group libel in the form of sexist hate speech. It is outside the scope of this paper to deal fully with this issue.

### 3 Factors expressly mentioned for consideration

Having examined free speech principles which are not expressly mentioned in the FVPCA but should nonetheless be taken into account, factors which are expressly mentioned in the Act and are relevant to rap will now be considered. The impact of music as a medium, which must be considered under s 9(4)(b) will be examined first. Then the artistic merit of the publication and its cultural value, both of which must be taken into account under s 3(4)(c) of the FVPCA, will be considered. In the following analysis, it must be remembered that "rap is not a monolith",<sup>143</sup> and not all rap music will show the same results when examined under the factors which follow.

#### (a) The impact of music as a medium

The consideration of a musical work will require an analysis somewhat different from that required of other media. In the *Bodycount* decision, the Indecent Publications Tribunal noted that as opposed to writing, a musical sound recording may be heard by people who have not deliberately chosen to listen to it and that the degree of concentration given to listening to the music and lyrics can vary greatly; the music may be at the forefront of the listener's mind or it may barely be noticed.<sup>144</sup> Music also has the power to evoke strong emotion and influence mood, arguably more potently and directly than the written word. Lyrics and sound interplay to create meaning and music may be open to very different interpretations.<sup>145</sup>

#### (b) Artistic Merit

Artistic merit should count strongly in rap's favour compared with pornography, which has received little credit as an artistic form. Rap music is an art form and has received high accolades, including this from Robert Hilburn: "[n]othing since the arrival of punk in the late '70s has given pop music a greater creative jolt than rap music".<sup>146</sup>

In the United States, one of the prerequisites for a rap work to be found obscene and thus unprotected speech is that it must lack serious artistic value.<sup>147</sup> In New Zealand, rap is potentially more vulnerable to censorship; artistic merit is simply one of the factors to be

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143 John Parlene, above n 123.

144 Above, n 45, 6.

145 Judge Gonzalez acknowledged in *Skywalker Records* that "[m]usic is sufficiently subjective that reasonable persons could disagree as to its meaning". Above n 1, 579.

146 Robert Hilburn "Getting a Bad Rap; The Creative Energy of the Black Street Music Shouldn't Be Buried Under Racism and Misinterpretation" *Los Angeles Times*, Los Angeles, United States, June 24, 1990, 2.

147 Above, n 2, 138, applying the standard for obscenity outlined in *Miller v California* 413 US 15 (1973).

weighed under the second tier.<sup>148</sup> The situation is more dire if a work is being considered under the first tier, in which case artistic merit cannot be considered.<sup>149</sup>

It is interesting to consider which of these approaches is more appropriate to a consideration of rap. The radical feminists would argue that if a publication causes harm to women, no amount of artistic or other merit should save it.<sup>150</sup> This argument is convincing in the United States context, as there the unenviable situation could arise where a work which is considered likely to strongly influence attitudes towards women in a negative way would be protected if it possessed a modicum of artistic merit. This really is just indicative of American obscenity law not being about preventing harm to women. The more consequentialist New Zealand approach probably would bring a better result on similar facts: the work would probably be banned. However, unlike the merit-blind approach favoured by the radical feminists, the New Zealand approach is able to avoid suppression of a work of great artistic value.<sup>151</sup>

Judge Gonzalez's judgment in *Skywalker*<sup>152</sup> was strongly and justifiably criticised for its treatment of the artistic merit issue. He decided that the 2 Live Crew album "As Nasty as They Wanna Be" lacked artistic merit purely on his own evaluation of the album and was in fact overturned on this point.<sup>153</sup> Due to s 4 of The Films, Videos, and Publications Act 1993, the Classifications Office can decide if a work is objectionable without receiving evidence relating to the matters it may consider. However, it may call for evidence and people affected by the decision are entitled to give evidence. The Indecent Publications Tribunal rightly called for expert opinion in the two rap decisions it made. It is submitted that receiving expert evidence as to artistic merit is especially important when rap music is being considered. The reasons for this are threefold. First, rap music may start from a disadvantage as it is often dismissed as ugly and without artistic merit by casual observers

148 However an absence of artistic merit does not necessarily mean that it will be censored.

149 This could lead to works of great artistic merit being banned merely for being in breach of current moral standards (which may not be the moral standards of the future); the likelihood of harm need not be shown. This is a situation at complete odds with the liberal philosophy, which sees the prevention of harm to others as the only legitimate reason to curtail an individual's right to choose what speech to receive. See above n 8, 55.

150 Above n 113, 21.

151 The remaining difficulty is that when it is looked at in such stark terms as this, the Classification Office is being asked to balance women's safety against art, in a situation in which determining the risk to women is little more than guess work. It should also be noted that the Act is not solely concerned with possible harms to women.

152 Above n 1.

153 Above n 1, 138-139.

with little knowledge or appreciation of the genre.<sup>154</sup> It is fairly likely that rap may be well outside the personal interests of the decision maker, thus making a decision on artistic merit difficult. Second, rap cannot simply be reduced to its lyrics and analysed as if it were literature.<sup>155</sup> The music itself, the way the lyrics are delivered, the attitude with which they are delivered, and the lyrics themselves all combine in a complex manner to create meaning and emotion. It would therefore seem sensible to have guidance from an expert, for example a music critic, to help unravel these non-literary devices. Finally, rap music draws heavily on Black culture and history, makes cross-references to other rap songs and music generally and uses much street slang. Many rap songs are tongue-in-cheek or employ sarcasm or hyperbole. Again it would be prudent to utilise expert help in interpretation. As rap music is an art form it is hard to imagine a rap work being completely devoid of artistic value.

(c) Cultural Merit

Rap is a predominantly Black medium which came out of Black street culture.<sup>156</sup> As was pleaded in defence of 2 Live Crew in the trial over whether their album was obscene,<sup>157</sup> rap has its roots in Black oral traditions. Some of the literary devices used in rap, including "doing the dozens" (escalating satirical insults) and "boasting" (overstating virtues like sexual prowess), can be traced back to the Black oral traditions.<sup>158</sup>

In many ways, rap music is a positive, creative force in the hard, bleak world of the inner city ghetto. It provides a chance for an under-represented minority to tell its unique experiences to the world. It encourages Black pride, identity and awareness.<sup>159</sup> Rappers provide role models in a world where most leaders and role models are white.<sup>160</sup>

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154 For instance, Judge Gonzalez denied any bias against the rap music genre, but still put rap on a different plane to more melodic music (see K A Olsen "Constitutional Law: Can Music Be Considered Obscene?" (1991) 44 Oklahoma L Rev 513, 596) and failed to see any merit in two of rap's important artistic qualities, sampling and danceability (see AL Clark "As Nasty as They Wanna Be" - Popular Music on Trial" (1990) 65 New York L Rev 1481, 1519).

155 This was acknowledged by the Indecent Publications Tribunal in the Bodycount decision, above n 44. On the other hand, Judge Gonzalez, in *Skyywalker Records, Inc*, took an overly simplistic approach when he considered that reducing the 2 Live Crew album to a written transcript would not significantly alter its message, above n 1, 595.

156 For excellent accounts of the beginnings and roots of rap, see above n 36.

157 See text at nn 171-179.

158 See above n 62, 682.

159 Dr Patricia Rose, in the film *RAP, RACE AND EQUALITY*, above n 123, talks of rappers grounding themselves in a complicated world and stating their identity and location, thus gaining pride and asserting themselves.

160 As Queen Latifah notes above, n 123.

Rap is very important politically and provides an angry, rebellious message which is uncomfortable to the mainstream. Austin argues that the militant, gangster style of dress and behaviour which many of the rappers use has been adopted from former Black militants like the Black Panthers, and is a positive expression of Black strength and political power.<sup>161</sup> Jeffrey B Kahan considers that "we must vigilantly protect the speech rights of these musicians, lest we deprive a community of a viable and vital political voice".<sup>162</sup> Rap is regarded as the one mass-communication unsullied by whites, and has been called the "'CNN' of the black community".<sup>163</sup> Because rap is strongly linked to Black ghetto culture, it is not surprising that any move to censor it will be met with accusations of racism.<sup>164</sup>

There have been many claims that the calls for censorship of rap have failed to recognise the context from which rap's lyrics come; that the lyrics directly reflect street language and that they may be subject to different interpretation and levels of tolerance.<sup>165</sup>

These arguments are strong and the mainly white-controlled governments of New Zealand and the United States should treat the cultural value of rap with respect and weigh cultural value highly in any consideration of censoring rap. However, given that there are also strong calls to censor rap coming from within the Black community,<sup>166</sup> and that Black women are the main victims of harms flowing from misogynistic rap,<sup>167</sup> this should not be an absolute defence.

The word "nigga" is often used and this could appear at first glance to be racist against the Black race. The Indecent Publications Tribunal dealt effectively with this argument, recognising that the word is being reclaimed and redefined by those who were victims of it with the intention of stripping the word of its oppressive force and rendering its use by that group empowering.<sup>168</sup>

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161 R Austin "The Black Community,' its Lawbreakers, and a Politics of Identification" (1992) 65 Southern Cali L Rev 1769.

162 Above n 21, 2586

163 Above n 21, 2586.

164 Above n 120, 26.

165 Above n 67, 682-685.

166 See generally above n 120.

167 Above text at nn 34-35.

168 Above n 46, 8. Some rap explains why the word is used, see eg NWA's *Real Niggaz Don't Die* and *Niggaz 4 Life*, on EFILAZAGGIN (Priority Records, 1991).



#### 4 *Balancing factors under the second tier*

The Classification Office must somehow balance the factors listed above to decide whether the availability of a particular misogynistic rap work is likely to be "injurious to the public good". It has been argued that it seems reasonable to assume that misogynistic rap may negatively influence attitudes, and possibly behaviours, towards women but that there is as yet no solid proof of this. Unlike pornography, which arguably has little social utility, rap has a number of qualities counting strongly in its favour. It is submitted that if a particular misogynistic rap work qualifies for higher protection because it has a political message then it should not be censored as the likelihood of harm is as yet not well proven enough to override this higher protection. The dialogue within rap about the sexist language and attitude means that, in contrast to pornography, the market place of ideas theory seems to apply reasonably well and the possible harms of misogynistic rap should be lessened by this discourse. The self-fulfilment justification for free speech is also activated by rap. These factors and the likelihood of harm will vary depending on the work in question, but it would seem these factors will usually make it undesirable and unlikely (if the analysis of this paper is accepted) that a particular rap work will qualify as objectionable under the second tier. It may also be argued that the misogyny of rap - the objectification of women, the rape-myth affirming messages and to some extent the depiction of violence against women - is not qualitatively different from messages which pervade other forms of popular culture,<sup>169</sup> just more obvious.<sup>170</sup> Thus the appropriate response may be to critique rap rather than ban it.

### III *THE CENSORSHIP OF RAP IN THE UNITED STATES*

It will be shown that there is little potential for rap to be suppressed under America's demanding free speech jurisprudence, and that gender-based harms cannot properly be taken into account because of America's strict requirement of neutrality towards the viewpoint of speech. Possible ways in which rap's misogyny may be attacked under First Amendment jurisprudence will be considered.

#### A *The American Obscenity Doctrine*

In *Skywalker Records, Inc v Navarro*,<sup>171</sup> 2 Live Crew's album "As Nasty as They Wanna Be" became the first, and to, date the only, musical recording ruled obscene in federal court

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169 See generally N Wolfe *The Beauty Myth: How Images of Beauty are used Against Women* (W Morrow, New York, 1991).

170 A similar argument is made in the context of pornography by feminists opposed to censorship, see above n 8, 59.

171 739 F Supp 578 (SD Fla 1990).

history.<sup>172</sup> The United States current test for obscenity and that applied by the court in *Skywalker* is the *Miller* test.<sup>173</sup>

The judgment, which was later overruled on appeal,<sup>174</sup> has been the subject of intense criticism. It was criticised on several grounds. It was argued that the album did possess serious artistic merit;<sup>175</sup> that it did not appeal to the prurient interest;<sup>176</sup> that it was not patently offensive;<sup>177</sup> that the trial judge had wrongly ignored the context and cultural differences of the community from which 2 Live Crew came (an urban Black community);<sup>178</sup> and that because rap has its roots in the Black oral tradition it does possess serious cultural merit.<sup>179</sup> Most of these arguments are applicable to rap in general and were dealt with above under the analysis of New Zealand's second tier criteria, but the prurient interest requirement will be dealt with here as it is not expressly part of New Zealand law.<sup>180</sup> A characteristic peculiar to the American artistic merit requirement will then be dealt with also.

### 1 *The prurient interest requirement*

Barendt, while acknowledging that exactly what qualifies as appealing to the prurient interest is hard to ascertain and has been ill-defined by the Supreme Court, argues that "[w]hat seems to be indicated is material which is purely designed to excite sexual fantasies,

172 Olsen, above n 154, 513.

173 For a work to be found obscene under the *Miller* test, it must satisfy all three prongs of the following test:

(a) Whether "the average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Miller v California* 413 US 15, 24 (1973).

174 It was overruled on the ground that the trial judge should not have determined that the work lacked serious artistic value simply by listening to it, and that contemporary community standards should not be applied to determine whether a work possesses serious value. Above n 2, 138-139.

175 See Clark, above 154, 1519; KG Gordon "The First Amendment Doesn't Extend to Music Lyrics Judicially Determined to be Obscene" (1991) 22 Rutgers LJ 505, 519-522.

176 See Gordon, above n 170, 519-521; Clark, above n 154, 1517-1518; above n 82.

177 See Olsen, above, n 154, 522-524.

178 Above n 67, 682-685.

179 See Olsen, above n 154, 302; Gordon, above n 175, 522-523; above n 67, 684-685.

180 In New Zealand, the sexual prurience of a depiction may increase the likelihood of its being found to promote or support the activity depicted. See text at n 62.

largely as an aid to masturbation".<sup>181</sup> Generally, rap music is not created for sexual arousal and it is certainly not created purely for this purpose. 2 Live Crew's music can be said to be for dancing, aural pleasure, telling stories, and humour. Indeed the plaintiffs presented both lay and expert testimony that "the Nasty recording did not actually physically excite anyone who heard it and indeed, caused boredom after repeated play".<sup>182</sup> Thus it should not have been found to appeal to the prurient interest under current obscenity law.<sup>183</sup> This argument can be generalised to most rap. The sexual references in gangsta rap are made even less erotic by the genre's more hard-core, tough, and violent subject-matter and style.<sup>184</sup>

## 2 *Artistic merit in the United States*

Anne L Clark states that in the United States, if the intent of a work "is to convey a literary, artistic, political, or scientific idea, or to advocate a position," then that work has serious artistic value.<sup>185</sup> As Clark rightly points out, most musicians intend to convey an artistic idea.<sup>186</sup> She also points out that only a segment of the population needs to find that the material has artistic merit.<sup>187</sup> These points lead Clark to the conclusion that "it is almost inconceivable that *any* music could fail to satisfy the last part of the *Miller* test, i.e., that the material lacks artistic value".<sup>188</sup>

So, given obscenity's requirement for prurience and lack of artistic merit, there is little risk of rap being justifiably found obscene.

## 3 *The obscenity doctrine's failings*

The obscenity doctrine itself can be criticised for failing to deal with the gender-based harms which rap may cause in the same way as it has been attacked by radical feminists for failing to consider the harms pornography is alleged to cause. The obscenity doctrine is

181 Barendt, above n 88, 263.

182 Above n 82.

183 This point is argued strongly in Campbell, above n 82.

184 David Toop, above, n 28, 46, describes being questioned in a British obscenity trial (which could not be located) of NWA's album EFIL4ZAGGIN:

Could "She swallowed it" be regarded as erotic, I was asked by counsel for the defence Geoffrey Robertson QC. Not in my book. Lines like "just don't bite it" take the sensual edge off any oral sex scenario.

185 Clark, above n 154, 1519, citing *State v Walden Book Co.* 386 So 2d 342, 345 (La 1980).

186 Clark, above n 154, 1519.

187 Clark, above n 154, 1519.

188 Clark, above n 154, 1519 (emphasis in original).

based on vague and problematic anti-erotic and moral justifications.<sup>189</sup> Feminists have recasted the problem in terms of a civil rights issue concerned with equality for women. Thus erotica is acceptable (and indeed beneficial) but pornography is not, the difference being an element of subordination.<sup>190</sup> There is little room under the current obscenity test, outlined above, to consider gender-based harms because the test focuses instead on the depiction of sexual conduct in a patently offensive way.<sup>191</sup>

Kimberlé Williams Crenshaw further criticises the obscenity doctrine for its prurient interest requirement. She claims that the "obscenity doctrine asks the wrong questions with respect to sexual violence"<sup>192</sup> as it "separates out sexuality and violence, thus shielding the more violently misogynistic groups [such as NWA, Too Short, Ice Cube, and the Geto Boys] from prosecution".<sup>193</sup> In other words, because of the obscenity doctrine's requirement for an appeal to the prurient interest, relatively "lightweight" groups like 2 Live Crew will be susceptible to prosecution under obscenity law whereas groups whose lyrics are more *violently* misogynistic and "celebrate violent assault, rape, rape-murder, and mutilation"<sup>194</sup> will be immune. This argument is strong, especially as there is stronger evidence about violent sexually explicit material negatively effecting attitudes and behaviours than similar, non-violent material.<sup>195</sup> It is submitted, however, that music by 2 Live Crew and similar bands should not be regarded as appealing to the prurient interest under the current test either.<sup>196</sup> If this is accepted, obscenity fails to address the harms of both violent and non-violent misogynistic rap.

### ***B Attacking Rap Music by Focusing on its Supposed Harms***

A framework which openly and directly investigated the question of whether a particular work of misogynistic rap should be suppressed if it was likely to cause the gender-based harms discussed above would have to work on two assumptions. First, it would assume that some rap music may be causally linked to these harms. Second, it would

189 Sunstein, above n 86, 595.

190 See MacKinnon and Dworkin's Indianapolis Ordinance, included in above n 113, 7.

191 Sunstein argues that "[u]nder almost any view, regulation of speech merely because it is offensive is problematic under the First Amendment. Sunstein, above n 86, 594.

192 Above n 31, 124.

193 Above n 31, 125.

194 Above n 31, 125.

195 See J Weaver "The Social Science and Psychological Research Evidence: Perceptual and Behavioural Consequences of Exposure to Pornography" in C Itzin *Pornography: Women, Violence and Civil Liberties: A Radical New View* (Oxford University Press, New York, 1992) 284-309.

196 See text at nn 181-184.

assume that rap music which is likely to cause such harms can be distinguished from rap which is not by examining its attitude to women - whether it degraded women or advocated violence towards women and so on. *American Booksellers' Association, Inc v Hudnut*<sup>197</sup> is powerful authority that such a piece of legislation would almost certainly fail in an American context for being viewpoint-specific as it would be penalising material because of its misogynistic viewpoint.

In *Hudnut*, the United States Court of Appeals for the Seventh Circuit struck down the Indianapolis Ordinance which was to provide that pornography which is found to cause harm will be suppressed and civil liability will attach. The court found the Ordinance impermissibly viewpoint-specific. This ruling was later summarily affirmed by the Supreme Court.<sup>198</sup> The Ordinance was drafted mainly by Professor Catherine MacKinnon and Andrea Dworkin and reflected not the anti-erotic premises which the obscenity doctrine is based on, but radical feminist concerns about pornography and the gender-specific harms it can do to women.<sup>199</sup> "Pornography" was defined as "the graphic sexually explicit subordination of women".<sup>200</sup>

Judge Frank Easterbrook's reasoning for striking the Ordinance down was as follows. The Ordinance, in failing to make allowance for artistic, literary, political or scientific value, broadened the scope of its subject-matter beyond unprotected obscenity, and thus opened itself up to First Amendment scrutiny. The court stated that "[u]nder the First Amendment the Government must leave to the people the evaluation of ideas"<sup>201</sup> and then mentioned some previous decisions in which the Supreme Court had held unpopular or offensive messages were protected by the First Amendment. The Ordinance was struck down as it discriminated on the basis of the viewpoint which the work presented. Judge Easterbrook labelled the Indianapolis Ordinance "thought control" and stated that it "establishes an 'approved' view of women, of how they may react to sexual encounters, of

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197 771 F2d 323 (7th Cir 1985).

198 *Hudnut v American Booksellers' Association, Inc* 106 S Ct 1172 (1986).

199 These harms are: (i) the harm which befalls women who are coerced into participating in the production of pornography, or are brutalised during it, (ii) encouraging sexual violence against women and (iii) the less direct harm of influencing men and women's perception of women's role in society and in relationships.

200 For a work to satisfy the Ordinance's definition of pornography, it must also contain at least one of the following: women presented as sexual objects enjoying pain or humiliation or rape; or as tied up, cut up, mutilated or penetrated by objects or animals; in scenarios of degradation, injury, abuse, or torture; or as meant for domination, conquest, violation, exploitation, possession, use or submission. Above n 197, 324.

201 Above n 197, 327.

how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not".<sup>202</sup>

*Hudnut* is strong authority that legislation which allowed for the suppression of rap which promoted a negative view of women would be struck down. There is obiter in the case which tend to suggest this may still be the case even if the legislation targeted only obscene works.<sup>203</sup> In any case, as noted earlier, it seems probable that few rap works would be found obscene under the strict Miller test.

### C *Incitement*

It is unlikely that rap music could qualify as incitement on the grounds of its misogyny under the "clear and present danger" test enunciated in *Brandenburg v Ohio*.<sup>204</sup>

.... constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

It could be argued that rap which deals with violence or sexual violence against women could incite such behaviour.<sup>205</sup> Some of the songs examined by this author which deal with violence or sexual violence against women may be argued to glorify it or present it in a positive light<sup>206</sup> but it would be difficult to show that the group advocated it, and even more difficult to show that it was "directed" to producing lawless action. There would also be a problem with the requirement of imminence. It would be hard to know exactly how to apply this requirement to recorded music, as the test contemplates speech directed to a live crowd. On the one hand it could be argued that because recorded music is designed for repeated listenings, any violent or illegal message would become more powerful and so its non-live nature should not preclude a finding of incitement,<sup>207</sup> especially since it is possible that a group of people could listen to it together in a group situation and get emotionally charged by it. On the other hand it could be argued that the receiver had to take several affirmative

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202 Above n 197, 328.

203 Above n 197, 331, (stating that regulations of low-value speech which were found allowable did not select among viewpoints).

204 395 US 444, 447 (1969).

205 For discussions of whether rap could qualify as incitement on the grounds that it advocated violence, see above n 25; above n 68

206 For example NWA's *One Less Bitch* and *She Swallowed It* from the album "Efil4zaggin"; Geto Boys' *Murder Avenue* from the album "Till Death Do Us Part."

207 Above n 68, 45.

steps to listen to the recording and that the message is listened to far away from the maker, whose presence urging the lawless action may arguably be a requirement.<sup>208</sup> It is also unlikely that a rap song would urge imminence.

#### *D Group Libel*

Many commentators support the notion that speech which is hateful towards a race and causes harm should be suppressed.<sup>209</sup> This can arguably extend by analogy to cover speech which is hateful towards a gender, especially a gender which as a group has been and continues to be subordinated. As noted by Toni Massaro however, interesting questions arise in the case of rap as the speech is also advanced by members of a disadvantaged minority.<sup>210</sup>

Under the current United States jurisprudence these issues may be redundant as it appears that any attempt to suppress speech on the basis that it constitutes hate speech will be probably be found unconstitutional.<sup>211</sup> The Supreme Court's recognition of group libel in *Beauharnais v Illinois*<sup>212</sup> has since been doubted and distinguished in many cases.<sup>213</sup> For example in *Brandenburg v Ohio*<sup>214</sup> the Supreme Court protected racial advocacy by Ku Klux Klan members and in *Collin v Smith*<sup>215</sup> various Ordinances which had been drafted to stop a Nazi Party march through a substantially Jewish community were held unconstitutional. More recently, in the case of *RAV v St Paul*<sup>216</sup> the Supreme Court held a Minnesota anti-cross-burning Ordinance unconstitutional. These cases again highlight the Supreme Court's commitment that the state should remain neutral as to the worth of political ideas.<sup>217</sup>

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208 Above n 68, 46.

209 See for eg TM Massaro "Free Speech and Religious, Racial and Sexual Harassment: Equality and Freedom of Expression: the Hate Speech Dilemma" (1991) 32 Wm and Mary L Rev 211; MJ Matsuda *Words that Wound* (Westview Press, Boulder, Colorado, 1993).

210 Massaro, above n 209, 16.

211 See Barendt, above n 88, 166-167.

212 343 US 250 (1952).

213 Barendt, above n 88, 167.

214 395 US 444 (1969).

215 578 F2d 1197 (7th Cir), cert.denied 439 US 916 (1978).

216 120 L Ed 2d 305 (1992).

217 See above n 11, 926-927.

The above discussions show that there is little potential for rap music to be censored on the basis of its misogyny.<sup>218</sup> Because of the obscenity doctrine's requirements of an appeal to the prurient interest and an absence of artistic merit, it seems that there is little potential for rap works to be suppressed under this doctrine, especially if rap is considered in the way this paper has argued it should be considered. It has been shown that the obscenity doctrine fails to deal properly with the gender-based harms which may flow from rap. An attack on misogynistic rap which does focus on these harms is unlikely to be successful: an approach similar to the Indianapolis anti-pornography Ordinance is likely to be struck down as impermissibly viewpoint-specific; rap is unlikely to be found to incite violence against women; and rap is unlikely to be suppressed as sexist hate speech.<sup>219</sup>

#### **IV NEUTRALITY OR EQUALITY? A MAJOR PHILOSOPHICAL DIFFERENCE BETWEEN THE NEW ZEALAND AND UNITED STATES APPROACHES TO FREEDOM OF SPEECH**

There are huge and marked differences between the protection given to freedom of speech in New Zealand and the United States. While the protection for free expression contained in New Zealand's Bill of Rights can be overridden by legislation,<sup>220</sup> America's First Amendment<sup>221</sup> to the Constitution can be used to strike down legislation which is contrary to it.<sup>222</sup> While New Zealand's constitutional document expressly recognises that the right to free speech may be subject to limitation,<sup>223</sup> the American Constitution does not and free speech is treated with great deference and limitations must be strongly justified.<sup>224</sup>

One particular philosophical distinction between the two countries' approaches has been highlighted by the analysis of this article, and deserves mention. This is the fact that American jurisprudence sees the state as having no role in interfering in the market place of

218 For a discussion arguing that rap should not be suppressed under the doctrines of subversive advocacy, offensive language or fighting words, see generally Wolfe, above n 67.

219 There is however pressure from various non-governmental bodies on rap which sometimes amounts to censorship. See above n 21, 2592-2600.

220 Section 4 of the New Zealand Bill of Rights Act 1990

221 The relevant part of which reads: "Congress shall make no law...abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

222 See eg above n 197.

223 Section 5 of the Bill of Rights Act 1990.

224 Note eg the exacting standard of *Brandenburg*, text at above n 204. Note also the fact that literary, artistic, political, or scientific value precludes a finding that a work is obscene under the *Miller* test, above n 173. Tribe talks of the "Supreme Court's demanding first amendment jurisprudence," above n 11, 926.



ideas<sup>225</sup> or suppressing "bad" messages<sup>226</sup> and the courts go to great lengths to retain neutrality and strike down legislation which is impermissibly viewpoint specific.<sup>227</sup> In New Zealand, on the other hand, the state is less reluctant to interfere in the market place of ideas and censors some messages because what they support is thought of as wrong or "bad". The first tier of the FVPCA means that some topics are simply not up for debate in publications and the second tier holds that if one of the things listed is being shown in a positive light or context (assuming that this is what "the manner in which" in s 3(3) means) then it will be more likely to be censored. Of special relevance here are ss 3(3)(c) and 3(3)(e), which are influenced by and reflect feminist arguments<sup>228</sup> and accept equality as an inviolable truth.

Presumably, someone who agreed with the American jurisprudence would label the FVPCA paternalistic<sup>229</sup> and criticise the government for believing that it can determine the truth in some areas and for interfering in the market place of ideas. Indeed, the court in *Hudnut* would probably liken the FVPCA to "thought control" as it (together with its

- 225 In *Hudnut*, the Supreme Court rejected the idea that speech should be limited when truth has not yet prevailed and is not likely to. The Court reasoned that this would imply the government could declare truth, something the government is unable to do. The Court also stated that a failure of the market place of ideas justification in a specific situation does not preclude the protection of free speech in that situation. Above n 197, 330-331.
- 226 Tribe, relying on the rule from *Kingsley International Pictures Corp v Regents of NYU* 360 US 684 (1959) (in which a law denying licenses to show movies presenting adultery in a favourable light), argues that "[p]resumably, the first amendment similarly protects advocacy - however sexually explicit or graphic - of the opinion that women were meant to be dominated by men, or blacks to be dominated by whites, or Jews by Christians, and that those so subordinated not only deserve but subconsciously enjoy their humiliating treatment. That such opinions are despicable and that their dissemination works real injury does not render their suppression consistent with the first amendment." Above n 11, 925.
- 227 Sunstein, above n 86, 590-591. CA MacKinnon describes the extreme neutrality of American jurisprudence as applying a "'speech you hate' test: the more you disagree with content, the more important it becomes to protect it. You can tell you are being principled by the degree to which you abhor what you allow. The worse the speech protected, the more principled the result." *Only Words* (Harper Collins, London, 1994) 54.
- 228 The FVPCA as a whole was influenced by feminist theories, and these sections are obvious manifestations of them, see above n 5, 176. Although the words degrade, dehumanise and demean in s 3(3)(e) have the potential to apply to men, not just women or children, they are far less likely to apply to men. See for example the Indecent Publication Tribunal decisions 29/92, 37/92 and 69/92, which can be taken together as supporting the proposition that part of what can make explicit depictions of heterosexual activity demeaning to women is the male/female roles and power relationship, thus it is harder to demean men. These decisions are discussed in above n 5, 199-200 (arguing that men can also be degraded).
- 229 FS Haiman argues that restrictions on speech because of the harm they may cause is paternalistic. *Speech and Law in a Free Society* (University of Chicago, Chicago, 1981) 181.

application) "establishe[s] an approved view of women, of how they may react to sexual encounters [and] of how the sexes may relate to each other".<sup>230</sup>

However, many have criticised the neutrality of American first amendment jurisprudence<sup>231</sup> and these criticisms can be used to justify New Zealand's choice to restrict certain viewpoints or messages on certain topics.

As Sunstein powerfully argues, free speech principles may in fact be better served by restricting misogynistic speech. This is because the market place of ideas theory needs equality in order to operate effectively, and in the case of pornography, the "anti-pornography cause in particular and women in general" are silenced, due to being denied the necessary requisites for free speech - credibility, trust and the opportunity to be heard.<sup>232</sup> Thus, although normally equality conducive to free speech will best be served by a lack of state interference, here substantive equality requires intervention. Catherine MacKinnon argues that there is a lack of understanding of the relationship between equality and free speech: "the less speech you have, the more the speech of those who have it keeps you unequal; the more dominant they become and the less the subordinated are heard from".<sup>233</sup> Thus the doctrine of neutrality, at least in the area of speech against minorities, actually perpetuates the dominant situation rather than protecting minority speech from censure by the majority.

The argument that once the state decides that it can interfere in some areas to declare truth, that it may then be tempted to do so in other areas<sup>234</sup> is simply the slippery slope argument. It provides an important warning, but as long as the state does this only in well-specified circumstances for the reason of avoiding harm and protecting equality, this argument need not discount the desirability of non-neutrality in certain areas.

A utilitarian may argue that the state should suppress a certain type of speech if such suppression is supported by a majority of the population. Here, this would mean that since the principle of equality is supported by a majority<sup>235</sup> it is acceptable to suppress expression contrary to equality. A liberal will not be moved by this as one of the main

230 As it did of the MacKinnon-Dworkin Ordinance, above n 197, 328.

231 See eg Sunstein, above n 86; Massaro, above n 209; above n 229.

232 Sunstein, above n 86, 618-619.

233 Above n 227, 52.

234 Above n 197, 331 (per Easterbrook, CJ) "If the government may declare the truth, why wait for the failure of speech?"

235 Equality was one of the five basic principles recognised in the Report of the Ministerial Committee of Inquiry into Pornography as "transcend[ing] particular views in ways that may achieve consensus without compromising essential values." Above n 8, 59-60.

rationales for freedom of speech is to protect the expression of unpopular views.<sup>236</sup> Relying on national consensus to justify suppression of speech suffers from the problems that national consensus changes over time and that if speech counter to consensus is stifled, so too are possibilities for change of consensus. Massaro, putting this point in context, argues that "[i]n many ways, subordination and equality are contested, contextual, and fluid phenomena".<sup>237</sup>

However, because the relevant encroachment on state neutrality towards speech is based on equality, it need not be justified on national consensus grounds, and is justified instead on the grounds that the principle of equality is fundamental to New Zealand society and implicitly recognised in the Bill of Rights.<sup>238</sup> Indeed, Caldwell, addressing liberal concerns over state interference with individual autonomy, argues that "[t]he goals of freedom, equality, dignity and respect of the person are the necessary prerequisite conditions for an individual to enjoy autonomy, and it would seem sensible that all necessary measures, including legislation, be used to protect and secure those goals".<sup>239</sup> This argument is compelling and parallels can be drawn with the argument, outlined above, that for the market place of ideas theory of free speech to operate effectively, true equality is required; both arguments look beyond procedural equality to substantive equality. Another point is that the liberal requirement that there must be harm before speech can be suppressed is not breached under the second tier as speech which violates this tier's equality provisions still require harm (in the form of injury to the public good)<sup>240</sup> before it can be censored.<sup>241</sup> In contrast, as noted above, the first tier can be criticised for breaking this liberal rule.<sup>242</sup>

## V CONCLUSION

The issue of whether misogynistic rap music should be censored is a difficult one. On the one hand is the possibility that this type of rap may cause real harm to women, particularly

236 Massaro, above n 209, 224.

237 Massaro, above n 209, 224.

238 Section 19 of the New Zealand Bill of Rights Act 1990 protects freedom from discrimination.

239 Above n 5, 181.

240 A liberal purist may, however, take issue with the standard of harm required.

241 Sunstein argues in the American context that the *Hudnut* court should not have found the Indianapolis ordinance impermissibly viewpoint specific as it targeted harms not viewpoint *qua* viewpoint, and just used the viewpoint as a means of identifying when the harms were likely. Sunstein, above n 81, 589. Tribe argues that this argument is not valid as all viewpoint-specific suppression is aimed at some supposed harm. Above n 11, 925.

242 See text at n 72.

women of colour. Against this is the fact that free speech principles and rap's artistic merit and its value to the Black race count heavily against censorship. The Black feminist critique captures the essence of the problem and recognises that Black women suffer from the insult to their race if misogynistic rap is censored but also suffer the possible harms if it is allowed.

This article has commented on the way in which the FVPCA should be applied to rap music in order to take its special qualities into account. It has been argued that the first tier is contrary to liberal principles and that it does not deal well with misogynistic rap, as there is no room for a consideration of possible harms or redeeming features. The second tier on the other hand, may be applied in a way which takes into account free speech principles, feminist and Black feminist concerns, liberal concerns and the value of art. It has been argued that when these factors are applied, few rap works would or should be banned.

The American free speech jurisprudence, because of its commitment to neutrality towards ideas and abhorrence of restrictions of viewpoint (even when these restrictions target harms), fails to deal with gender-based harms of speech and misogynistic rap is very unlikely to get banned in the United States if the qualities of rap are properly assessed.

While the gender-based harms identified by feminists and Black feminists cannot be properly taken into account in the American context and American obscenity law has been rightly criticised by Black feminism for this failing, the New Zealand situation at least allows them to be considered in a censorship decision. If it is accepted that similar messages exist in other forms of popular culture, the suppression of rap may be harmful to Black women because of the racist undertones in singling out rap, which is inexorably tied to Black culture, for suppression.

Finally, this paper considered a fundamental difference between the New Zealand and United States jurisdictions' philosophies on freedom of speech: that the American state must remain neutral towards ideas, even when they are counter to equality, while in New Zealand, publications which express an ideology counter to equality may be censored for that reason as long as harm is shown.<sup>243</sup> It was argued that New Zealand's position is superior, reasoning that equality is a principle fundamental to our society and that when substantive equality is considered, the reasoning that true ideas will prevail in the market place is flawed when one side of the debate has substantially less power.

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243 As mentioned earlier, under the first tier harm need not be shown in an individual case. This quality of the FVPCA has been criticised above, text at n 72.