

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

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## Abstract

Cartoons and comics have been a part of American culture since the formation of this nation. Throughout that lengthy history, comics and cartoons have also been a subject of controversy, censorship, legislation and litigation. They have been viewed as a threat to society, amid claims that they incite juvenile delinquency, and are scandalous, indecent and obscene.

This article is a case study of the work of the Comic Book Legal Defense Fund (CBLDF), a New York-based non-profit organization which provides legal defense for comic artists, collectors, distributors and retailers who find themselves facing civil and/or criminal penalties for the creation, sale and even ownership of comics, cartoons, graphic novels and related works.

The article begins with an Introduction that charts the history of the comic art form and in particular, its history in the United States. This section of the article then offers a summary of the first effort to restrict the content of comics via an investigation and a series of hearings that took place in 1954 before the U.S. Congress. The dubious psychology and social science theories of Dr. Frederic Wertham, which fueled the congressional investigation, are profiled and offer an example of the kind of misguided fears that still figure in the attacks on the comic art form today. The Introduction concludes with the origin of the CBLDF and the first prosecution of a comic store owner that was the impetus for the creation of the organization.

The second section of the article provides a detailed discussion of the case of *Mavrides v. Franchise Tax Board*, a case in which comic creator Paul Mavrides, who, among other work, was a co-creator (with Gilbert Shelton) of the notorious underground comic *The Fabulous Furry Freak Brothers*, battled with the California Franchise Tax Board over the taxation of comics. The CBLDF paid the legal fees in this conflict, and the success of this effort had a huge impact

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on the ability of independent comic artists to continue to create comics laden with edgy, political and social commentary.

The third section of the article focuses on what has become the principal type of case the CBLDF has worked on for the past two decades - fighting the efforts of local state prosecutors and the U.S. Justice Department to censor the content of comics, usually on alleged grounds that the content is obscene or indecent. An array of cases in which CBLDF has been involved are examined, with particular focus on the case of Gordon Lee, a Georgia based distributor prosecuted for allegedly distributing an obscene graphic novel to a minor, and the case of Christopher Handley, an adult prosecuted under the PROTECT Act for the mere possession of allegedly obscene Manga comics.

The final section of the article looks at how we came to a point in American jurisprudence where we are imprisoning creators, distributors and collectors for the ideas they express in graphic formats. It discusses the fork in the road of obscenity law when it was decided that obscene materials are outside of the protection of the First Amendment, and examines the impact of that decision on the rights of comic creators, distributors and collectors. This is followed with an analysis of the rationale for criminalizing explicit sexual material – to protect children from the alleged harm exposure to these materials causes, and the absence of any definitive proof of that harm, leading to a recommendation that at the very least, criminal penalties for the creation of comics and cartoons with sexual content be de-criminalized.

## 1. Introduction

Like many kids born in the 1950s, I spent my time and meager allowance on my entertainment of choice: comic books, newspaper cartoons and comic strips, and Saturday morning cartoon shows. When I went to college at Berkeley in the 1970's, my focus shifted from superhero comic books to what were called “underground comix”, a heady mix of anti-war politics, drugs and sex – the creations of artists like R. Crumb, Art Spiegelman, Vaughn Bode, Gilbert Shelton and Paul Mavrides. My interest in this art form never faded, and I continue to read and collect comic art. Over the years, I have found it particularly interesting to note the number of lawyers and law professors who share my passion for this genre of expressive works.<sup>1</sup>

My interest has led me to realize how inaccurate it is for many to assume that comic art is limited to superhero comics, or to the daily newspaper strips. This is an amazingly diverse art form, with a history that can be traced to the earliest artistic expression of primitive man in cave art. So

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<sup>1</sup> In one very interesting use by lawyers of comics, the Law and the Multiverse blog site, <http://lawandthemultiverse.com/>, uses current superhero comics plot lines as a base upon which to discuss law and legal doctrine. So in one blog posting, the authors use a scene from the recent Thor motion picture, in which government agents seize the research of scientist Jane Foster (played by Natalie Portman) as a basis to discuss the circumstances under which such government seizures are lawful (*see, e.g.,* <http://lawandthemultiverse.com/2011/05/06/thor/>; for a different approach to the intersection between lawyers and comics, *see* William A. Hilyerd, *Hi Superman, I'm A Lawyer: A Guide To Attorneys (And Other Legal Professionals) Portrayed In American Comic Books: 1910-2007*, 15 *Widener L. Rev.* 159 (2007), in which the author offers a detailed and exhaustive study of the numerous ways in which attorneys have been portrayed in comic books over a 93 year period.

before we look at the intersection of comic art and the law, a bit of historical perspective is warranted to overcome these inaccurate perceptions.

## A. A Brief History of the Comic Art Form

At its core, art is a form of communication. As soon as humans developed to a point where they formed social groups, communication in the form of telling stories and sharing experiences became a key element of tribal communities. And it was in these early days of human experience that the impulse to create a visual image to help tell that story led to the birth of art.

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

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

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The earliest existing works of representation are the well-known depictions of animals found in cave paintings. It is noteworthy that the technique was that of the cartoon.

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Because we are so accustomed to representation, it is difficult to conceive of the original leap of the imagination that allowed images to stand for things and enabled the observer to respond to those images with his whole being. The cartoon continues to derive its effectiveness from this basic cathartic response.”<sup>2</sup>

One of the important characteristics of a comic is that it is comprised of a series of images, usually, although not always, accompanied by words, all of which are arranged in a narrative sequence. Comics are sometimes referred to as "sequential art", as Carlin notes:

“[h]ieroglyphics and comics share certain structural characteristics. This sense of layout, in which images are read sequentially like words, was carried over into the graphic designs which illuminate medieval manuscripts.”<sup>3</sup>

Moving from the Middle Ages, sequential art used to tell stories next appears, in Western art<sup>4</sup>, in Englishman William Hogarth's famous popular prints, *The Harlot's Progress* (1732), and *The*

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<sup>2</sup> John Carlin, *In Praise of Folly: The Early Development of Comics in Art*, in John Carlin & Sheena Wagstaff, *Catalog: The Comic Art Show: Cartoons in Painting and Popular Culture (1983)* Whitney Museum Of American Art (published by Fantographic Books, Inc.), at 10.

<sup>3</sup> *Id.* at 11.

<sup>4</sup> For reasons both of brevity and the scope of my research, I am not addressing the development of comic and cartoon art in Asia, Africa, South America or the Middle East. This form of art also developed and thrived in those regions of the world, and creators there made significant contributions to the development of this art form. Given the

*Rake's Progress* (1733-34) which John Carlin describes as being “the first modern works to express the narrative sequence through images”.<sup>5</sup> Hogarth employed satire and caricature for the purpose of offering social and political commentary, in what were some of the first political cartoons in Western history.<sup>6</sup>

Hogarth's success prompted other artists to venture into the cartoon and comics genre – in 1800, Hogarth's contemporary, Thomas Rowlandson, created Dr. Syntax, arguably the first continuing comic character.<sup>7</sup> This was followed in the 1840's when Swiss educator Rudolphe Topffer created illustrated stories that used a panel sequence to link pictures and text, creating one of the early forerunners of the modern comic book.<sup>8</sup>

In the next decade a host of famous French and English artists and writers began creating more works in the comic and cartoon satiric genre. Gustave Dore, Honor Daumier, Odilon Redon and others illustrated works of political and social commentary in comic and cartoon modes. And Lewis Carroll created the original illustrations for *Alice in Wonderland*, which were later professionally redone by Sir John Tenniel.<sup>9</sup>

French art critic Charles Beaudelaire was one of the first writers to give comics serious attention via an 1855 article entitled “On the Essence of Laughter, and in General, on the Comic in the Plastic Arts”.<sup>10</sup>

In the United States, artists were influenced by their European counterparts, and the mid-19<sup>th</sup> century became the launching point for many political satire magazines, which gave a home to artists like Winslow Homer, Thomas Nast and Joseph Keppler. Their work attacked Lincoln and Civil War politics, the political tyranny of New York's Boss Tweed and Tammany Hall (his notorious political machine), and the unsuccessful presidential campaign of Republican James G. Blaine (Keppler's candidate, Grover Cleveland, won in a tight race).<sup>11</sup>

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

“By 1900, comic art had become an indelible feature of American popular publishing, and two new genres emerged to great acclaim: the daily editorial cartoon and the comic strip. ...[d]aily cartoons as a national phenomenon awaited the apocalyptic newspaper war between Joseph Pulitzer's *New York World* and William Randolph Hearst's *New*

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U.S. focus of this article, those contributions are, regrettably, beyond the scope of this article, and for that reason I have limited this discussion to the development of the comic art form in Europe and in the U.S.A.

<sup>5</sup> *Id.*

<sup>6</sup> Harry Katz, *A Brief History of American Cartooning*, in *Cartoon America: Comic Art in the Library of Congress*/ (2006) published by Harry N. Abrams, Inc., at 29.

<sup>7</sup> John Carlin, *supra* n.2, at 11.

<sup>8</sup> *Id.* at 13.

<sup>9</sup> *Id.* at 14

<sup>10</sup> Baudelaire, Charles. "On the Essence of Laughter" [1855], in *The Mirror of An*, tr. & ed. Jonathan Mayne (London, Phaidon Press Ltd., 1955). This book is largely out of print.

<sup>11</sup> Katz, *supra* n.6, at 40-50. The works of these artists were featured in weekly magazines that launched in this same era, such as *Vanity Fair*, *Harpers*, *Puck*, *The New Yorker*. *Id.*

*York Journal*. Cartoons were at the center of this epic battle for circulation and political influence.”<sup>12</sup>

One of these new comic strips became the source of a huge battle between Pulitzer and Hears. Richard Felton Outcault’s comic strip, *At the Circus in Hogan’s Alley*, introduced a street urchin named Mickey Dugan, who became known as the *Yellow Kid*. Introduced by Pulitzer in the *World*, Hearst opened, and won, a bidding war for the strip and it moved to the *Journal*.<sup>13</sup>

As should be evident from the history of comics as they entered the 20<sup>th</sup> century, the genre was principally oriented to adult readers, appearing in adult focused magazines and newspapers. As the century progressed, comic strips moved onto a separate series of pages, primarily appearing on Sundays, and included humorous strips, in color, which were popular with children and young adults (the concept of teenagers was not to be introduced until the 1950s). The interest children showed in this new medium caught the attention of educators, who were critical of the lack of moral instruction in these comics – which were instead simply focused on fun, adventures and humor.<sup>14</sup>

John Carlin notes that the use of the term “comics” to describe this art form is in some senses misleading, which may in part account for the educators’ reactions:

“The use of the term “comic” to describe these works is both misleading and somewhat reductive. While humor is an element in many sequential graphic works, there are also many such works which focus on drama, characters, the absurd, the grotesque and the surreal.”<sup>15</sup>

My Google search under the question “Are Comics Just for Kids?” generated 57 million hits, all of them denying that comics are now, or ever really were, a medium targeted just for kids. As a regular attendee, and sometime panelist, at the San Diego International ComicCon, I can personally attest that most of the 125,000 in attendance are not children, but rather adults of all ages, genders and races.

Despite the considerable evidence that comics are not primarily an art form for children, concern about the impact they might have on children triggered the first major legal challenge to the genre – the 1954 Congressional hearings.

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<sup>12</sup> *Id.* at 54.

<sup>13</sup> *Id.* at 55-56. The *Yellow Kid* offered readers a look into gritty tenement life of the lower classes in New York City, see, e.g., [The Yellow Kid on the Paper Stage: Introduction](http://xroads.virginia.edu/~ma04/wood/ykid/intro.htm), last viewed at [xroads.virginia.edu/~ma04/wood/ykid/intro.htm](http://xroads.virginia.edu/~ma04/wood/ykid/intro.htm). In an apparent response to the dismal view of life the strip and cartoons offered, in 1905 the *New York Herald* debuted the Sunday full page comic strip *Little Nemo in Slumberland*, by Winsor McKay – a strip based on the dreams of the artist’s son, which were illustrated in striking beauty and surreal details. The Sunday strips were republished in digitally re-mastered full size reproductions in 2005 by Sunday Press Books ([www.sundaypressbooks.com](http://www.sundaypressbooks.com)).

<sup>14</sup> Thierry Groensteen, *Why Are Comics Still in Search of Cultural Legitimization?*, in *A Comic Studies Reader* (2009) Edited by Jeet Heer and Kent Worcester, published by University Press of Mississippi, at 4.

<sup>15</sup> John Carlin, *supra* n.2, at 14.

## B. Censoring Comics: The 1954 Congressional Hearings

The first comic books published in the United States were reprints of Sunday newspaper comic strips re-formatted into a soft-cover book presentation, and bore names like *Funnies on Parade*, and *Famous Funnies*. The popularity of the books led publishers to seek original material, and detective stories were the next iteration of comic books, along with mystery stories and adventure tales, with titles like *Henri Duval of France*, *Famed Soldier of Fortune*, and *Dr. Occult, the Ghost Detective*.<sup>16</sup>

In June 1938, Detective Comics published the first superhero comic, in Action Comics #1, which featured a character named Superman, written by Jerome Siegel and illustrated by Joseph Shuster, two young men from Cleveland.<sup>17</sup> The superhero age had arrived, and DC Comics added, in quick order, hero comics featuring Batman, Wonder Woman, the Flash, Aquaman, and many others.

Comic books became immensely popular with all ages, and many readers were young children. Superhero books were not the only type of books published. Their subject matter covered a wide range, from westerns to romances, from detective stories to fantasy and horror.

William Gaines' company, Entertaining Comics (aka EC), launched in 1950 one of the most successful lines of horror comics, with titles like *Crypt of Terror*, *Haunt of Fear*, and *Vault of Horror*.<sup>18</sup> This success was copied quickly, and by 1954 there were more than 40 horror titles published every month.<sup>19</sup> Sales in the early 1950s, a time before the widespread distribution of televisions, were between 80 and 100 million comic books per week.<sup>20</sup> By 1954, however, another event occurred which would mean trouble for the comics industry.

Dr. Fredric Wertham, a psychiatrist from Germany who had come to the United States in 1922 to teach psychiatry at Johns Hopkins University, devoted his career to the study of criminal behavior. He moved to New York City in 1934 and became the director of the Court of General Sessions psychiatric clinic, a clinic that examined every convicted felon in the city. He worked at several other New York hospitals, including Bellevue and the Queens Hospital Center.<sup>21</sup>

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<sup>16</sup> Les Daniels, *Superman, The Complete History* (1998 Chronicle Books, pub.) at 23.

<sup>17</sup> *Id.* at 31-41.

<sup>18</sup> Amy Kiste Nyberg, *William Gaines and the Battle over EC Comics*, in *A Comic Studies Reader*, *supra* n.14 at 58-59.

<sup>19</sup> *Id.* at 59.

<sup>20</sup> Louis Menand, *The Horror: Congress Investigates the Comics*, *The New Yorker Book Review* (March 31, 2008), reviewing David Hajdu's *The Ten-Cent Plague: The Great Comic Book Scare and How It Changed America*, last viewed at <http://www.newyorker.com/arts/critics/books/2008/03/32/080331cr...>, at 4.

<sup>21</sup> *Id.* at 5. Dr. Wertham also started a clinic in Harlem, the LaFargue Clinic, named after Paul LaFargue, Karl Marx's son, where he provided free psychiatric services to people of color. His writings about the psychological effects of segregation on African Americans, was used in the Supreme Court case of *Brown v. Board of Education*. *Id.* at 5, 10.

Based on his experiences working in clinics treating young people who had engaged in acts of violence and juvenile delinquency, Dr. Wertham became convinced that comic books in the horror, detective and crime genres, were a major contributing factor in juvenile delinquency.<sup>22</sup> He set forth his findings in a book entitled *The Seduction of the Innocent*<sup>23</sup>, a work which was chosen as a Book-of-the-Month Club selection and excerpted in *Ladies Home Journal*. Although Wertham's conclusions about the causal relationship between comics and delinquency were subjected to some criticism by social scientists, his conclusions struck a chord with the general public, and came to the attention of the U.S. Senate. A subcommittee of the Senate Judiciary Committee charged with investigating the causes of juvenile delinquency was holding hearings of the issue at the Foley Square U.S. Courthouse (now re-named the Thurgood Marshall Courthouse) in New York City, and invited Dr. Wertham to testify at the April 21, 1954 session.<sup>24</sup>

Dr. Wertham's attack on comic books in *The Seduction of the Innocent*, has been written about extensively, however most commentators paraphrase his work, rather than citing to it directly. Doing so robs the reader of the force of Wertham's rhetoric and as such makes it more difficult to understand why his work has such an impact. A representative sampling from the book, describing his concerns about the iconic three D.C. comics superheroes, Superman, Batman and Wonder Woman, all comics he characterizes with the general term "crime comics", gives us a sense of his style and its impact:

"The Superman type of comic books tends to force and superforce. Dr. Paul A. Witty, professor of education at Northwestern University, has well described these comics when he said that they "present our world in a kind of Fascist setting of violence and hate and destruction. I think it is bad for children" he goes on, "to get that kind of recurring diet...[they] place too much emphasis on a Fascist society.

...

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

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Superwoman (Wonder Woman) is always a horror type. She is physically very powerful, tortures men, has her own female following, is the cruel, "phallic" woman. While she is a frightening figure for boys, she is an undesirable ideal for girls, being the exact opposite of what girls are supposed to want to be."<sup>25</sup>

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<sup>22</sup> *Id.* at 5.

<sup>23</sup> Frederic Wertham M.D., *The Seduction of the Innocent*, 1954 (republished in a limited edition of 220 copies in 2004 by Main Road Books, Inc.)

<sup>24</sup> Louis Menand, *supra* n. 20, at 3.

<sup>25</sup> *The Seduction of the Innocent*, *supra* n. 23, at 34. Wonder Woman is the creation of another psychologist, Dr. William Moulton Marston, who held a law degree as well as a medical degree, and is also famous for his role in the invention of the lie detector. Married to an attorney and the father of four, his love of Greek mythology and desire to create a role model counterpart to Superman that girls and women could admire, he describes Wonder Woman in terms very different from Dr. Wertham:

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

"Several years ago a California psychiatrist pointed out that the Batman stories are psychologically homosexual. Our researches confirm this entirely. Only someone ignorant of the fundamentals of psychiatry and of the psychopathology of sex can fail to realize a subtle atmosphere of homoeroticism which pervades the adventures of the mature "Batman" and his young friend "Robin". Male and female homoerotic overtones are present also in some science-fiction, jungle and other comic books.<sup>26</sup>

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

Robin is a handsome ephebic<sup>27</sup> boy, usually shown in his uniform with bare legs. He is buoyant with energy and devoted to nothing on earth or in interplanetary space as much as to Bruce Wayne. He often stands with his legs spread, the genital region discreetly evident.

In these stories there are practically no decent, attractive, successful women. A typical female character is the Catwoman, who is vicious and uses a whip. The atmosphere is homosexual and anti feminine."<sup>28</sup>

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

Les Daniels, *Wonder Woman, the Life and Times of the Amazon Princess* (Chronicle Books 2000), at 22-23.

<sup>26</sup> *The Seduction of the Innocent*, supra n. 23, at 189-190.

<sup>27</sup> Yes, I had to look up this word too. Ephebic's root word is ephebus, which means "a young man".

<http://www.merriam-webster.com/dictionary/ephebic>. Don't ask me why Dr. Wertham could not have simply said that.

<sup>28</sup> *Id* at 190-191. Once again, those responsible for the creation of these comic characters don't support Wertham's analysis. Jerry Robinson, a young comic artist generally credited with the creation of Batman's sidekick, Robin, based the character and his costume after Robin Hood as illustrated in an oil painting by N.C. Wyeth. He added a young sidekick so that children reading the books would have someone their own age to identify with. *See, e.g.* N.C. Christopher's *Jerry Robinson: Ambassador of Comics* (2010) at 37-40. Batman co-creator and illustrator Bob Kane disputes Robinson's claim, asserting that he is Robin's creator - the majority of comics scholars support Robinson's claims. Nonetheless, both men assert that Robin was created to give younger readers a character to identify with, not as a gay partner for Batman. *See, e.g.* Bob Kane with Tom Andrae, *Batman and Me*, 1989 at 46.

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

"By no stretch of critical standards can the text in crime comics qualify as literature, or their drawing as art. Considering the enormous amount of time spent by children on crime comic books, their gain is nil....and since almost all good children's reading has some educational value, crime comics by their very nature are not only non-educational; they are anti-educational. They fail to teach anything that might be useful to a child; they do suggest many things that are harmful.<sup>29</sup> ...Brutality in fantasy creates brutality in fact.<sup>30</sup>

Wertham offered a summary of his findings, a summary the congressional committee would find compelling:

"The general lesson we have deduced from our large case material is that the bad effects of crime comic books exist potentially for all children and may be exerted along these lines:

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

Crime comics are an agent with harmful potentialities. They bring about a mass conditioning of children, with different effects in the individual case. A child is not a simple unit which exists outside of its living social ties. Comic books themselves may be the virus, or the lack of resistance to the social virus of a harmful environment."<sup>31</sup>

Reading Dr. Wertham's theories and conclusions in the light of the 21st century, social scientists shudder at his faulty methodology, and the broad, sweeping, unsubstantiated conclusions he drew from his collection of anecdotal evidence. Marjorie Heins, in her book *Not in Front of the Children*<sup>32</sup>, discusses the weakness of Dr. Wertham's argument:

"A witness in the 1994 "heinous crimes" trading card case made the same point about the evidence adduced by Fredric Wertham in the 1950s against comic books. Wertham interviewed juvenile offenders, she said,

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<sup>29</sup> *Id.* at 89-90.

<sup>30</sup> *Id.* at 109.

<sup>31</sup> *Id.* at 118.

<sup>32</sup> Marjorie Heins, *Not in Front of the Children: Indecency, Censorship, and the Innocence of Youth* (2001).

and asked them if they had read comic books. And they said they had. And he therefore concluded that reading comic books made them into juvenile delinquents. His study is now cited in courses on mass communication as a form of error...because you see, had he asked all children of New York City, have you read comics, he would have found that 93 percent of all children had read comics. And they were not all juvenile delinquents.

Judith Harris pithily summarized the problem: "the plural of anecdote is not data".<sup>33</sup>

However, in April 1954, those critics were not heard from in the Judiciary subcommittee hearings. Instead, after receiving what was viewed at the time as compelling testimony by Dr. Wertham, a hostile committee then took testimony from William Gaines, the lone member of the comics community who had agreed to offer a response. His testimony was an unmitigated disaster, one which was blamed in part on the effects of prescription medication (Dexedrine) he was taking at the time. In Louis Menand's *New Yorker* article, he tells of one particularly tough cross examination, in which Gaines was trapped into some damaging admissions:

"Let me get the limits as far as what you put into your magazine," the committee's junior counsel, Herbert Beaser, asked him. "Is the sole test of what you would put into your magazine whether it sells? Is there any limit you can think of that you would not put in a magazine because you thought a child should not see or read about it?"

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

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

GAINES: I don't believe so.

BEASER: There would be no limit actually to what you put in the magazines?

GAINES: Only within the bounds of good taste.

BEASER: Your own good taste and saleability?

GAINES: Yes.

Kefauver (Senator Estes Kefauver, Chair of the subcommittee) spoke up. He pointed to one of the covers, from an issue of "Crime SuspensStories," on display in the hearing room.

KEFAUVER: Here is your May 22 issue. This seems to be a man with a bloody axe holding a woman's head up which has been severed from her body. Do you think that is in good taste?

GAINES: Yes, sir, I do, for the cover of a horror comic. A cover in bad taste, for

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<sup>33</sup> Judith Heins, Article, *Media Effects*, excerpted from *Not in Front of the Children: Indecency, Censorship, and the Innocence of Youth*, reprinted in *Censoring Culture: Contemporary Threats to Free Expression*, edited by Robert Atkins and Svetlana Mintcheva, (2006), at 177. The Judith Harris quote is from Judith Rich Harris, *The Nurture Assumption: Why Children Turn Out the Way They Do*, (New York: The Free Press, 1998), at 214.

example, might be defined as holding the head a little higher so that the neck could be seen dripping blood from it, and moving the body over a little further so that the neck of the body could be seen to be bloody.

KEFAUVER: You have blood coming out of her mouth.

GAINES: A little.<sup>34</sup>

Once the debate shifted to whether horror comics were in good taste, the battle was lost. Of course horror comics aren't in "good taste" – very little that appeals to adolescent boys fits that category.<sup>35</sup>

Public reaction to the Congressional hearings, which were televised on the newly widespread medium of television, was strongly negative. A Gallup poll taken in November 1954 found that seventy percent of Americans agreed with the view that comic books were a cause of juvenile crime.<sup>36</sup> More than a dozen states passed laws restricting the sale of comic books, and there were public burnings of comic books.<sup>37</sup> In the two year period from 1954 to 1956, the comic book industry suffered a huge contract, going from publishing 650 titles a year down to about 250 titles, and over eight hundred artists, writers and related creators (ie: letterers, colorists, etc.) left the industry.<sup>38</sup>

Desperate to salvage the tattered remnants of their industry, comics publishers created a trade organization, the Comics Magazine Association of America, and created a code of conduct that, as David Hajdu puts it, was "an unprecedented (and never surpassed) monument of self-imposed repression and prudery. All comics published after the October 1954 adoption of the Code were reviewed by a team of five censors, and all comic books, once they were approved for publication, bore a replica of a stamp with the words "Approved by the Comics Code Authority" on their front covers.<sup>39</sup> Over time the fear and hysteria about the role of comics in young people's lives died down, and the market for comics shifted to a more adult market, resulting in the gradual elimination of the Code – however the last major comic publishers, DC and Archie Comics, to drop the CCA stamp didn't happen until 2011, making the 56 year self-imposed period of censorship one of the longest of any creative industry.<sup>40</sup>

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<sup>34</sup> Louis Menaud, *supra* n. 20, at 6-7.

<sup>35</sup> *Id.* at 7. Menaud points out: "Disrespect for good taste was one of the chief attractions comic books had for pre-adolescents. Grossness is a hot commodity in the ten-to-fourteen demographic". *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* EC Comics was among the casualties – it published its last comic in November, 1955. Gaines, however, stayed in the business. In order to avoid the strictures of the Comic Code (discussed *infra*), he took his satire comic book, *Mad*, and converted it into a black and white magazine format, thereby allowing him to ignore the Code and its limits. *Id.* at 8.

<sup>39</sup> *Id.* at 7.

<sup>40</sup> Glen Weldon, [Censors and Sensibility: RIP, Comics Code Authority Seal Of Approval, 1954 - 2011](http://www.npr.org/blogs/monkeysee/2011/01/27/133253953/censors-and-sensibility-rip-comics-code-authority-seal-1954-2011), last viewed at <http://www.npr.org/blogs/monkeysee/2011/01/27/133253953/censors-and-sensibility-rip-comics-code-authority-seal-1954-2011>.

The text of the Code has to be read to be believed. It is cited in its entirety here because of its significance in the contemporary efforts to limit the content of comics and related graphic works under current federal law, as is discussed *infra* in section \_\_ herein. Here is the Code:

### **“Code For Editorial Matter**

#### **General Standards Part A:**

- 1) Crimes shall never be presented in such a way as to create sympathy for the criminal, to promote distrust of the forces of law and justice, or to inspire others with a desire to imitate criminals.
- 2) No comics shall explicitly present the unique details and methods of a crime.
- 3) Policemen, judges, government officials, and respected institutions shall never be presented in such a way as to create disrespect for established authority.
- 4) If crime is depicted it shall be as a sordid and unpleasant activity.
- 5) Criminals shall not be presented so as to be rendered glamorous or to occupy a position which creates the desire for emulation.
- 6) In every instance good shall triumph over evil and the criminal punished for his misdeeds.
- 7) Scenes of excessive violence shall be prohibited. Scenes of brutal torture, excessive and unnecessary knife and gun play, physical agony, gory and gruesome crime shall be eliminated.
- 8) No unique or unusual methods of concealing weapons shall be shown.
- 9) Instances of law enforcement officers dying as a result of a criminal's activities should be discouraged.
- 10) The crime of kidnapping shall never be portrayed in any detail, nor shall any profit accrue to the abductor or kidnapper. The criminal or the kidnapper must be punished in every case.
- 11) The letters of the word "crime" on a comics magazine shall never be appreciably greater than the other words contained in the title. The word "crime" shall never appear alone on a cover.
- 12) Restraint in the use of the word "crime" in titles or subtitles shall be exercised.

#### **General Standards Part B:**

- 1) No comic magazine shall use the word "horror" or "terror" in its title.
- 2) All scenes of horror, excessive bloodshed, gory or gruesome crimes, depravity, lust, sadism, masochism shall not be permitted.
- 3) All lurid, unsavory, gruesome illustrations shall be eliminated.
- 4) Inclusion of stories dealing with evil shall be used or shall be published only where the intent is to illustrate a moral issue and in no case shall evil be presented alluringly nor so as to injure the sensibilities of the reader.
- 5) Scenes dealing with, or instruments associated with walking dead, torture, vampires and vampirism, ghouls, cannibalism, and werewolfism are prohibited.

### General Standards Part C:

All elements or techniques not specifically mentioned herein, but which are contrary to the spirit and intent of the Code, and are considered violations of good taste or decency, shall be prohibited.

#### **Dialogue:**

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

#### **Religion:**

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

#### **Costume:**

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

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

**Marriage and Sex:**

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

**Code For Advertising Matter:**

These regulations are applicable to all magazines published by members of the Comics Magazine Association of America, Inc. Good taste shall be the guiding principle in the acceptance of advertising.

- 1) Liquor and tobacco advertising is not acceptable.
- 2) Advertisement of sex or sex instructions books are unacceptable.
- 3) The sale of picture postcards, "pin-ups," "art studies," or any other reproduction of nude or semi-nude figures is prohibited.
- 4) Advertising for the sale of knives, concealable weapons, or realistic gun facsimiles is prohibited.
- 5) Advertising for the sale of fireworks is prohibited.
- 6) Advertising dealing with the sale of gambling equipment or printed matter dealing with gambling shall not be accepted.
- 7) Nudity with meretricious purpose and salacious postures shall not be permitted in the advertising of any product; clothed figures shall never be presented in such a way as to be offensive or contrary to good taste or morals.
- 8) To the best of his ability, each publisher shall ascertain that all statements made in advertisements conform to the fact and avoid misinterpretation.

9) Advertisement of medical, health, or toiletry products of questionable nature are to be rejected. Advertisements for medical, health or toiletry products endorsed by the American Medical Association, or the American Dental Association, shall be deemed acceptable if they conform with all other conditions of the Advertising Code.

Adopted in October 1954 by the Comics Magazine Association of America, Inc.”<sup>41</sup>

The Comics Code was universally accepted for about ten years following its adoption. The first signs of erosion of that acceptance can probably be traced to the beginnings of the Free Speech Movement launched in Berkeley in 1965 when Mario Savio led Berkeley students in a protest over the University’s effort to limit the kinds of allowable speech in Sproul Plaza, on the U.C. Berkeley campus. The Free Speech Movement became the springboard for protests against the expanding involvement of the U.S.A in the war in Vietnam, and by the late 1960’s a full blown counter-culture had developed.<sup>42</sup>

Comic artists and writers enthusiastically embraced the counter-culture, and engaged in a period of self-publishing of black and white comics that allowed them to address topics banned by the Code. Explicit sexual activity, anti-war protests, drug use and many other counter-cultural expressions were the subject of the “underground comix” of this era.<sup>43</sup> Mainstream comics followed, with the rise of Marvel Comics, led by Stan Lee and Jack Kirby, and D.C. Comics, both offering characters and story lines that dealt with controversial issues.<sup>44</sup>

As comics and graphic novels matured as literary forms in the years following the comic book battles of the 1950’s, and as they began to address more adult themes, and appeal to a broader range of readers than their primarily younger audience (although it is an error to assume that there ever was a time when the only readers of comics were children and adolescents – there has always been a significant adult readership), they came under scrutiny by law enforcement on grounds that their content violated obscenity law. It was in that context that the circumstances that gave rise to the Comic Book Legal Defense fund arose.

### **C. The Origins of the Comic Book Legal Defense Fund**

By the fall of 1986, Denis Kitchen had been involved in the comic art and business fields for over twenty years. He was part of the group of artists who were active in the underground comix movement, which also included Robert Crumb and Art Spiegelman. He got involved in publishing during that time, and founded the eponymous Kitchen Sink Press, a company he ran until 1999. Currently he is a co-owner and founder of a number of comics related businesses,

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<sup>41</sup>The Comics Code Authority; Last viewed at [http://www.lambiek.net/comics/code\\_text.htm](http://www.lambiek.net/comics/code_text.htm)

<sup>42</sup> See, generally, James Danky and Denis Kitchen, *Underground Classics: The Transformation of Comics Into Comix* (2009, Abrams ComicArts, pub.)

<sup>43</sup> *Id.*

<sup>44</sup> Marvel Comics’ Spiderman character featured the hero’s alter ego, Peter Parker, who was depicted as an insecure high school student; and D.C.’s Green Lantern superhero, in a series of comic books created by Neal Adams, travelled across America viewing instances of social injustice. See, e.g. Stan Lee, Steve Ditko & Jack Kirby, *The Amazing Spider Man #1*, (Marvel Comics, March 1963)(first appearance of Spiderman in his own book) (a copy of this book sold for \$97,750 at an August 2005 auction); Denny O’Neill & Neal Adams, *In the Heart of America: A War Zone*, Green Lantern/Green Arrow 77 (DC Comics, June 1970).

including Kitchen, Lind and Associates, a company which packages books and represents cartoonists to the mainstream literary marketplace<sup>45</sup>, and CAPE (Comic Art Productions and Exhibitions), a company which produces comics-focused touring museum and gallery shows and related online apps (for mobile devices).<sup>46</sup>

In December 1986, Kitchen received a telephone call from Frank Magiaracina, owner of a chain of comics stores in Indiana and Illinois called Friendly Franks. Frank told him that his store in Lansing, Illinois had been the subject of a police raid. Six police officers had come into the shop, and seized seven comic titles, including *Omaha the Cat Dancer*, *Weirdo* and *Heavy Metal*. They arrested the store manager, Michael Correa, on charges of having obscene books on display, and closed the Friendly Franks store for a five-day period.<sup>47</sup>

The arresting officer, Sgt. Jack Hoestra, told the *Gary Post-Tribune* newspaper that in addition to the legal charges of obscenity, he noticed a “satanic influence” in many of the shops’ comics. “Oh yes, there was absolutely a lot of satanic influence in the comics there”, he told the paper. “If you know what you’re looking for, you can see the satanic influence all over. Three-quarters of the rock groups today show satanic influence, and it’s all over the television.”<sup>48</sup>

Kitchen was appalled at the total lack of merit of the police action. He felt a personal sense of responsibility to try to help Magiaracina and Correa, because one of the titles seized, *Omaha the Cat Dancer*, was distributed by Kitchen Sink Press.<sup>49</sup> A short time after the raid, while he was attending a comics convention in St. Paul, Minnesota, he discussed with a few colleagues who were equally outraged by the police action, what they could do to lend support to the legal defense effort. Kitchen came up with the idea of creating and selling limited edition prints by an impressive array of artists, under the rubric of a First Amendment Portfolio. Adding his own contribution, he put together a group of 14 artists to create the portfolio, and found a printer to print the work at cost. The resulting effort yielded a net profit of \$20,000, which he put into a bank account that he named the Comic Book Legal Defense Fund.<sup>50</sup>

Before the funds raised could be put to use, the charges against the defendants went to trial and the trial judge found Correa guilty of corruption charges. Using the money raised, Kitchen hired Burton Joseph, a well-known attorney who specialized in First Amendment cases, and who had

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<sup>45</sup> Charles Brownstein, Essay, *Who is Denis Kitchen? Snapshots From an Oddly Compelling Life*, published in *The Oddly Compelling Art of Denis Kitchen* (2010 Dark Horse Books) at 48.

<sup>46</sup> By way of self disclosure, I am the legal counsel to CAPE, and my wife Kim Munson, is one of the partners in the company.

<sup>47</sup> Denis Kitchen, Press Release entitled: *Origins of the Comic Book Legal Defense Fund* (2005), copy in the possession of the author, at 1. A few weeks after the original raid, the police added *Elektra: Assassin, Love & Rockets*, *Ms. Tree*, *Bodessey*, and *Elfquest* to the list of allegedly obscene material. *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* Kitchen notes that although *Omaha the Cat Dancer* contains adult content (primarily nudity by the lead character, an anthropomorphic feline creature who works as a dancer in a strip club), the book had received critical praise all over the world, and was one of the few comics in 1986 with a high female readership. *Id.*

<sup>50</sup> *Id.* at 2. The artists contributing to the portfolio, and the work they were known for, were: Sergio Aragones (*MadMagazine*), Hilary Barta (*Plastic Man*), Reed Waller (*Omaha the Cat Dancer*), Steve Bissette (*Swamp Thing*), Bob Burden (*Flaming Carrot*), Richard Corben (*Bodessey*), Robert Crumb (*Weirdo* and *Zap*), Howard Cruse (*Wendel*), Will Eisner (*The Spirit*), Frank Miller (*Batman: The Dark Knight* and *Elektra*), Mitch O’Connell & Don Simpson (*Megaton Man*) and Eric Vincent (*Alien Fire*).

represented the Playboy Foundation, to appeal the conviction. The appeal was successful and the conviction was overturned.<sup>51</sup>

Following the successful conclusion of the Correa case, Kitchen found that several thousand dollars remained in the bank fund. After discussing options with his colleagues in the venture, he decided that the Friendly Frank's raid wasn't likely to be an isolated incident, so he took steps to create a 501(c) 3 non-profit organization, using the same name he'd applied to the bank account – The Comic Book Legal Defense Fund. The non-profit status was obtained in 1990, and through additional fund raising, enough money was raised to hire a full-time Executive Director, a small staff, and to fund an office. Originally set in Massachusetts, near his home, the organization subsequently moved to New York City, where it presently occupies offices at 255 West 36<sup>th</sup> Street, Suite 501, in the heart of the city.

Although the case that launched CBLDF focused on obscenity law, and many of the cases it dealt with in the years to come would share that focus, the first major case the CBLDF would work on following its creation dealt with another vital issue to comic creators – the use of the power to tax to potentially limit free speech.

## **2. The Power to Tax and the First Amendment: Mavrides v. Board of Equalization**

Paul Mavrides has been an artist since 1976, working in a variety of media, including comics and graphic art. He is best known for a short stint he spent in the 70's working as a co-creator with Gilbert Shelton on an underground comic known as the Fabulous Furry Freak Brothers. The three brothers spent a great deal of time and effort in the pursuit of drugs (mostly marijuana), casual sex and rock and roll.<sup>52</sup>

In his non-comix creator role as a commercial artist, Mavrides was registered with the California state taxing authority, the Board of Equalization (the BOE), as a vendor. When he sold original pieces of artwork to client's, he charged sales tax on the transaction, and paid the tax to the BOE.

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<sup>51</sup> *Id.* at 3. *See, also*, CBLDF Case Files – Illinois v. Correa, last viewed at <http://cblfdf.org/about-us/case-files/correa>; James A. Morrisard, *Comics Relief: CBLDF Comes to Legal Aid of Comic-Book Artist, Publishers, and Sellers*, Baltimore City Paper (March 4, 1998), last viewed at <http://www2.citypaper.com/arts/story.asp?id=5032>. Kitchen points out the irony in that the judge in the case, Cook County Circuit Court Judge Paul Foxgrover, later pled guilty to charges of theft, forgery and official misconduct charges that stem from his endorsement of \$27,534 in restitution checks paid by defendants who appeared before him. *See, e.g.*, [http://articles.chicagotribune.com/1992-06-06/news/9202200388\\_1\\_foxgrover-charges-guilty](http://articles.chicagotribune.com/1992-06-06/news/9202200388_1_foxgrover-charges-guilty).

<sup>52</sup> *See, e.g.*, Gilbert Shelton, *The Collected Freak Brothers* (1971 Rip Off Press, pub.). This is a collection of early Freak Brothers stories, originally published, as was the case with many underground comix, in what were called “underground newspapers”, bearing such colorful names as : The East Village Other, Yellow Dog, The Rag, Gothic Blimp Works, The Rat, Radical American Komiks, Zap Comics, and Hydrogen Bomb Funnies. Underground comix were generally drawn in black and white, without the division between writers and illustrators that marked mainstream comics. They were sold primarily in record stores, “head shops” and other venues that catered to the counter-culture – and they were definitely not aimed at a children's readership. The brothers, Fat Freddie, Phineas and Freewheelin' Frank, were known for making marijuana consumption their primary activity. In one exemplary story, Phineas reaches into the sugar jar and says: “Looks like we're out of money again!” to which Freewheelin' Frank replies: “Well, that's all reet...we have plenty of grass, and as we all know, dope will get you through times of no money better than money will get you through times of no dope!” Obviously not a mainstream perception or one that most parents would like their children to read. *Id.* at 2, original copy in possession of the author.

When he filed his state tax returns in 1991 for the 1990 calendar year, he listed his sales income and the tax owed. He also listed his royalty income for his comics work, and filed for an exemption from tax for that income.<sup>53</sup> In requesting this exemption, he was following his pattern over many years of work in the comics industry based on his understanding that the work of an author, submitted for subsequent publication, was exempt from tax, since ultimately the sale of the published work would be a sales taxable transaction, so taxing the work in transit would be a double taxation.<sup>54</sup>

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

“(b) APPLICATION OF TAX

(1) AUTHORS

- a. The transfer to a publisher of an *original manuscript*, whether on paper or in machine-readable form, by the author or authors thereof for the purpose of publication is not subject to taxation. ***The transfer of any paper, tape, diskette or other tangible personal property transferred as a means of expressing an idea is not taxable.*** However, tax applies to the sale of mere copies of an author’s work.
- b. Tax applies to transfers of photographs and illustrations, whether or not the photographs or illustrations are copyrighted. ***Transfers of photographs or illustrations illustrating text written by the photographer or illustrator are not taxable when they are merely incidental to the editorial matter.***<sup>55</sup>

The BOE responded with a letter requesting that Mavrides explain the nature of the work he did for which he was claiming his exemption. He responded with an explanation of his work as an artist-writer of comic books, citing the relevant portion of §1543(b).<sup>56</sup> The BOE rejected his explanation, and sent him a tax bill for \$1,036. Mavrides sought reconsideration of this bill through the BOE’s informal grievance procedure. During this process, he was the subject of an audit by the BOE. He met with an auditor in his home and was able to convince her that his position regarding the exemption claim was correct, and he was assured that the tax demand would be rescinded. The auditor, however, was overruled by her immediate superior.<sup>57</sup>

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<sup>53</sup> *The Mavrides Case*: Transcript of a panel discussion held at the 1994 San Diego Comic Convention, at 4. From the CBLDF Case files, copy in possession of the author.

<sup>54</sup> *Id.*

<sup>55</sup> California Sales and Use Tax Section 1543(b) in 1990, as set forth in the CBLDF Executive Summary: *California Sales Tax Appeal of Comic Author Paul Mavrides* at 1, *emphasis in original*. From the CBLDF Case files, copy in possession of the author. This regulation has since been revised, as is discussed *infra*.

<sup>56</sup> *The Mavrides Case*, *supra* n.53, at 4. The first contact Mavrides received from the BOE was a letter requesting an explanation of how he had earned over \$90,000 in exempt royalty income. He replied that the BOE had misread his return, as he was only claiming about **\$900** in exempt income. In their reply letter, the BOE accepted the revised figure, but still sought the explanation for the exemption claim. *Id.*

<sup>57</sup> *Id.*

In December 1991, Mavrides received a letter from the BOE rejecting his argument that as a comics writer and illustrator, he was entitled to an exemption under §1543(b). The BOE asserted that the very nature of comics, which intertwine illustration with text, made them subject to tax. Here is the text of the letter:

“Dear Taxpayer:

I am in receipt of your letter of October 17, 1991, in which you explained your deduction or royalties. In your reply, you state royalties represent income from the sale of books to various publishers. You identified your work as sequential panel storytelling involving your labors both as an artist and as a writer. You further state you would have a difficult time in determining the percentage of labor involving one category or the other exclusively. You strive to blend both, often doing both at the same time.

Regulation 1542 (copy enclosed) states that the sale of an original manuscript to a publisher by the author is not taxable, but the sale of finished artwork is taxable. Since the finished artwork is a substantial and integral part of the finished product and since a separation cannot be made between the artwork and the manuscript, tax would apply to the selling price of the book to the publisher. Because of this, tax would also apply to royalties received.

Based on the above, the taxes are due as determined.”<sup>58</sup>

The implications of this determination on the mainstream comics industry are both profound and absurd. This interpretation, applied to the typical mainstream superhero comic book, would mean that the writer of the book (Stan Lee in the early Marvel days, for example) would not be taxed when he/she sent in their story to the publisher; but an independent illustrator/artist who drew and inked the same story, would be taxed on their submission of their work to the publisher. This is more sophistry than logic.

Mavrides spent the next two years battling with the BOE over this issue. Unable to personally finance the retention of a qualified tax attorney, he sought the assistance of CBDLF. The Board of CBDLF, recognizing the significant damage this interpretation of §1543(b) would cause, agreed to provide legal and financial assistance, and was able to retain the services of tax attorney Sanford Present of the Kaye, Scholer, Fierman, Hayes & Handler law firm. Present, speaking on a panel at the July 1994 San Diego Comic Convention (also known as ComicCon), summarized in simple terms the nature of the BOE’s position: They are saying that a comic work is not an author’s manuscript; in other words, a comic author is not an author.”<sup>59</sup>

The American Civil Liberties Union, a watchdog organization that focuses on conduct which they believe jeopardizes civil rights, felt that the issues in the Mavrides case were important enough to join in his claim, and to submit an amicus brief in support.<sup>60</sup> Paul Hoffman, also a

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<sup>58</sup> *The Mavrides Case*, *supra* n.53, at 1.

<sup>59</sup> *Id.* at 2.

<sup>60</sup> Paul L. Hoffman & Ann Brick, ACLU Counsel; *Amicus Letter Brief to Brad Sherman, Chairman, State Board of Equalization, in support of Paul Mavrides* (SR BH 19-760740), dated 9/8/1994, (hereinafter ACLU Brief), From the CBLDF Case files, copy in possession of the author.

panelist at the 1994 ComicCon panel, spoke eloquently of the intersection between the power to tax and the First Amendment issues in the case:

“From a First Amendment standpoint, the ACLU views this in the same way...it’s a clear-cut case. The Supreme Court has often focused on the fact that the power to tax is the power to destroy, the power to censor. Our First Amendment values can be severely undermined by taxing someone, even where those taxes are not intentionally creating a damaging effect on the freedom of speech. ... One of the areas where the courts have been clearest on are those taxing schemes that discriminate between kinds of speech – between authors- is exactly the kind of thing that goes harder on the person than on the prohibition. And I think the reason we see the Mavrides case as so important is that this taxing scheme gives the tax bureaucrat the opportunity to decide whether Paul Mavrides is or isn’t the author....And that’s in the core of the First Amendment: that bureaucrats shouldn’t be deciding those kinds of questions.”<sup>61</sup>

Several months later, Mr. Hoffman, with assistance from a CBDLF research team, filed an eleven page amicus letter brief with the BOE, in support of Paul Mavrides claim for a refund of the tax at issue (in 1993 the BOE had imposed a personal property lien on Mavrides’ property in the amount of the tax claim, which Mavrides had paid with assistance from CBLDF funds).<sup>62</sup>The ACLU Brief began by noting that the organization normally doesn’t become involved in tax cases, but it was making an exception here because of the significant First Amendment issues involved.<sup>63</sup>

The ACLU Brief asserted that the distinction the BOE was making between illustration and text for purposes of determining qualification for exemption was “impermissible”<sup>64</sup> The Brief notes that there is case law precedent establishing that comics and cartoons are entitled to the same robust level of First Amendment protection afforded to text materials.<sup>65</sup> Hoffman and Brick argue that because Regulation §1543(b) imposes different tax obligations on works based on whether they contain illustrations or not, the regulation is a content-based restriction on speech<sup>66</sup>

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<sup>61</sup> *The Mavrides Case*, *supra* n.53, at 2-3. Mr. Hoffman’s reference to the Supreme Court’s statement comes from the case of *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1819). In that case, Supreme Court Chief Justice John Marshall, writing for the majority in striking down a Maryland state tax levied against a branch of the U.S. Bank that had issued bank notes but had not obtained a state charter to do so, found that the state did not have the power to tax the conduct of a federal government chartered entity. His famous quote on the limits of taxation reads: “That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one Government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.” 17 U.S. 431.

<sup>62</sup> Paul L. Hoffman & Ann Brick, ACLU Counsel; *Amicus Letter Brief to Brad Sherman, Chairman, State Board of Equalization, in support of Paul Mavrides* (SR BH 19-760740), dated 9/8/1994; *See* n. 60, *supra*. From the CBLDF Case files, copy in possession of the author.

<sup>63</sup> *Id.* at 1.

<sup>64</sup> *Id.* at 2.

<sup>65</sup> *Id.* at 3, citing Chief Justice Rehnquist’s finding, in *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 53-55 (1988), that the cartoon is an American institution which has traditionally received the same robust First Amendment protection that text has; and Judge Kaufman’s opinion in *Irving Berlin v. E.C. Publications, Inc.* (Mad Magazine), 329 F. 2d 541, 545 (2d. Cir. 1964), finding protection for a comic book parody, wherein he noted that “many a true word is indeed spoken in jest”.

<sup>66</sup> *Id.* at 3-4.

The principal rebuttal to this claim is that since the Regulation just specifies that illustrations are taxable, without focusing any attention on the subject of the illustration, the regulation is content-neutral and thereby not in violation of any free speech rights. Hoffman and Brick answer that rebuttal by noting that there is significant authority to the contrary, citing a line of cases where similar taxes and fees were found to ultimately be content restrictive.<sup>67</sup> The Brief concludes that it is the suppression of particular ideas or viewpoints, in this case those that are conveyed through illustration as a means of expression, that gives rise to the 1<sup>st</sup> Amendment violation in this case.<sup>68</sup>

The final section of the ACLU Brief argues that the BOE regulations are void for vagueness, because it is impossible to determine, particularly in the case of comics and cartoons, “what is primarily illustrative and what is primarily textual”.<sup>69</sup> Paul Mavrides’ encounters with the BOE suggest that the agency is similarly uncertain of how to make this determination. In a talk he gave at a CBLDF benefit fundraiser he related an incident in which, at a May 1995 BOE Appeals Board hearing, he asked a BOE senior auditor to explain the literary standard the Board was using in making its determination that his work was not literature. He notes that she replied: “There are none. But we know it when we see it.”<sup>70</sup> Shades of Potter Stewart and his famous statement confirming the similar lack of clarity on the definition of obscenity.<sup>71</sup>

Hoffman and Brick argue that the difference between a comic book and a drawing in a book is that in a comic book, the drawings are part of the narrative – they are a part of the text in a way that a book illustration, for example John Tenniel’s illustrations in Lewis Carrol’s *Alices*’

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<sup>67</sup> *Id.* at 4, citing *Arkansas Writers’ Project v. Ragland*, 481 U.S. 221, 229, 231 (1987) finding that a tax scheme that exempted daily newspapers, religious, professional, trade and sports magazines but applied the sales tax to other forms of expression was an impermissible content-based restriction); *Simon & Schuster, Inc. v. Crime Victims Board*, 502 U.S. 105 (1991), finding that a “Son of Sam” law that confiscated the proceeds of books that discussed the previous crimes of the author or his or her mental state towards them was a content-based restriction; *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), finding that a scheme where license fees for political demonstrations were set based on the expected costs of security at the demonstration was found to be a content-based restriction, because in order to assess the security risk, the county would have to look at the content of the speech; *J-R Distrib., Inc. v. Eikenberry*, 725 F.2d 482, 495 (9<sup>th</sup> Cir. 1984), finding that a fine structure that bases fines on profits from adult book sales violates the First Amendment; and *Festival Enterprises v. City of Pleasant Hill*, 182 Cal.App. 3d 960, 964 (1<sup>st</sup> Dist. App. 1986) finding that an admissions tax on movie theaters was a First Amendment violation.

<sup>68</sup> *Id.* at 5. Hoffman and Brick also note that the BOE regulations don’t address how §1543(b) is to be interpreted in the case of editorial cartoons. They point out, as is discussed herein, that the works of Thomas Nast in the turn of the century, and the more recent Pulitzer Prize winning work in Garry Trudeau in *Doonesbury*, the long history of political and social satire via cartoons found in the pages of *Mad Magazine* and *The New Yorker* and even such mainstream newspaper comics as *Cathy*, *For Better or For Worse*, and Johnny Hart’s *B.C.* all offer more than simple illustration – they offer social commentary in the realm of ideas. *Id.* at 7-8.

<sup>69</sup> *Id.* at 8-10.

<sup>70</sup> Paul Mavrides, Speech at the Comic Book Legal Defense Fund Benefit at the Palace of Fine Arts, San Francisco, California, October 31, 1995, at 6. From the CBLDF Case files, copy in possession of the author.

<sup>71</sup> “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [“hard-core pornography”]; and perhaps I could never succeed in intelligibly doing so. But **I know it when I see it**, and the motion picture involved in this case is not that.” [*Emphasis added.*]” — Justice Potter Stewart, [concurring opinion](#) in [Jacobellis v. Ohio](#) 378 U.S. 184 (1964).

*Adventures in Wonderland*, are not.<sup>72</sup> They conclude this argument with a warning that if these vague regulations are allowed to limit free expression through the means of an oppressive tax scheme, great damage is done to society.<sup>73</sup>

Alas these eloquent arguments did not, at least initially, sway the BOE. The ACLU brief, as well as arguments presented by Mr. Mavrides' counsel, was considered by the BOE in a hearing before the Business Taxes Appeals Review Section on January 20, 1995. Four months later, the Decision and Recommendation of the Board, authored by Staff Counsel Carl J. Bessent, rejected the arguments and denied Mr. Mavrides' refund claim.<sup>74</sup>

The first half of Mr. Bessent's statement of the Board's Decision accurately summarizes the claims made by Mr. Mavrides and the response of the Sales and Use Tax Department (the "Department").<sup>75</sup> This summary is followed by Mr. Bessent's analysis and conclusions. At the outset, Mr. Bessent frames the relevant issue as one in which "[w]e must discuss the true object sought by the publishers".<sup>76</sup> And from this point on Mr. Bessent launches into a convoluted argument about the difference between a text manuscript and illustrations. While acknowledging that comics and comic strips are expressions of ideas, he asserts that the issue is whether the publisher is seeking "[t]he service of crating the comic per se or the expression of the idea in its physical form."<sup>77</sup> He concludes it is the latter – that the publisher wants the physical camera ready art. He contrasts this with a text manuscript, asserting that in this instance the publisher is only interested in the ideas in the text, and not the physical text itself – noting that "The manuscript is merely a convenient method of conveying words and ideas."<sup>78</sup> From this premise, he concludes:

"Since the true object sought by the publisher is the property produced by the service of creating the comics, rather than the service per se, the transfer of possession of the comics to the publisher in California for a consideration is subject to tax."<sup>79</sup>

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

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<sup>72</sup> Paul L. Hoffman & Ann Brick, ACLU Counsel; *Amicus Letter Brief to Brad Sherman, Chairman, State Board of Equalization, in support of Paul Mavrides* (SR BH 19-760740), dated 9/8/1994, at 7. From the CBLDF Case files, copy in possession of the author.

<sup>73</sup> *Id.* at 10. The Brief notes: "The economic damage to Mr. Mavrides from having to pay this tax is significant; the damage to our system of free expression is incalculable. The power to tax is literally the power to destroy (citing *McCulloch*). Free expression is too important to be sacrificed at the altar of vague regulations that selectively tax illustrations."*Id.*

<sup>74</sup> Carl J. Bessent, Board of Equalization Business Taxes Appeals Review Section Decision and Recommendation, In the Matter of the Claim for Refund Under the Sales and Use Tax law of Paul Mavrides; May 18, 1995. From the CBLDF Case files, copy in possession of the author.

<sup>75</sup> *Id.* at 1-5.

<sup>76</sup> *Id.* at 5.

<sup>77</sup> *Id.* at 6.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 7.

The other flaw in this argument is that its suggestion that what the publisher wants is the physical possession of the camera-ready art requires that the nature of the transaction be a sale of that art by the artist to the publisher. However, comics art pages are generally returned to the artist, unless the artist is an employee of the comic book publisher (and in many cases, even employees get their original art back). One need only stroll the lanes of any comics convention to see hundreds of comic artists selling their original pages to collectors.<sup>80</sup> It is those sales, and not the transfer of the work to the publisher, which should be, and are, subject to sales tax since the object of those transactions is the purchase of the original page as a work of art.

Mr. Bessent next addresses the Constitutional claims made by the ACLU and Mr. Mavrides. He makes short work of those arguments by citing Article III, Section 3.5 of the California Constitution to the effect that state agencies may not refuse to enforce state statutes on the basis of a claim that the law is unconstitutional unless a decision to that effect has been rendered by a Court.<sup>81</sup> While he acknowledges that Mavrides has, by raising the constitutional issues, preserved his right to litigate them in court, he concludes that the BOE has no jurisdiction to act on those claims, even if they thought that the regulation is constitutionally invalid.<sup>82</sup>

Based on their analysis that §1543(b) allows taxation of comic art, the BOE began to contact other comic art publishers and distributors in an effort to collect tax revenue. The first effort requested seven years of records from Creators Syndicate, which distributed columns by Ann Landers, Hillary Clinton and Dan Quayle, and editorial cartoons by Herblock, Mike Luckovitch and Doug Marlette, as well as daily *B.C.* comic strip creator Johnny Hart. This was followed by a similar request to the Siskiyou Daily News, a small Northern California newspaper, for records relating to payments it made for its comics page and editorial cartoons.<sup>83</sup>

While it seems safe to assume that the BOE's intention all along was to seek to collect tax on comics transfers to more publishers than just those in Paul Mavrides' case, it appears that once they actually began to take action, these other parties realized that they now had a stake in the outcome of the case. Mavrides and his counsel sought a further appeal of the May 1995 denial of their claim, and the BOE scheduled a public hearing for January 10, 1996 in Sacramento. For this hearing, they gathered an impressive list of amicus submissions,<sup>84</sup> while at the same time

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<sup>80</sup> The sale of original comic art pages is a lucrative part of the comics business. Cover art and full page illustrations of well known artists often sell for tens of thousands of dollars, often at auctions. Heritage Auctions is one of the best known companies engaged in this business – see their site at <http://comics.ha.com/c/ref/worth.zx?type=google+comix+price>.

<sup>81</sup> Carl J. Bessent, Board of Equalization Business Taxes Appeals Review Section Decision and Recommendation, In the Matter of the Claim for Refund Under the Sales and Use Tax law of Paul Mavrides; May 18, 1995, at 8. From the CBLDF Case files, copy in possession of the author.

<sup>82</sup> *Id.* Bessent also declines to address the argument that this interpretation of California tax law will result in an exodus of comic artists and publishers from the state, rather than pay this tax. He dismisses this argument on the same jurisdictional grounds, noting: “In regards to the loss of California revenue to other states, the possible impact of this decision on other businesses cannot affect my recommendation in this case. Claimant may be correct that there would be a revenue loss to other states, but I have no authority to change the law.” *Id.*

<sup>83</sup> Jeff Stark, *The Difference Between Comics and Literature*, SF Weekly Online, October 4, 1995, at 3, last viewed at <http://www.sfweekly.com/1995-10-04/news.the-difference-between-comics-and-literature/>.

<sup>84</sup> Susan Alston, CBLDF Executive Director, *Cartoon Sales Tax Appeal Of Comic Author Paul Mavrides: Executive Summary* (dec. 19, 1995) at 3, listing the following amici submissions: ACLU of Northern California; ACLU of

preparing to take the case to the next level, a state court filing, if they were once again unsuccessful in convincing the BOE of the merits of the claim. The Creators Syndicate was considering the possibility of joining that state court litigation depending on the outcome of the BOE's investigation of their records.<sup>85</sup>

It appears that the added support may have turned the tide. Another possibility to explain the outcome of the case is that the BOE saw Steve Greenberg's editorial cartoon about the case, which looked like this:



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In any event, following the public hearing on January 10<sup>th</sup>, the Board voted, 3-2, that cartoon artwork was not subject to tax.<sup>87</sup> In its final confirming letter regarding its decision, dated March

Southern California; Association of American Publishers; California Newspaper Publishers Association; Children's Book Council, Inc.; Creators Syndicate; National Cartoonists Society; Printing Industries of California; Society of Children's Book Writers and Illustrators. Mavrides also identified famous writers, comic artists and publishers Ray Bradbury, Will Eisner, Mort Walker, Roger Corman, Paul Conrad and Stan Lee as persons also offering support for his claim. See Paul Mavrides, Speech at the Comic Book Legal Defense Fund Benefit at the Palace of Fine Arts, *supra* n. 70 at 7. From the CBLDF Case files, copy in possession of the author.

<sup>85</sup> Jeff Stark, *supra* n. 83, at 3.

<sup>86</sup> Steve Greenberg, December 1995, the right to use this cartoon in this article has been licensed to the author. Steve Greenberg is not related to the author.

6, 1996, the Board offered no explanation for its change of heart, saying only: “The Board concluded that cartoon artwork is not subject to tax. Accordingly, the Board ordered that the claim for refund be granted.”<sup>88</sup> Alf Brandt, and aide to BOE Chairman Johan Klebs, offered this brief explanation to the New York Times: “We’re trying to be consistent with the intent of the law that a cartoon is an expression of an idea and should be treated as a manuscript.”<sup>89</sup> Following their decision, the BOE amended Regulation 1543(b), which now reads:

**“(b) APPLICATION OF TAX.**

**(1) AUTHORS.**

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

**(B)** Tax applies to charges for transfers of photographic images and illustrations, whether or not the photographic images or illustrations are copyrighted. Transfers of photographic images or illustrations illustrating text written by the photographer or illustrator are not taxable when they are merely incidental to the editorial matter.”<sup>90</sup>

The CBLDF and Mavrides were understandably happy with the ultimate result in this case, and Paul Mavrides had, by his determined refusal to accept this tax and willingness to accept considerable damage to his professional career, done a great service to the comics industry, the result was also not without significant cost to the CBLDF. Executive Director Susan Alston noted: “To date Mavrides’ legal bills have totaled over \$75,000, of which \$23,000 is still due. It may take about 18-24 months of aggressive fund raising to finish paying the legal bills for this one case.”<sup>91</sup>

As all-consuming as the Mavrides case was for the CBLDF, it was not the only case the Foundation assisted with during the 1990s. The Foundation’s primary slate of cases dealt with the issue of obscenity and the First Amendment. And in these cases, the stakes were even higher, since a conviction for distribution and/or sale of obscene materials generally was prosecuted as a criminal matter, with jail time as a very real possible outcome.

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<sup>87</sup> Andrea Adelson, *Tax on Comics To Be Lifted In California: Cartoons Are Seen As Ideas, Not Goods* (New York Times, January 13, 1996; CBLDF Press Release, *Mavrides Beats California BOE*, January 16, 1996, From the CBLDF Case files, copy in possession of the author.

<sup>88</sup> Elsa Moreno Vega, Staff Tax Auditor, Audit Review and Refund Section, BOE, letter to Sanford Present, March 6, 1996. From the CBLDF Case files, copy in possession of the author..

<sup>89</sup> Andrea Adelson, *Tax on Comics To Be Lifted In California: Cartoons Are Seen As Ideas, Not Goods* (New York Times, January 13, 1996.

<sup>90</sup> California Sales and Use Tax Section 1543(b), as amended in 1996.

<sup>91</sup> CBLDF Press Release, *Mavrides Beats California BOE*, January 16, 1996. From the CBLDF Case files, copy in possession of the author.

### 3. Obscenity Law and the First Amendment: CBLDF to the Defense

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

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

"He has tattoos and long, stringy hair, likes the band Nine Inch Nails, sports a pronounced anarchist attitude, and fits most people's definition of, well, *creepy*....Diana isn't the boy next door; his artistic tastes, when compared to the mainstream, are completely off the meter. Whether it's death and excrement, or simply shapes that make no sense, most of Diana's material leaves viewers wondering, "What's wrong with this kid?"<sup>92</sup>

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

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

A man looks at a pretty woman. In the next frame, a montage, the man has the look of a psychopath and is surrounded by slivers of abstract images, including a nipple being sliced off by a knife."<sup>93</sup>

Strong, disturbing and uncomfortable material. So much so that when a copy of *Boiled Angel*, which had a miniscule subscriber base of 300 people, found its way into the hands of a California law enforcement officer, the violent images reminded him of a brutal series of unsolved student murders in Gainesville, Florida (Diana lived in Largo, Florida). The officer sent the 'zine to Florida law enforcement, who sought out Diana and asked him to give a blood sample to see if he was the perpetrator. Although the lab tests ruled him out as the murderer, the copy of *Boiled Angel* was sent on to the Pinellas County Sheriff's office, which charged Diana with a violation of Florida's obscenity law.<sup>94</sup>

The CBLDF hired Tampa attorney Luke Lirot to defend Diana. A six member jury, after a four day trial in which testimony offered the unsubstantiated claim that seeing his images could appeal to or inspire serial murders, found Diana guilty of publishing, distributing, and advertising obscene material.<sup>95</sup> The judge's sentence was a bit unusual. Diana was ordered to pay a \$3,000 fine, undergo psychological evaluation at his own expense, do eight hours of community service per week during a three-year probation period, refrain from any contact with children under the age of 18, take a course in journalism ethics (again at his own expense) and refrain from drawing

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<sup>92</sup> Sean Henry, *Comic Threat*, Mothers Jones Magazine, (November/December 1994 issue), last viewed at <http://motherjones.com/print/15358>, at 1-2.

<sup>93</sup> *Id.* at 2.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*; Susan Alston, *Censorship in Comics: Is This the United States?* Animation World Magazine, (Issue 2.4, July 1997) at 4; CBLDF Case Files – Florida v. Mike Diana, last viewed at <http://cblfd.org/about-us/case-files/mike-diana>.

any "obscene" material during his probation period. The judge ordered that this last element of his sentence would be enforced by unannounced inspections of his home at any time, conducted without warrant or any notice, to determine if he was in possession of, or was creating, any "obscene material".<sup>96</sup>

The Mother Jones article features a quote from the prosecutor, distinguishing Diana's crime from violent movies, in a prescient observation that foreshadows the Supreme Court's 2011 decision rejecting a California law banning violent video games:<sup>97</sup>

"American courts have decided that rights of free expression cover a broad range of filth, hate, and violence. The sole trip wire that slams the First Amendment shut is sexually arousing material. In other words, you can be as disgusting and violent as you want, as long as nobody gets turned on.

As Pinellas County Assistant State Attorney Stuart Baggish, who prosecuted the Diana case, explains, a teen slasher movie available at a video store would not be ruled obscene, because "it portrays violence in a gross way, but it does not portray sex in a patently offensive way."<sup>98</sup>

One other challenge the prosecution faced in the Diana case was how to meet the first prong of the *Miller v. California*<sup>99</sup> test for obscenity, which is that the work must appeal to the "average" person's prurient interest in sex. Diana's work was challenging in that regard – it might be gross or repulsive to jurors, but how could it be found to be sexually appealing to the average person? The prosecution found an answer to that question in the pre-*Miller* decision in *Mishkin v. New York*.<sup>100</sup> The *Mishkin* case posed a similar question, in that case dealing with whether cheap pulp magazines that featured sexual activity described as "such deviations as sado-masochism, fetishism, and homosexuality"<sup>101</sup>, could support a finding of appealing to the average person's prurient interest, under the then applicable test for obscenity, found in *Roth v. United States*.<sup>102</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> *Brown v. EMA*, 130 S. Ct. 2398 (2010).

<sup>98</sup> Sean Henry, *Comic Threat*, Mothers Jones Magazine, (November/December 1994 issue), last viewed at <http://motherjones.com/print/15358>, *supra n.* 91, at 2-3.

<sup>99</sup> *Miller v. California*, 413 U.S. 15 (1973). The entire three part test set forth in the majority opinion of the Court is:

"The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, [Kois v. Wisconsin, supra, at 230](#), quoting [Roth v. United States, supra, at 489](#); (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." *Id.* at 24.

The *Miller* standard has been roundly criticized; the majority's decision was sharply attacked in a dissent by Justice Douglas, who wrote: "The Court has worked hard to define obscenity and concededly has failed....To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process." *Id.* at 44.

<sup>100</sup> *Mishkin v. New York*, 383 U.S. 502 (1966)

<sup>101</sup> *Id.* at 505.

<sup>102</sup> *Roth v. United States*, 354 U. S. 476 (1957) at 491-492.

The Court in *Mishkin* explained that the use of the term “average person” in *Roth* was not to be narrowly interpreted to mean that deviant sexual materials could not be found obscene because they were not sexually arousing to “normal” people (whatever that means). Rather, the Court held, “We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group...”<sup>103</sup>

Based on this rationale, the prosecution in the Diana case was able to argue that Diana’s work would appeal to the prurient interest of people who found the gross and disgusting images in his work to be arousing.<sup>104</sup>

The CBLDF filed two separate appeals of the Diana trial court decision.<sup>105</sup> They achieved only limited success, with the Appellate Court reversing the conviction for “advertising obscene material, but allowing the production and distribution convictions to stand. The courts refused to accept an amicus brief submitted by the ACLU, and a subsequent final appeal to the United States Supreme Court was rejected “without comment”. Mike Diana moved to New York City with the consent of the Florida Court, and fulfilled his community service obligation by doing volunteer work for the CBLDF. The Fund spent in excess of \$50,000 on his unsuccessful defense.

Sean Henry concludes his Mother Jones profile with the following observation:

“Not far from the courthouse, in another part of Pinellas County, are other disturbing paintings and drawings. Although more complex and artfully rendered than Diana’s cartoons, they share a number of thematic similarities.

The paintings include penises and breasts and disfigured buttocks. A severed heard. Blood coming out of an eye socket and from anuses. One painting, “The Profanation of the Host”, even mixes homosexual activity with religious images.

But this collection of work is neither hidden nor under attack. On the contrary, it is proudly publicized as one of St. Petersburg’s cultural crown jewels: the Salvador Dali Museum.”<sup>106</sup>

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<sup>103</sup> *Mishkin*, *supra* n. 99, at 509.

<sup>104</sup> Sean Henry, *Comic Threat*, *Mothers Jones Magazine*, (November/December 1994 issue), *supra* n. 97 at 3.

<sup>105</sup> Susan Alston, *Censorship in Comics: Is This the United States?* *Animation World Magazine*, (Issue 2.4, July 1997) *supra* n.97, at 4; CBLDF Case Files – Florida v. Mike Diana, last viewed at <http://cblfdf.org/about-us/case-files/mike-diana>, *supra* n. 97 at 2.

<sup>106</sup> Sean Henry, *Comic Threat*, *Mothers Jones Magazine*, (November/December 1994 issue), *supra* n. 97 at 6-7. Film historians will recognize another Dali similarity in the second Diana story line described in this account – in the famous short film collaboration of Dali and Luis Bunuel entitled *Un Chien Andalou* (*An Andalousian Dog*) (1929), there is a searing scene in which images of a cloud bisecting the moon are intercut with a scene of a razor being sliced through a woman’s eye. The film is generally regarded as one the triumphs of the surrealist art movement. As Justice Douglas put it: “What shocks me may be sustenance for my neighbor.” *Miller*, *supra* n. 98, at 41.

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

Michael Kennedy and John Hunter were the co-owners of Planet Comics, a comic book store in Oklahoma City, Oklahoma. In the first days of September, 1995, Oklahoma City police raided Planet Comics in response to a complaint from an unidentified woman who was a member of the Christian Coalition, a local religious group. She had complained to Oklahomans for Children and Families (OCaF), a non-profit obscenity watch-dog group, about the comics available in the store, notably a comic entitled *Verotik #4*. OCaF in turn delivered a copy of the comic to the police department, triggering the raid.<sup>107</sup>

*Verotik #4* is one of a series of violent, erotic comics published by Verotik Comics (the name is a combination of the words “violent” and “erotic”), a company operated by Gary Danzig, a self-styled “radical, a revolutionary, and a direct descendant of renowned abolitionist John Brown”.<sup>108</sup> Following the raid, which occurred when the store owners were out of town, they were arrested on their return and were arraigned, in handcuffs, and charge with trafficking, keeping for sale, and displaying obscene material deemed to be harmful to minors, and one count of child pornography regarding Eros’s Comics *The Devil’s Angel*, illustrated by well known comics artist Frank Thorne.<sup>109</sup> This last count was particularly ridiculous, since the only “child” in Thorne’s work was a spawn of the devil, and was a drawing, neither depicting nor involving a human child.<sup>110</sup>

At the arraignment, the State argued that Kennedy and Hunter were “dangerous criminals”, and bail was accordingly set at \$20,000.<sup>111</sup> The combined charges they were facing, if sustained, carried a maximum prison sentence of **43 years**. CBLDF posted their bail and retained three well known defense attorneys, Mark Hendrichsen, James A. Calloway, and C.S. Thornton, whose initial efforts were successful in getting the State to drop all charges against all titles except *Verotik #4*.<sup>112</sup> The two charges of felony trafficking as to that comic did, however, still carry a

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<sup>107</sup> Susan Alston, *Censorship in Comics: Is This the United States?* Animation World Magazine, (Issue 2.4, July 1997) *supra* n.97, at 4; CBLDF Case Files – Oklahoma v. Planet Comics, last viewed at <http://cblfd.org/about-us/case-files/planet-comics>, *supra* n. 97 at 1.

<sup>108</sup> Peter David, *But I Digress*, Comic Buyer’s Guide #1147 (11/10/1995), reprinted in Rock Out Censorship, last viewed at <http://www.theroc.org/roc-mag/textarch/roc-20/roc20-19.htm>. Unlike most other comics publishers, Danzig declined to offer support to CBLDF in their defense of the Planet Comics owners, arguing that CBLDF should do more in the way of advocacy and lobbying for a change in censorship laws on a pro-active basis, rather than offering legal defense after charges are brought. Given the limitations on 503(c) non-profit organizations under federal law, this is not possible for CBLDF, other than through filing amicus briefs, which the Fund regularly does. *Id.*

<sup>109</sup> Susan Alston, *Censorship in Comics: Is This the United States?* Animation World Magazine, (Issue 2.4, July 1997) *supra* n.97, at 5; CBLDF Case Files – Oklahoma v. Planet Comics, last viewed at <http://cblfd.org/about-us/case-files/planet-comics>, *supra* n. 97 at 1. The displaying material harmful to minors count involved the comics *Verotik #4*; Boneyard Press’ *Mighty Morphing Rump Rangers*; and Japan Books’ *The Viper Series Official Art Book*. The trafficking count was based on the display of Eros Comics *Screamers#2*, *Sex Wad #2*, *Nefarismo #5*, and *Beatrix Dominatrix #2*.

<sup>110</sup> Peter David, *But I Digress*, *supra* n. 107.

<sup>111</sup> CBLDF Case Files – Oklahoma v. Planet Comics, last viewed at <http://cblfd.org/about-us/case-files/planet-comics>, *supra* n. 97 at 1.

<sup>112</sup> *Id.*

potential prison sentence of three to five years – a substantial reduction from 43 years, but still a significant, life-altering penalty.

The raid and arrest has other consequences. The owner of the premises Planet Comics rented evicted the store, forcing it to relocate to a less-visible location. Sales dropped by 80% as many customers assumed the store was out of business. The police raided John Hunter's home, seizing the store computer and 250 disks. A brick was thrown through the store window. In March 1996, Hunter and Kennedy gave up, and closed Planet Comics for good.<sup>113</sup> Michael Kennedy explained the closure:

“[i]n good conscience I cannot continue to incur bills if the sales aren't there. I've lost my wife, my house, and my store over all of this, I need to step back and rebuild my life. Luckily, thanks to the CBLDF, I don't have legal bills to contend with on top of everything else.”<sup>114</sup>

On April 12, 1996, at a preliminary hearing on the case, the judge reduced the three felony counts to misdemeanors, based on his view that the materials seized didn't warrant felony charges. The following Monday, the state prosecutors filed a notice of intention to appeal the judge's decision, seeking to reinstate the felony charges.<sup>115</sup> Thereafter the State delayed hearings on this motion for a year, and in April 1997, two of the felony counts were reinstated, and one was reduced again to a misdemeanor. Trial was set for September 8, 1997.<sup>116</sup>

On September 5, 1997, an exhausted Hunter and Kennedy accepted a plea deal, and agreed to plead guilty to the two felony charges of trafficking in obscenity for selling *Verotik #4* to consenting adults. Their plea bargain resulted in a three-year deferred prison sentence and a fine of \$1500 each. If they stayed free of any felony convictions during that three year period, they would serve no jail time and the felony convictions would be permanently erased from their records.<sup>117</sup>

The decision to take the plea deal was not shared with the CBLDF before it was accepted. The Fund's policy is to only take cases where the accused agree not to take such deals. However, the pressure on defendants in these cases is enormous, and after two years of unrelenting attacks that cost them their homes, their livelihood and in some cases their families, it was not surprising that the Planet Comics' owners accepted the deal. As CBLDF Executive Director Susan Alston said at the time:

“To say that we're all disappointed is an understatement. In human terms, we all share a sense of relief that Kennedy and Hunter's ordeal is over. But that in no way diminishes the fact that they were convicted in violation of their rights as Americans under the First Amendment. Their conviction will have a chilling effect on what retailers choose to

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<sup>113</sup> *Id.*

<sup>114</sup> Susan Alston, *Censorship in Comics: Is This the United States?* Animation World Magazine, (Issue 2.4, July 1997) *supra* n.97, at 5.

<sup>115</sup> *Id.* at 6.

<sup>116</sup> *Id.*

<sup>117</sup> CBLDF Case Files – Oklahoma v. Planet Comics, last viewed at <http://cblddf.org/about-us/case-files/planet-comics>, *supra* n. 97 at 1-2.

display and sell in ‘high risk’ jurisdictions....Their guilty plea represents an erosion of the rights guaranteed by the First Amendment.”<sup>118</sup>

The situation faced by the defendants in the Planet Comics case is not one usually faced by criminal defendants. Should they proceed with a First Amendment defense of the right to distribute these expressive works and accept the risk that the failure of the defense will result in jail time, or should they take a plea despite the strong legal arguments in their favor, and the impact an adverse decision will have on the industry they have chosen to work in? Was it the framers’ intent, in drafting the First Amendment, that parties invoking it should have to choose between defending their rights of expression and a jail sentence? Should the decision to assert free speech rights depend on how long a jail sentence you might face if you lose? And finally, have we really made a reasoned determination that distribution of sexually explicit materials, that do not involve the exploitation of real people but instead are limited to illustrations of fictional characters, warrants incarceration as a penalty? These questions, all of which arise in the context of the CBLDF cases where a defendant accepts a plea deal and thereby waives a First Amendment, are discussed in detail in Section \_\_\_ of this article, *infra*.

**c. Texas v. Castillo: The State Invokes the “Protect the Children” Argument in Response to Expert Testimony That a Comic is Not Obscene**

Keith’s Comics had the bad luck to be located on East Mockingbird Lane in Dallas, Texas, right across the street from an elementary school. The store primarily sold mainstream superhero and similar comic books, but it also had a section in the back of the store which was clearly marked “No One Under 18 Allowed Past This Point.”<sup>119</sup>

Craig Reynerson, a Dallas Police Department detective, operating undercover, went into the adult section of Keith’s comics in 2000, and purchased a copy of a comic book entitled “*Demon Beast Invasion, The Fallen*”<sup>120</sup>. The cover of the book depicted a nude female. The book had a warning label, “Absolutely Not For Children”.<sup>121</sup> He left the store, reviewed the comic book, made his own determination that the contents were obscene, and returned to the store and arrested Jesus Castillo, the clerk who sold him the book, on two counts of obscenity under Texas law.<sup>122</sup>

The CBLDF provided legal counsel and expert testimony in defense of Castillo. Scott McCloud was one of two experts who offered testimony in support of the defense. An award-winning author, artist and comic book authority, he testified that although *Demon Beast* contained sexually explicit illustrations, it was representative of Japanese manga and that the themes found in the entire series (the book at issue was one of a four-book series) had serious literary and artistic merit – thereby meeting one of the *Miller v. California* elements needed to establish that

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<sup>118</sup> *Id.* at 2.

<sup>119</sup> JESUS A. CASTILLO, JR., Appellant v. THE STATE OF TEXAS, Appellee, Decision of the Court of Appeals of Texas, Fifth District, 79 S.W.3d 817 (July 2, 1002), at 818.

<sup>120</sup> This comic is a manga work – manga being a form of comic art from Japan. For a more extensive discussion of manga, see Eri Izawa, *What are Manga and Anime?*, (1995), last viewed at <http://www.mit.edu/~rei/Expl.html>

<sup>121</sup> *Id.*

<sup>122</sup> JESUS A. CASTILLO, JR., Appellant v. THE STATE OF TEXAS, *supra* n. 118, at 819.

a work was not obscene.<sup>123</sup> When he was asked on cross-examination whether he thought a particular scene the State alleged was obscene was “perverted”, he replied, “I think it’s disturbing...and it’s meant to be”.<sup>124</sup>

The second expert witness provided by CBLDF was Susan Napier, then an associate professor in Asian Studies at the University of Texas in Austin. Based on her expertise in Japanese literature, and in particular manga and anime,<sup>125</sup> she testified that the bizarre creatures and related themes of apocalypse and metamorphosis found in *Demon Beast Invasion* were typical of the manga genre of Japanese works, and offered her opinion that they were “beautifully drawn” in this comic.<sup>126</sup>

The State only offered the testimony of Detective Reynerson, whose conclusion that in his opinion the work was obscene was admitted over defense objections that he was not qualified to offer such an assessment. In response, the defense offered the testimony of a private investigator it had hired, who testified that sexually explicit materials were prevalent in North Texas.<sup>127</sup> He stated that within one mile of Keith’s Comics, he was able to buy a Penthouse magazine that had photos of men and women performing sex acts, and a story of two women having sex with a grasshopper. At a nearby adult boutique, he bought three magazines that contained depictions of oral sex, anal sex, bondage and sex with multiple partners.<sup>128</sup>

All of this sounds like pretty compelling evidence that the sale of this one sexually explicit comic book, from a marked “adult only” section of the store, with an “adults only” warning label, to a consenting adult, couldn’t be illegal. However, what the CBLDF didn’t anticipate was the approach the prosecutor would take in summing up the case in closing statements. Prosecution attorney Rex Anderson presented the following argument to the jury:

“I don’t care what type of evidence or what type of testimony is out there; use your rationality; use your common sense. Comic books, traditionally what we think of, are for kids. This is in a store directly across from an elementary school and it is put in a medium, in a forum, to directly appeal to kids. That is why we are here, ladies and gentlemen. We’re here to get this off the shelf.”<sup>129</sup>

That did the trick. Despite the fact that the charges in the case, and the facts of the case, had nothing to do with children being exposed to alleged obscene material, the jury returned a guilty verdict and the judge sentenced Castillo to 180 days in jail, a \$4,000 fine and probation for one year.<sup>130</sup> Outraged by this result, the CBLDF appealed. The Court of Appeals of Texas, Fifth

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<sup>123</sup> CBLDF Case Files – Texas v. Castillo, last viewed at <http://cbldf.org/about-us/case-files/castillo>, at 1.

<sup>124</sup> *Id.*

<sup>125</sup> Anime is generally defined as animation films and television shows based on manga work; see Eri Izawa, *What are Manga and Anime?*, (1995), last viewed at <http://www.mit.edu/~rei/Expl.html>

<sup>126</sup> CBLDF Case Files – Texas v. Castillo, last viewed at <http://cbldf.org/about-us/case-files/castillo>, at 1.

<sup>127</sup> JESUS A. CASTILLO, JR., Appellant v. THE STATE OF TEXAS, *supra* n. 118, at 824.

<sup>128</sup> *Id.* When asked if he believed these materials were acceptable in the State of Texas, the detective replied, “I guess so. They are sold all over the place.” *Id.*

<sup>129</sup> CBLDF Case Files – Texas v. Castillo, last viewed at <http://cbldf.org/about-us/case-files/castillo>, at 1.

<sup>130</sup> *Id.*

District, located in Dallas, affirmed the trial court in a 2-1 decision<sup>131</sup> An appeal to the Texas Court of Criminal Appeals was subsequently denied, as was the Fund's petition for a writ of certiorari to the United States Supreme Court. Thereafter, Castillo served a period of unsupervised probation.<sup>132</sup>

In their next major obscenity case, the Fund would again deal with the spectre of fear of the influence of comics on the moral education of youth – this time with a surprising result.

#### **d. Georgia v. Gordon Lee: Is Picasso's Nude Body Obscene?**

It is more than a little bit ironic that Gordon Lee's personal nightmare began on Halloween, 2004. Lee, the owner of the Legends Comics store in Rome, Georgia, was participating in a community free giveaway activity for merchants, as part of a traditional trick or treat program local businesses on Broad Street participated in that day. In his case, he was giving away free comics.<sup>133</sup>

Lee passed out thousands of comics that day. One of the comics was *Alternative Comics#2*, which was a sampler comic with ten separate graphic novel excerpts of a few pages each.<sup>134</sup> One of the ten stories featured in *Alternative Comics #2* was an eight page excerpt from a full length graphic novel by Nick Bertozzi, entitled *The Salon*.<sup>135</sup>

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

“In the Paris of 1907, a salon of later famous Modernists, including Gertrude Stein, Georges Braque, Erik Satie and their sawed-off, potty-mouthed, frequently naked, hilariously arrogant acquaintance Pablo Picasso, discover a stash of secret blue absinthe that allows its drinkers to travel inside paintings, which may hold the key to the demonic creature who's been dismembering avant-gardists.”<sup>136</sup>

On one of the excerpted pages of *The Salon* in the *Alternative Comics #4* sampler, Picasso comes to the door of his studio, having been interrupted allegedly whilst masturbating, and greets his visitors in a naked and angry state. The words “penis” and “masturbation” are found in the text, however, Picasso's penis is not erect, and no sexual conduct between him and his nude model is shown on any of the excerpted pages.

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<sup>131</sup> JESUS A. CASTILLO, JR., Appellant v. THE STATE OF TEXAS, *supra* n. 118. The dissenting judge argued that the evidence did not sustain a finding that Castillo knew that the contents of the book were obscene, and for that reason he voted for reversal – he did agree, however, that the book was obscene. *Id.* at 842.

<sup>132</sup> CBLDF Case Files – Texas v. Castillo, last viewed at <http://cblfd.org/about-us/case-files/castillo>, at 1-2.

<sup>133</sup> CBLDF Case File – Official Transcript of the Proceedings, In the Superior Court of Floyd County, State of Georgia, *State v. Lee*, in Rome, Georgia November 5, 2007 (1<sup>st</sup> Day of Trial), at 23-24, copy in the possession of the author.

<sup>134</sup> Sampler comics are used by publishers to generate interest in an array of different comic books and/or graphic novels they publish. By including a few page excerpt of different works, they hope to whet the appetite of the reader in the hope that the reader will then buy the entire book.

<sup>135</sup> CBLDF Case Files – Georgia v. Gordon Lee, last viewed at <http://cblfd.org/about-us/case-files/gordon-lee>, at 1.

<sup>136</sup> [http://www.amazon.com/Salon-Nick-](http://www.amazon.com/Salon-Nick-Bertozzi/dp/B0045EPCMI/ref=sr_1_3?s=books&ie=UTF8&qid=1310348311&sr=1-3)

[Bertozzi/dp/B0045EPCMI/ref=sr\\_1\\_3?s=books&ie=UTF8&qid=1310348311&sr=1-3](http://www.amazon.com/Salon-Nick-Bertozzi/dp/B0045EPCMI/ref=sr_1_3?s=books&ie=UTF8&qid=1310348311&sr=1-3)

That fateful afternoon, Mrs. Brandy Bishop and her mother Barbara, were out taking Brandy's sons, Blake Bishop (six years of age) and Brandon Bishop (nine years of age) out trick or treating on Broad Street. One of the boys received a copy of *Alternative Comics #4* as a give-away in front of the Legends Comics Store. Later that day, while driving in their car on the way from Broad Street, Blake passes the comic to Brandon, who sees the panel from *The Salon*, and shows it to his mother, allegedly saying, "Momma, I don't think this is something we're supposed to have."<sup>137</sup>

Mrs. Bishop stopped the car, inspected the book, and called her brother, Floyd County Deputy Sheriff James Womack to register a complaint. Deputy Womack obtains the copy of the book from his sister, and goes immediately over to Legend Comics to discuss the matter. Mr. Lee explained that he had not screened all of the sampler's pages before the book was added to the stack of free books being given away, and that he agreed that it should not have been given to a minor. He also allegedly disclosed to the officers that he had previously been charged with a distribution of obscenity violation, involving an adult. He offered to make both a private apology to the Bishop family, as well as a public apology to the community – offers which were rejected. Several days later Gordon Lee was arrested.<sup>138</sup>

Lee was charged with 2 felony counts of violating Georgia's Distribution of Material Depicting Nudity or Sexual Conduct, and five misdemeanor counts of Distribution of Material Harmful to Minors. One of the felony counts and two of the misdemeanor counts listed the recipient of the materials as JOHN and JANE DOE.<sup>139</sup>

CBLDF funded counsel to represent Lee. In May 2005 they filed motions to dismiss the felony counts on lenity grounds, and on the grounds that the statutes were unconstitutional on their face, that they operated as a prior restraint on free speech, violated due process, were vague, overbroad and violated equal protection laws. They also filed to dismiss the misdemeanor counts on similar constitutional grounds.<sup>140</sup>

At a December 2005 hearing on the motions to dismiss, the prosecution voluntarily dismissed the felony counts on the basis of the lenity argument and the two DOE counts, and the Court consolidated the remaining misdemeanor counts.<sup>141</sup> This left for trial two counts of distribution of sexually explicit material to minors, under Official Code of Georgia Annotated 16-12-103.<sup>142</sup>

This section of the law, as it read in 2005, provides as follows:

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<sup>137</sup> CBLDF Case File – Official Transcript of the Proceedings, In the Superior Court of Floyd County, State of Georgia, *State v. Lee*, in Rome, Georgia November 5, 2007 (1<sup>st</sup> Day of Trial), *supra* n. 132, at 23-24; copy in the possession of the author.

<sup>138</sup> *Id.*; CBLDF Case Files – Georgia v. Gordon Lee, last viewed at <http://cblfd.org/about-us/case-files/gordon-lee>, *supra* n. 134, at 1.

<sup>139</sup> CBLDF Case File – Order on Motions, in the Superior Court of Floyd County, State of Georgia, *State v. Lee*, Criminal Action No. 05-CR-28976 JFL 001, December 29, 2005, at 1; copy in the possession of the author.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 2.

<sup>142</sup> *Id.* at 2.

**“16-12-103. Selling, loaning, distributing, or exhibiting.**

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

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors; or

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

...

(e) It shall be unlawful for any person knowingly to exhibit, expose, or display in public at newsstands or any other business or commercial establishment or at any other public place frequented by minors or where minors are or may be invited as part of the general public:

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors; or

(2) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.”<sup>143</sup>

Subsection 16-12-102 provides definitions of the terms used in the statute at issue in the case. Specifically, it defines “harmful to minors” and “sexually explicit nudity” as follows:

16-12-102. Definitions

As used in this part, the term:

(1) "Harmful to minors" means that quality of description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

(A) Taken as a whole, predominantly appeals to the prurient, shameful, or morbid interest of minors;

(B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(C) Is, when taken as a whole, lacking in serious literary, artistic, political, or scientific value for minors.

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<sup>143</sup> *Id.* at 3-4.

(2) "Knowingly" means having a general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(A) The character and content of any material described in this part which is reasonably susceptible to examination by the defendant; and

(B) The age of the minor; provided, however, that an honest mistake shall constitute an excuse from liability in this part if the defendant made a reasonable, bona fide attempt to ascertain the true age of such minor.

(3) "Minor" means a person less than 18 years of age.

...

(7) "Sexually explicit nudity" means a state of undress so as to expose the human male or female genitals, pubic area, or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state."<sup>144</sup>

Having obtained the dismissal of the two felony counts, and having reduced the five misdemeanor counts down to two, counsel for Lee next addressed the remaining two misdemeanor counts. They noted that the State had charged Gordon Lee with two counts of sale of sexually explicit materials to nine-year old Brandon Bishop, based on the fact that subsection (a)1 of section 103 prohibits sale of material with visual images, and subsection (a)2 prohibits the sale of material with verbal descriptions or narrative accounts.<sup>145</sup> Counsel for CBLDF argued in response: "[t]his is a single magazine which we have here. It contains words and pictures which is not uncommon. And it is taken as a whole as one item that is being alleged. We would submit that it should all be put in one count... ."<sup>146</sup> Once again, as occurred in the *Mavrides* case, law enforcement authorities failed to understand the nature of the comics medium, and took the position that a comic work is two separate components – art and text – when the simple truth is that this is a medium in which the two components are blended.

Judge Salmon denied this motion, and further denied that the Georgia statute was unconstitutional, thereby setting the case for trial on the remaining two misdemeanor counts.<sup>147</sup> Judge Salmon offered little in the way of explanation of his decision on the constitutional questions, except to note, dismissively, "This is not an obscenity case it is simply a case of furnishing and distributing prohibited material to a minor."<sup>148</sup>

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<sup>144</sup> *Id.* at 7-8.

<sup>145</sup> CBLDF Case File – Official Transcript of the Proceedings – Motion Hearing, In the Superior Court of Floyd County, State of Georgia, *State v. Lee*, in Rome, Georgia December 1, 2005, at 12; copy in the possession of the author.

<sup>146</sup> *Id.* at 13.

<sup>147</sup> CBLDF Case File – Order on Motions, in the Superior Court of Floyd County, State of Georgia, *State v. Lee*, Criminal Action No. 05-CR-28976 JFL 001, December 29, 2005, *supra* n. 138, at 6, 9; copy in the possession of the author.

<sup>148</sup> *Id.* at 6, *emphasis in original*. Judge Salmon may have been sensitive to the lack of analysis offered in his ruling on the extensive constitutional arguments submitted by Lee's counsel. In a later section of his Order on Motions, he reiterates his decision on both the constitutional argument and the issue of whether the indictment contains correctly

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

“MR. CADLE (counsel for Lee): This case involves the instance of a comic book being given out on Halloween of 2004. A free comic book, which we will introduce into evidence in Mr. Begner’s presentation, Your Honor. A single ---  
THE COURT: Well, I’ve got to look – I’ve got to make a threshold determination on that, don’t I?  
MR. CADLE: Yes, Judge, we ask you to.  
THE COURT: Yuck. Okay.”<sup>149</sup>

The Court and the prosecution also reveal a disappointing lack of understanding of the concept of “community standards” to be applied in an obscenity case – a level of confusion that is disconcerting when considered in conjunction with the judge’s statement that this was not an obscenity case – if so, why would consideration of local community standards even be an issue?

Here is the discouraging exchange between the judge and the prosecutor:

“THE COURT: [A]nd prevailing community standards – what is the geographical area that we are dealing with? You see, I live in Armuchee and someone that lives down here in high-fluting Forest Apartments might have a different – I shouldn’t say that. I don’t mean that in a disparaging – people who live in more cosmopolitan parts of Floyd County may have a different perspective than some redneck that lives out in Armuchee.  
MR. MCCCELLAN: Yes, sir.  
THE COURT: Now, does that – are we dealing with – what’s the geographical community that we’re dealing with?  
MR. MCCCELLAN: Your Honor, I haven’t found that addressed.  
THE COURT: Okay. Well, I tried. All right. Go ahead.”<sup>150</sup>

Following the decision on these motions, CBLDF counsel prepared for trial on the remaining two counts. On April 2, 2006, the eve of trial, the prosecution advised that they were going to

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pled prosecutable allegations, saying somewhat apologetically, “The first two questions have already been answered in the affirmative after, it is hoped, a more than cursory analysis.” *Id.* at 8. Cursory is generous – the analysis offered in the Order on Motions barely touches on the constitutional arguments. The same is true for the challenge to the prosecutable allegations – here Lee’s counsel argued that the panels at issue do not show any “uncovered male genitals in a discernibly turgid state”, as required under the definition of “Sexually explicit nudity” found in subsection 102(7). Judge Salmon ignored this argument.

<sup>149</sup> CBLDF Case File – Official Transcript of the Proceedings – Motion Hearing, In the Superior Court of Floyd County, State of Georgia, *State v. Lee*, in Rome, Georgia December 1, 2005, *supra* n. 144, at 8; copy in the possession of the author.

<sup>150</sup> *Id.* at 28. Unfortunately, counsel for Lee missed an opportunity to argue that the “local community standards” doctrine from the *Miller* case was indeed a hopelessly confused concept, which the judge seemed to intuit. Instead, counsel for Lee correctly advised the Court later in the hearing that per recent case law, “The jury, I believe, under the law now, is told to determine the community”. *Id.* at 33. The jury is given no tools to make such a determination, and the result is that the local community standard in an obscenity case is determined by the personal views of the jurors – in this case six individuals from Floyd County.

dismiss all charges against Lee because they had the wrong victim – it wasn't Brandon Bishop, the 9 year old boy, it was his Blake Bishop, his six year old brother, who had received the book! The next day, the prosecution came before the court and declared the case *nolle prosequi*, meaning that the charges that were to go to trial were to be dismissed. Shortly thereafter, they re-filed them, and instead of substituting the younger brother as the victim/recipient of the book, they alleged that both brothers were the victims.<sup>151</sup>

Counsel for Lee responded with a flurry of renewed motions to dismiss the new indictment on the same constitutional grounds that they had previously argued, adding motions for expedited discovery, and a motion to quash the indictment on the grounds that Georgia law precluded the bringing of an accusation that the grand jury had previously considered and heard evidence on.<sup>152</sup> Lee's counsel also filed a Motion to Dismiss Accusation Based on Prosecutorial Misconduct<sup>153</sup> arguing that it was prosecutorial misconduct for the prosecution to fail to figure out, for 18 months, who the real alleged victim was.<sup>154</sup>

Lead counsel for Lee, Alan Begner, expressed amazement at the prosecution's conduct:

"I have never – as a criminal trial lawyer for thirty years – seen a complete changing of the facts like this. Throughout the year and a half before that trial date, through written statements, the investigation, and the presentation of evidence before the grand jury, as well as the written accusation and indictment, the State had steadfastly asserted that the comic book had been handed to the nine-year old. The dismissal of the charges today reflects the prosecution's admission that everything that was presented as evidence before was untrue, and that they had stuck to the false facts through procedure after procedure in the case. How did a year and a half of statements based on one set of facts get changed at the last minute to another set of facts?"<sup>155</sup>

Oral argument on the defense teams motions was conducted, and on October 26, 2006, Judge Salmon issued his Order on Pre-Trial Motions, which he began with the following somewhat caustic preamble:

"The above styled case is in its' third re-incarnation. It was previously indicted as Criminal Action No. 05-CR-28976 and Accused as Criminal Action No. 06-CR-00922. Same song. Third verse. Same prosecution."<sup>156</sup>

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<sup>151</sup> CBLDF – Articles: *Gordon Lee: The Road to Trial*, (October 31, 2007) at 2, last viewed at <http://www.cbldf.org/articles/archives/00318.shtml>.

<sup>152</sup> CBLDF Case File, *State v. Lee*; Motions to Dismiss, Memorandum in Support of Motions to Dismiss, Motion to Require Prosecutor to Disclose Evidence Favorable to Defendant, Omnibus Motion for Discovery, Demurrer and Motion to Quash, filed at various dates in May, 2006, copy in the possession of the author.

<sup>153</sup> CBLDF Case File, *State v. Lee*; Motion to Dismiss Accusation Based on Prosecutorial Misconduct, copy in the possession of the author.

<sup>154</sup> *Id.*

<sup>155</sup> CBLDF – Articles: *Gordon Lee: The Road to Trial*, (October 31, 2007) at 2, last viewed at <http://www.cbldf.org/articles/archives/00318.shtml>.

<sup>156</sup> CBLDF Case File – Order on Motions, in the Superior Court of Floyd County, State of Georgia, *State v. Lee*, Criminal Action No. 06-CR-01387 JFL 001, October 26, 2006, at 1; copy in the possession of the author.

Judge Salmon then proceeded to dismiss all of the defense motions and the case was finally ready for trial. In characteristic fashion, he declined to offer much in the way of reasoning behind his decisions; for example, he dealt with the prosecutorial misconduct issue by noting that he had heard from counsel for both sides on the record, and found that the motion was “without merit”, offering no other explanation.<sup>157</sup>

After another year of delays, the trial of Gordon Lee was finally set for November 5, 2007. On the day before the trial, a story ran in the Sunday Rome News-Tribune, the local paper, that Lee had a prior 1994 conviction of distributing obscene material. Mr. Begner, Lee’s lead counsel, pointed this out to the Court on the first day of trial, arguing that during jury selection, any juror who had read that story should be excused, since the prior conviction was irrelevant and prejudicial. The judge agreed, and thereafter dismissed several jurors for cause, based on their admission that they had read the article.<sup>158</sup>

Mr. Begner also made an oral motion in limine, asking the judge to preclude any testimony from the detectives in the case regarding their conversation with Gordon Lee about his prior conviction. While the judge declined to entertain an oral motion in limine the morning of trial, he made it clear that any such reference would result in a mistrial, and Assistant District Attorney John Tully told the Court and Mr. Begner that he had told the detectives not to discuss that conversation.<sup>159</sup>

Then, in this case already marked by incredible prosecution misconduct, an amazing incident followed. Mr. Tully began his opening statement to the jury, summarizing the events on October 30, 2004 when the comic was given to one of the Bishop boys. Describing the subsequent discussion between Mr. Lee and the police officers, Tully said: “Defendant also continues to get defensive with the deputies and *at some point he tells the deputies that he had been through this before and had beat it. That’s what he tells the deputies.*”<sup>160</sup>

Mr. Begner is flabbergasted. He objects, asks for the jury to be removed, and when they are out of the room, he moves for an immediate mistrial. Mr. Tully offers a lame excuse that the statement he is referring to as having been made by Lee refers to a different claim Lee successfully brought against the police on a different matter, but the Judge agrees with Mr. Begner that in the context of the testimony, the jury is likely to believe that this is a reference to a prior obscenity claim against Mr. Lee, and so he grants the motion, and declares a mistrial.<sup>161</sup>

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

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<sup>157</sup> *Id.* Judge Salmon dismissed the constitutional arguments by simply referring to his prior decision in the 2005 motions

<sup>158</sup> CBLDF Case File – Official Transcript of the Proceedings, In the Superior Court of Floyd County, State of Georgia, *State v. Lee*, in Rome, Georgia November 5, 2007 (1<sup>st</sup> Day of Trial), *supra* n. 132, at 1-5; copy in the possession of the author.

<sup>159</sup> *Id.* at 23.

<sup>160</sup> *Id.* at 25.

<sup>161</sup> *Id.* at 25-26.

“Never in the Fund’s history have we seen prosecutorial misconduct of this nature. We’re dumbfounded by prosecutors assuring the court that they weren’t going to do something and then doing exactly that thing five minutes later. Every step of the way they have been adding further expense to Lee’s defense, first by changing their facts, then by entering new indictment after new indictment, and today by contaminating the jury. Nobody, especially a small retailer, can bear this kind of expense on their own. Today’s action is clear evidence of why the Fund needs to be around to protect comics.”<sup>162</sup>

The question now was what would the State do – would it re-try Lee? Rome District Attorney Leigh Patterson vowed to do so on the next misdemeanor calendar; however when that calendar came up for trials in February 2008, the case was not scheduled.<sup>163</sup> Shortly thereafter Patterson advised Begner that the State would drop the case if Lee would write a public apology. Lee did so immediately, and although Patterson dragged his feet for several months, finally in April the State dismissed the case against Gordon Lee and Judge Salmon entered the dismissal of all charges.<sup>164</sup> Gordon Lee’s long ordeal was over - the case encompassed three years of work, and cost CBLDF over \$100,000 in fees.<sup>165</sup>

#### **e. U.S. v. Handley Case: Shades of Planet Comics; Another Obscenity Case, Another Plea Bargain**

On occasion, the CBLDF is asked to provide expert witnesses for the defense in comics related cases in which they are not initially involved. The case of *U.S. v. Handley* is one such instance. The statutory basis for his prosecution is alarming and the outcome of the case is so unfortunate, that they merit discussion in this article.

Christopher Handley fits a classic definition of what is known as a “fanboy” in the comics world. At the time of his arrest in May 2006, he was a single white male, sexually a virgin, living in a small town in Iowa at home with his mother.<sup>166</sup> Handley had done a term of service in the U.S. Navy, and now worked as a computer programmer following a medical discharge from the service. His chief social outlets were his work and a Bible Fellowship. He spent most of his spare time at his house, taking care of his mother, and playing online fantasy games and reading comic books in the basement of the house.<sup>167</sup> He was an avid manga collector, owning several thousand manga comic books. A small subset of his collection included “hentai manga”, which is defined as sexually explicit manga featuring drawings of characters that appear as young girls, known as “lolicon”.<sup>168</sup>

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<sup>162</sup> CBLDF Case Files – Georgia v. Gordon Lee, last viewed at <http://cblfd.org/about-us/case-files/gordon> lee, *supra* n. 134, at 2.

<sup>163</sup> CBLDF Press Release: *CBLDF Wins Gordon Lee Case!* April 23, 2008, at 1. Last viewed at <http://www.cblfd.org/pr/archives/000355>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> CBLDF Case Files – U.S. v. Handley, last viewed at <http://cblfd.org/about-us/case-files/handly> at 1-2.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* Of the over 1,200 manga comics in his collection, only a handful were hentai manga, and of those, only 7 books were the focus of the Government case. Eric Chase, *Christopher Handley’s Attorney Comments On His Case*, Comics Journal Online, (March 2, 2010), last viewed at <http://www.tcj.com/news/christopher-handley-attorney-comments-on-his-case>.

The case began in May, 2006, when Handley went to the post office to pick up a shipment of manga books he had received from Japan. The Postal Inspector had obtained a search warrant to search the package, based on the belief that it might contain cartoon images of objectionable content.<sup>169</sup> The Inspector's review of the package contents confirmed this suspicion, and law enforcement officials then waited for Handley to pick up the package. As he drove away from the post office, Handley was followed by a small flotilla of law enforcement officers, with representatives from the Postal Inspector's Office, the Immigration and Customs Enforcement Agency, Special Agents from the Iowa Division of Criminal Investigation, and officers from the local Glenwood Police Department all in the vehicles following him.<sup>170</sup> He was pulled over and ordered to proceed to his home, which the officers then searched, and seized over 1200 manga comic books, hundreds of DVDs, VHS tapes, laser disks, seven computers, and other documents.<sup>171</sup>

Handley hired well known local defense attorney Eric Chase to represent him. Chase enlisted the CBLDF to provide expert testimony in the case. CBLDF's then Legal Counsel, Burton Joseph, explained why the Fund was willing to help in the case:

“In the lengthy time in which I have represented CBLDF and its clients, I have never encountered a situation where criminal prosecution was brought against a private consumer for possession of material for his personal use in his own home. This prosecution has profound implications in limiting the First Amendment for art and artists, and comics in particular, that are on the cutting edge of creativity. It misunderstands the nature of avant-garde art in its historical perspective and is a perversion of anti-obscenity laws.”<sup>172</sup>

The relevant language of the statute at issue in the Handley case, known as the Protect Act, provides as follows:

**“18 U.S.C. § 1466A: Obscene visual representations of the sexual abuse of children**

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

(1)(A) depicts a minor engaging in sexually explicit conduct; and

(B) is obscene; or

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

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<sup>169</sup> CBLDF Press Release: *CBLDF to Serve as Special Consultant to PROTECT Act Manga Case*, October 9, 2008, at 1, last viewed at <http://cblfd.org/pr/archives/000372.shtml>, copy in possession of the author.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

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

(b) Additional Offenses. - Any person who, in a circumstance described in subsection (d), knowingly possesses a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that -

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

(2)(A) depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and (B) lacks serious literary, artistic, political, or scientific value; or attempts or conspires to do so, shall be subject to the penalties provided in section 2252A(b)(2), including the penalties provided for cases involving a prior conviction.

(c) Nonrequired Element of Offense. - It is not a required element of any offense under this section that the minor depicted actually exist.

(d) Circumstances. - The circumstance referred to in subsections (a) and (b) is that -

(1) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense; (2) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer; (3) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense; (4) any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or (5) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.

(e) Affirmative Defense. - It shall be an affirmative defense to a charge of violating subsection (b) that the defendant - (1) possessed less than 3 such visual depictions; and (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any such visual depiction - (A) took reasonable steps to destroy each such visual depiction; or (B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

(f) Definitions. - For purposes of this section - (1) the term "visual depiction" includes undeveloped film and videotape, and data stored on a computer disk or by electronic means which is capable of conversion into a visual image, and also includes any photograph, film, video, picture, digital image or picture, computer image or picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means; (2) the term "sexually explicit conduct" has the meaning given the term in section 2256(2)(A) or 2256(2)(B); and (3) the term "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted.<sup>173</sup>

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<sup>173</sup> 18 U.S.C. § 1466A: Obscene visual representations of the sexual abuse of children. The Protect Act appears to be Congress' response to the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 534 U.S. 234 (2002), a

There are two important issues of concern in the enforceability of this section of the Protect Act. The first issue is that the section targets visual “representations” of the sexual abuse of children, and is therefore not limited to photographs, film or even drawings of actual children engaged in actual conduct – as subpart (c) notes, the minor depicted need not actually exist.<sup>174</sup> Thus a drawing of a fictional person, who appears to be a child, can form the basis of a violation of this law.

The second issue is that although subpart (a) limits offenses to those involving distribution, creation, receipt, or possession with intent to distribute, subpart (b) allows a finding of a violation of the law for mere possession, regardless of the presence of an intent to distribute. Each of these issues present serious constitutional concerns.

Turning to the first issue, that this law doesn’t require an actual minor to be involved, this raises a real problem in determining that a violation has occurred, based on the age of the child involved. The definition of a minor, for purposes of this statute, is “any person under the age of eighteen years”.<sup>175</sup> The problem this presents in an illustration of a fictional character, is first that a drawing isn’t a “person” – it’s a drawing – as the famous Magritte painting of a pipe notes, *Ceci n’est pas une pipe* – “this is not a pipe” – it is a drawing of a pipe.<sup>176</sup> The picture is not the thing it represents. The second problem is how are we to determine the age of the minor if the picture depicts a representation of a person – who can say that the depiction is of a child below the age of 18, unless the text expressly states it is? It is difficult, if not impossible, to tell whether a person is under the age of 18 based solely on their physical appearance or clothing, except in the case of an infant or a very small child – once you depict a person in their teens, with obvious signs of having reached puberty, the actual age is very difficult to determine with any certainty. As a matter of law this creates a terrible vagueness problem.

The second issue, that the law makes mere possession of the prohibited materials an offense, seems to be in direct contradiction of the time-honored precedent established by the Supreme Court in its decision in *Stanley v. Georgia*,<sup>177</sup> in which the Court held that the possession of obscene materials in the privacy of one’s own home was not unlawful.<sup>178</sup>

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case in which the Court found the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. §2251 *et. seq.* abridges the freedom of speech. The CPPA attempted to extend the federal prohibition against child pornography to sexually explicit images that appeared to depict minors but were produced without using any real children – primarily through the use of digital techniques like morphing and using software (Photoshop) to create the impression that a photograph was one of a child, when in fact the body was of an adult and the head or face that of a child. The Supreme Court found that by prohibiting child pornography that did not depict an actual child, the statute went beyond the decision in *New York v. Ferber*, 458 U.S. 747 (1982), which had allowed a ban on child pornography even if the work was not obscene, per *Miller*, because of the State’s interest in protecting the children exploited by the production process. *Ashcroft, supra*, at 239-241.

<sup>174</sup> 18 U.S.C. 1446A(c).

<sup>175</sup> 18 U.S.C. §2256(1).

<sup>176</sup> See, e.g., [www.artscenecal.com/ArticlesFile/Archive/.../RMagritteA.html](http://www.artscenecal.com/ArticlesFile/Archive/.../RMagritteA.html), describing the 1929 painting by surrealist artist Rene Magritte of a tobacco pipe, with the words *Ceci n’est pas une pipe* written underneath it. Magritte’s point is that the painting is not the thing – only a representation of the thing.

<sup>177</sup> *Stanley v. Georgia*, 394 U.S. 557 (1969)

<sup>178</sup> *Id.* at 559. Justice Marshall, writing for the majority: “ For reasons set forth below, we agree that the mere possession of obscene matter cannot constitutionally be made a crime.” *Id.*

Both of these arguments were submitted by Eric Chase in support of a motion to dismiss the charges against Christopher Handley.<sup>179</sup> The District Court, engaging in some tortured logic, rejected both arguments.

With respect to the argument that the definition of what “appears to be” a “minor” is void language due to vagueness, the Court, citing the Supreme Court’s decision in *U.S. v. Williams*,<sup>180</sup> disagreed with Chase’s argument, holding:

“The determination of what is, or appears to be, a minor does not require a wholly subjective judgment. The term “minor” has a statutory definition contained within the PROTECT Act and has a commonly understood meaning of being an individual under the age of eighteen. The phrase “appears to be” is not subject to differing interpretations, and the plain meaning of the phrase is clear.”<sup>181</sup>

Clear as mud. This portion of the Court’s Order simply ducks the difficult question posed by Chase – how was Handley supposed to know that the fictional characters depicted in the manga books he purchased were under the age of eighteen? How can anyone tell if a character is 17 years, 11 months and 29 days old, and thereby a minor, or two days older, and therefore no longer a minor and a lawful subject of illustration? As ridiculous as this distinction seems, when we acknowledge that making this distinction is the determining factor in whether you spend five years in jail, the absurdity of it takes on a much more sinister cast.

Judge Gritzner’s Order also makes short work of the *Stanley v. Georgia* argument, on similarly shaky analysis. The Court finds that Handley was not being charged with mere private possession of obscene materials – he was charged with receipt of obscene materials that were transported in interstate commerce.<sup>182</sup> Judge Gritzner, citing the decisions in several prior federal and Supreme Court cases<sup>183</sup>, concludes:

“Thus, while an individual has a limited right to possess obscene materials in the privacy of his own home, there exists no right to receive or possess obscene materials that have been moved in interstate commerce, and that is the illegal conduct with which Defendant is charged.”<sup>184</sup>

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<sup>179</sup> CBLDF Case File - USDC Judge James E. Gritzner, Order on Motion to Dismiss, *U.S. v. Christopher S. Handley*, Case No. 1:07-cr-00030-JEG, In the United States District Court for the Southern District of Iowa, July 2, 2008, at 4-10, copy in the possession of the author.

<sup>180</sup> *United States v. Williams*, 553 U.S. 285 (2008).

<sup>181</sup> CBLDF Case File - USDC Judge James E. Gritzner, Order on Motion to Dismiss, *U.S. v. Christopher S. Handley*, Case No. 1:07-cr-00030-JEG, In the United States District Court for the Southern District of Iowa, July 2, 2008, *supra* n. 179, at 10, copy in the possession of the author.

<sup>182</sup> *Id.* at 5.

<sup>183</sup> Judge Gritzner cites *United States v. 12 200-Foot Reels of Super 8mm. Film*, 412 U.S. 123, 126 (1973) (holding that *Stanley* was decided on privacy, and not First Amendment, grounds); *U.S. v. Orito*, 413 U.S. 139, 141 (1973) (rejecting the argument that *Stanley* created a correlative right to receive, transport, or distribute obscene materials in interstate commerce); and *United States v. Whorley*, 386 F.Supp 2d 693 (holding that the zone of privacy in *Stanley* was limited and didn’t extend to the receipt of legally offensive materials from the internet). *Id.* at 5.

<sup>184</sup> *Id.* at 5.

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

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

“It is now well established that the Constitution protects the right to receive information and ideas. “This freedom [of speech and press] . . . necessarily protects the right to receive . . . .” *Martin v. City of Struthers*, 319 U. S. 141, 143 (1943); see *Connecticut*, 381 U. S. 479, 482 (1965); *Lamont v. Postmaster General*, 381 U. S. 301, 307-308 (1965) (BRENNAN, J., concurring); cf. *Pierce v. Society of Sisters*, 268 U. S. 510 (1925). This right to receive information and ideas, regardless of their social worth, see *Winters v. New York*, 333 U. S. 507, 510 (1948), is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.<sup>185</sup>

Justice William A. Douglas made it clear, in his concurrence with Justice Black’s dissent in *United States v. Thirty-Seven (37) Photographs (Luros, Claimant)*,<sup>186</sup> that unless the Court was reversing *Stanley*, it had to allow people to receive obscene materials for private use:

“Since the plurality opinion offers no plausible reason to distinguish private possession of “obscenity” from importation for private use, I can only conclude that at least four members of the Court would overrule *Stanley*. Or perhaps in the future that case will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room.”<sup>187</sup>

Justice Douglas joined Justice Black an expression of concern that the Court was abandoning “cherished freedoms”, perhaps in response to political pressures of the times (this was the era of

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<sup>185</sup> *Stanley v. Georgia*, *supra* n. 177, at 564.

<sup>186</sup> *United States v. Thirty-Seven (37) Photographs (Luros, Claimant)*, 402 U.S. 363 (1971) (upholding a conviction for violation of the Tariff Act of 1930, 19 U.S.C. §1305(a) against Milton Luros for bringing in his luggage on a return trip into the U.S. from Europe 37 allegedly obscene photos. Luros argued that under *Stanley v. Georgia* he was entitled to bring the photos into the country for his personal use. The U.S. District Court for the Central District of California agreed with this argument, and the Government appealed. The majority held that *Stanley* did not extend to bringing materials into the country. *Id.* at 376-77.

<sup>187</sup> *Id.* at 382.

the Nixon presidency, and the rejection of the findings of the President's commission on Obscenity and Pornography<sup>188</sup>). Douglas wrote:

“I do not understand why the plurality feels so free to abandon previous precedents protecting the cherished freedoms of press and speech. I cannot, of course, believe it is bowing to popular passions and what it perceives to be the temper of the times. As I have said before, "Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind that brings new political administrations into temporary power." *Turner v. United States*, 396 U. S. 398, 426 (1970) (BLACK, J., dissenting). In any society there come times when the public is seized with fear and the importance of basic freedoms is easily forgotten. I hope, however, "that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society." *Dennis v. United States*, 341 U. S. 494, 581 (1951) (BLACK, J., dissenting).”<sup>189</sup>

Judge Gritzner was not the judge who was going to restore Justice Douglas' cherished freedoms. While he did find one section of the PROTECT Act to be unconstitutional for failing to require a finding of obscenity as to certain materials prohibited by the Act, he also found that the remaining two sections of the Act, which do require a finding of obscenity under the standards set forth in *Miller v. California*, 413 U.S. 15 (1973), were constitutional.<sup>190</sup> Based on those findings, he found that there remained sufficient evidence of a possible violation of the Act to allow the case to go forward to trial.<sup>191</sup>

This left Handley facing a criminal trial with the possibility of a felony conviction and a five-year prison sentence. Like Messrs. Hunter and Kennedy in the Planet Comics case, this threat proved to be too much pressure. Mr. Handley accepted a plea bargain and pled guilty to “possessing obscene visual representations of the sexual abuse of children and mailing obscene material.” On February 10, 2010, he was sentenced to six months in prison, plus a 3 year supervised release (psychological treatment) running concurrent with five years of probation, and he forfeits his entire manga collection and other property that was seized.<sup>192</sup>

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

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<sup>188</sup> See, e.g., Richard Nixon's Statement About the Report of the Commission on Obscenity and Pornography, October 24, 1970, last viewed at <http://www.presidency.ucsb.edu/ws/index.php?pid=2759#axzz1SIIt5WaI0>.

<sup>189</sup> *United States v. Thirty-Seven (37) Photographs (Luros, Claimant)*, 402 U.S. 363 (1971), *supra* n. 186, at 388.

<sup>190</sup> CBLDF Case File - USDC Judge James E. Gritzner, Order on Motion to Dismiss, *U.S. v. Christopher S. Handley*, Case No. 1:07-cr-00030-JEG, In the United States District Court for the Southern District of Iowa, July 2, 2008, *supra* n. 179, at 14, copy in the possession of the author. Judge Gritzner found Sections 1466(a)(2) and (b)(2), which banned pornography without making a determination that the materials were either obscene or involved the use of actual minors were overbroad and unconstitutional. *Id.*

<sup>191</sup> *Id.* at 18.

<sup>192</sup> CBLDF Case Files – *U.S. v. Handley*, last viewed at <http://cblfd.org/about-us/case-files/handly>, *supra* n. 166, at 1; Eric A. Chase, *Christopher Handley's Attorney Comments On His Case*, Comics Journal Online, at 1, last viewed at <http://www.tcj.com/news/christopher-handley-%e2%80%99s-attorney-comments-on-his-case/>. Mr. Chase notes that the sentencing recommendation was that Handley spend the six month sentence in a halfway house, as opposed to jail. *Id.*

“From start to finish, the case against Christopher Handley was an appalling abuse of the justice system. Chris Handley is going to jail not because of anything he did, but because of what he reads and thinks...Putting Chris Handley in jail protects no one – he and his family are the only victims. ... Chris Handley could be any of us. He was prosecuted not because he had engaged in any actions that were a danger to members of his community, but because of his tastes in entertainment. ...When the government begins locking people up for the content of their intellect we are entering dangerous waters. Chris’ case is appalling. One hopes that it is not a harbinger of things to come.”<sup>193</sup>

#### **4. The Bigger Picture: Obscenity, the First Amendment, and the Moral Education of the Young**

When I was a law student in the fall of 1977, I took a class in Constitutional Issues Before the Supreme Court, taught by former U.S. Supreme Court Justice Arthur Goldberg.<sup>194</sup> In this small seminar-style class, students read cases pending before the Supreme Court that term, and presented mock oral argument on behalf of one of the parties. Justice Goldberg sat as Chief Justice, and the rest of the class offered commentary.

Justice Goldberg chose which cases would be argued by each student. He assigned me to argue, on behalf of the National Socialist Party, the argument that this group, which was the American version of the Nazi party, should be allowed the right to conduct a political march through the neighborhood of the village of Skokie, in Illinois, to promote their anti-Semitic viewpoints. Skokie had a large population of elderly Jewish residents, many of whom were survivors of the Holocaust in Germany during World War II.<sup>195</sup>

I’m certain that Justice Goldberg knew I was of the Jewish faith, and that he purposely assigned this case to me to help me learn that one of the purposes of the First Amendment is to protect speech that we may personally find distasteful, even repugnant. Lesson learned.

##### **a. The Fatal Fork in the Road: Separating Obscenity From the First Amendment**

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<sup>193</sup> CBLDF Case Files – U.S. v. Handley, last viewed at <http://cblfd.org/about-us/case-files/handly>, *supra* n. 166, at 2. It is important to note that the foregoing summary of these five cases are not all of the cases handled by CBLDF since the Fund began its work. Other cases have dealt with issues relating to parody and fair use, which are beyond the scope of this article. It is also appropriate to acknowledge that in many instances, CBLDF is able, by retaining counsel and sending a letter to a district attorney or prosecutor who is threatening to bring criminal obscenity charges against a comic store owner, distributor, creator or collection, to head off the threatened prosecution by pointing out the available First Amendment defense arguments.

<sup>194</sup> Justice Goldberg was a member of the Sixty-Five Club at Hastings College of the Law in San Francisco from 1974-1977. I had the privilege of being a student in one of his last classes at the law school. *See, e.g.* [www.uchastings.edu/about/history/sixty-five-club.html](http://www.uchastings.edu/about/history/sixty-five-club.html).

<sup>195</sup> The case was decided by the Supreme Court in their *per curiam* opinion in *National Socialist Party of America et al., v. Village of Skokie*, 412 U.S. 43 (1977) (reversing the Illinois Supreme Court’s denial of a stay of an injunction preventing the march and allowing the march to take place, on First Amendment grounds.).

**This section of the article has not yet been drafted. What follows is a series of quotes from cases and secondary sources which will be incorporated into the final draft. The draft will be finalized prior to my presentation of this work at the 2011 IPSC, and will thereafter be circulated for publication.**

Justice William O. Douglas shared a similar view.

He first articulated his view in his dissent in the *Roth* case, where he wrote:

“When we sustain these convictions, we make the legality of a publication turn on the purity of thought which a book or tract instills in the mind of the reader. I do not think we can approve that standard and be faithful to the command of the First Amendment,...

By these standards, punishment is inflicted for thoughts provoked, not for overt acts nor antisocial conduct. This test cannot be squared with our decisions under the First Amendment. Even the ill-starred *Dennis* case conceded that speech, to be punishable, must have some relation to action which could be penalized by government. *Dennis v. United States*, 341 U.S. 494, 502-511. Cf. Chafee, *The Blessings of Liberty* (1956), p. 69.

The test of obscenity the Court endorses today gives the censor free range over a vast domain. To allow the State to step in and punish mere speech or publication that the judge or the jury thinks has an undesirable impact on thoughts, but that is not shown to be a part of unlawful action, is drastically to curtail the First Amendment. As recently stated by two of our outstanding authorities on obscenity,

“The danger of influencing a change in the current moral standards of the community, or of shocking [p510] or offending readers, or of stimulating sex thoughts or desires apart from objective conduct, can never justify the losses to society that result from interference with literary freedom. Douglas dissent in *Roth v. U.S.*, 354 U.S. 476, 510-514, *citing* Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 *Minn.L.Rev.* 295, 387.”

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

There are a number of reasons for real and substantial doubts as to the soundness of that hypothesis. (1) Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other non-active entertainment. Thus, even assuming that reading sometimes has an adverse effect upon moral conduct, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency,

have recently published the results of a ten-year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency, but the Gluecks gave no consideration to the type of reading material, if any, read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who know so much about the problem of delinquency among youth -- the very [p511] group about whom the advocates of censorship are most concerned -- conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubt concerning the basic hypothesis on which obscenity censorship is defended. (3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence, and so much more potent in their effect, that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards. The Kinsey studies show the minor degree to which literature serves as a potent sexual stimulant. And the studies demonstrating that sex knowledge seldom results from reading indicates [*sic*] the relative unimportance of literature in sex thoughts, as compared with other factors in society, *citing* Lockhart & McClure, *op. cit. supra*, pp. 385-386.

Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, juries can censor, suppress, and punish what they don't like, provided the matter relates to "sexual impurity" or has a tendency "to excite lustful thoughts." This is community censorship in one of its worst forms. It creates a regime where, in the battle between the literati and the Philistines, the Philistines are certain to win. If experience in this field teaches anything, it is that "censorship of obscenity has almost always been both irrational and indiscriminate," *citing* Lockhart & McClure, *op. cit. supra* at 371. The test adopted here accentuates that trend.

I do not think that the problem can be resolved by the Court's statement that "obscenity is not expression protected [p514] by the First Amendment." With the exception of *Beauharnais v. Illinois*, 343 U.S. 250, none of our cases has resolved problems of free speech and free press by placing any form of expression beyond the pale of the absolute prohibition of the First Amendment. Unlike the law of libel, wrongfully relied on in *Beauharnais*, there is no special historical evidence that literature dealing with sex was intended to be treated in a special manner by those who drafted the First Amendment.

I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.

*Douglas dissent in Roth v. U.S., 354 U.S. 476(1957) at 510-514.*

Fourteen years later his views were even stronger, as we see in his dissent in the *37 Photographs* case:

"I particularly regret to see the Court revive the doctrine of *Roth v. United States*, 354 U. S. 476 (1957), that "obscenity" is speech for some reason unprotected by the First Amendment. As the Court's many decisions 380\*380 in this area demonstrate, it is extremely difficult for judges or

any other citizens to agree on what is "obscene." Since the distinctions between protected speech and "obscenity" are so elusive and obscure, almost every "obscenity" case involves difficult constitutional issues. After *Roth* our docket and those of other courts have constantly been crowded with cases where judges are called upon to decide whether a particular book, magazine, or movie may be banned. I have expressed before my view that I can imagine no task for which this Court of lifetime judges is less equipped to deal. *Smith v. California, supra*, (BLACK, J., concurring).

In view of the difficulties with the *Roth* approach, it is not surprising that many recent decisions have at least implicitly suggested that it should be abandoned. See *Stanley v. Georgia*, 394 U. S. 557 (1969); *Redrup v. New York*, 386 U. S. 767 (1967). Despite the proved shortcomings of *Roth*, the majority in *Reidel* today reaffirms the validity of that dubious decision. Thus, for the foreseeable future this Court must sit as a Board of Supreme Censors, sifting through books and magazines and watching movies because some official fears they deal too explicitly with sex. I can imagine no more distasteful, useless, and time-consuming task for the members of this Court than perusing this material to determine whether it has "redeeming social value." This absurd spectacle could be avoided if we would adhere to the literal command of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

*Douglas Dissent in U.S. v. 37 Photographs*, 402 U.S. 363 (1971) (joining in the dissent of Justice Black, at 380).

And again, two years later, in the *Paris Adult Theatre I* case, Justice Douglas reaffirmed his strongly held view that the Court erred in its decision in *Roth* that obscenity was not protected by the First Amendment.

"I have expressed on numerous occasions my disagreement with the basic decision that held that "obscenity" was not protected by the First Amendment. I disagreed also with the definitions that evolved. Art and literature reflect tastes; and tastes, like musical appreciation, are hardly reducible to precise definitions. That is one reason I have always felt that "obscenity" was not an exception to the First Amendment. For matters of taste, like matters of belief, turn on the idiosyncrasies of individuals. They are too personal to define and too emotional and vague to apply. Id. at 70

The other reason I could not bring myself to conclude that "obscenity" was not covered by the First Amendment was that prior to the adoption of our Constitution and Bill of Rights the Colonies had no law excluding "obscenity" from the regime of freedom of expression and press that then existed. I could find no such laws; and more important, our leading colonial expert, Julius Goebel, could find none, J. Goebel, *Development of Legal Institutions* (1946); J. Goebel, *Felony and Misdemeanor* (1937). So I became convinced that the 71\*71 creation of the "obscenity" exception to the First Amendment was a legislative and judicial *tour de force*; that if we were to have such a regime of censorship and punishment, it should be done by constitutional amendment. Id. at 71".

*Douglas dissent in Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973)

Justice Brennan, by 1973, had also come to the conclusion that the conclusion he had advanced in *Roth* was no longer valid. He added his voice to the dissenting justices in the *Paris* case, noting:

“I am convinced that the approach initiated 16 years ago in *Roth v. United States*, 354 U. S. 476 (1957), and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the 74\*74 time has come to make a significant departure from that approach. Id at 73-74

Our experience with the *Roth* approach has certainly taught us that the outright suppression of obscenity cannot be reconciled with the fundamental principles of the First and Fourteenth Amendments. For we have failed to formulate a standard that sharply distinguishes protected from unprotected speech... Id. at 83

I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist and that we "know it when [we] see it," *Jacobellis v. Ohio*, *supra*, at 197 (STEWART, J., concurring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech. Id. at 84

Like the proscription of abortions, the effort to suppress obscenity is predicated on unprovable, although strongly held, assumptions about human behavior, morality, sex, and religion. The existence of these assumptions cannot 110\*110 validate a statute that substantially undermines the guarantees of the First Amendment, any more than the existence of similar assumptions on the issue of abortion can validate a statute that infringes the constitutionally protected privacy interests of a pregnant woman. Id. at 110

*Brennan's dissent in Paris Adult Theatre, pages as noted.*

**The Missing Causal Link: Young people, explicit sexual material, and proof of actual harm or causal link to social misconduct.**

**In this section of the article, I address the absence of valid, reliable, empirical and scientific evidence establishing a causal link between the exposure of young people to sexually explicit graphic art and any anti-social or criminal conduct as a result of that exposure.**

**Two primary sources are quoted from, each of which incorporates an extensive discussion of the relevant social science and legal literature and scholarship regarding this subject. These two sources are:**

**Marjorie Heins extensive study of the subject, set forth in her book, *Not In Front Of The Children: "Indecency", Censorship and the Innocence of Youth*, (2001) Hill and Wang, A division of Farrar, Straus and Giroux; and an extensive law review article by Professor Bret Boyce, entitled *Obscenity and Community Standards*, 33 *Yale J. Int'l Law* 299 (2008).**

**My references to Marjorie Heins work have not yet been transcribed. What follows are quotes, with footnotes incorporated into breaks in the text, from Prof. Boyce's article:**

"Stephen's argument that society may punish immorality merely to gratify its hatred and to denounce immorality is, according to Hart, "uncomfortably close to human sacrifice as an expression of religious worship." If society wishes to denounce actions that do not cause harm but are nonetheless regarded as immoral, then "a solemn public statement of disapproval," rather than the infliction of suffering, would seem the most appropriate course."

Id. at 354 *citing* H.L.A. HART, LAW, LIBERTY, AND MORALITY 4-5 (1963), at 66.

"In recent years Harry Clor has presented perhaps the most comprehensive defense of the legal enforcement of public morality with regard to obscenity. Clor is remarkably vague, as we have seen, as to how public morality is to be ascertained and how its enforcement can be justified in a democratic and pluralistic society.<sup>408</sup> But he does offer a normative theory as to why pornography should be regarded as immoral and therefore subject to suppression. The essential problem with pornography, in Clor's view, is that it "obliterates the distinction between human and subhuman sexuality." It depicts "wholly loveless, affectionless sex"; "physical intimacies and reactions normally protected from public observation are placed conspicuously on display"; and it objectifies both women and men, portraying them as "*things* to be used for the gratification of the user."

Id. at 355, *citing* HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY: ESSAYS ON DECENCY, LAW, AND PORNOGRAPHY 13 (1996), at 187, 190-92.

"Clor's argument is less than fully convincing even on its own terms. Whatever else human beings are, they are also animals, and to depict human sexuality as an animal function is to portray an aspect of reality, even if it is not the whole reality. Even Clor admits that "objectification is an inescapable part of the story, even of the love story." It might be better if people were attracted to each other based purely on their spiritual qualities, and did not objectify one another based on their physical characteristics, but to expect or require this is perhaps too much to ask of most human beings. It could be argued that Clor objects to pornography not so much because it appeals to the subhuman element in our nature as because it fails to conform to a particular superhuman standard of morality."

Id at 355-56.

“The notion that obscenity may be suppressed merely because it predisposes its audience to antisocial *attitudes* is problematic. Much expression, including political, religious, and literary expression, arguably promotes hierarchy, propagates negative stereotypes, and glorifies domination and even violence. It is not subject to suppression on those grounds, absent more specific harms. But it is often claimed that “degrading or dehumanizing” sexual depictions deserve special treatment because they predispose their audience to antisocial *acts*, and in particular because they increase the propensity of men to abuse women. There is a huge literature on this topic, which can only be briefly summarized here. But the short answer is that empirical support for such a claim is weak and inconclusive. The Report of the U.S. Commission on Obscenity and Pornography, issued in 1970, determined that “[o]n the basis of the available data . . . it is not possible to conclude that erotic material is a significant cause of sex crime.” 470 The 1970 Commission therefore recommended that all statutes criminalizing the sale or distribution of sexual materials to consenting adults

### **Footnotes from Prof. Boyce’s article**

469. For a general discussion of these issues, in addition to the sources cited below, see JAMES WEINSTEIN, HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE 130-35, 191-217 (1999).

470. THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 243 (1970).

be repealed.<sup>471</sup> To refute this and other reports, President Reagan instructed his Attorney General Edwin Meese to appoint a new commission, which was dominated by opponents of pornography and charged with finding more effective ways to curb pornography.<sup>472</sup> As expected, the Meese Commission duly contradicted the earlier report and found that a causal connection between sexually violent pornography and crime did in fact exist (there was no similar claim for nonviolent pornography).<sup>473</sup> But the claimed effect appeared to depend on the degree of violence of the material, not the degree of sexual explicitness, “[o]nce a threshold is passed at which sex and violence are plainly linked.”<sup>474</sup> The Commission stated that “it is unclear whether sexually violent material makes a substantially greater causal contribution to sexual violence itself than material containing violence alone.”<sup>475</sup> Indeed, it concluded that “the so-called ‘slasher’ films, which depict a great deal of violence connected with an undeniably sexual theme but less sexual explicitness than materials that are truly pornographic, are likely to produce the consequences discussed here to a greater extent than most of the materials available in ‘adults only’ pornographic outlets.”<sup>476</sup> In other words, the Commission found a greater causal link to violence from nonpornographic violent material than from pornographic material. The principal empirical studies on which the Meese Commission and others who have reached similar conclusions have relied consist of laboratory experiments in which subjects were exposed to violent pornography and then questioned regarding their attitudes. Although some such studies found that exposure of men to such material led to some temporary increase in negative attitudes toward women, they do not support the claim of a causal connection to violence.<sup>477</sup> Indeed, several of the most prominent researchers on whose work the Commission relied repudiated its claim of a causal connection.<sup>478</sup>

And significantly, such studies showed that men exposed to both misogynistic and feminist materials had more positive and less discriminatory attitudes than men exposed to feminist materials alone, providing some empirical

### Footnotes from Prof. Boyce's article

471. *Id.* at 51.

472. See BARRY W. LYNN, POLLUTING THE CENSORSHIP DEBATE: A SUMMARY AND CRITIQUE OF THE FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 5-6, 14 (1986).

473. See 1 MEESE COMMISSION REPORT, *supra* note 251, at 326 (“[T]he available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials . . . bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence.”). The Report characterized this conclusion as “unanimous,” but at least two members of the Commission subsequently denied that the social science research has proven a causal link between exposure to pornography and the commission of sexual crimes. See STROSSEN, *supra* note 29, at 252. As for nonviolent pornography, which constitutes the vast bulk of commercially available material, some studies have shown that it “actually reduces aggression in laboratory settings.” Nadine Strossen, *A Feminist Critique of “The” Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1182 (1993).

474. 1 MEESE COMMISSION REPORT, *supra* note 251, at 328.

475. *Id.* at 328.

476. *Id.* at 329.

477. See STROSSEN, *supra* note 29, at 252.

478. See Daniel Linz, Steven D. Penrod & Edward Donnerstein, *The Attorney General's Commission on Pornography: The Gap Between “Findings” and Facts*, 4 AM. B. FOUND. RES. J. 713,723 (1987).

confirmation, as Nadine Strossen has argued, for the view that the best remedy for negative speech is refutation, not suppression.<sup>479</sup>

It is very difficult to translate laboratory findings to the real world. As Gore Vidal once said, the only thing pornography is known to cause directly is the “solitary act of masturbation.”<sup>480</sup> Only a fraction of available sexually explicit material depicts violence.<sup>481</sup> Arguably, even violent pornography may provide a harmless outlet for those who might otherwise engage in actual sexual violence.<sup>482</sup> Surveys in which men were asked to report their own consumption of pornography as well as their level of sexual aggression, found a significant correlation in only “0.84% of the population as a whole.”<sup>483</sup> In short, the experimental and survey evidence for the claim that pornography causes violence is exceedingly weak. Longitudinal and comparative studies utilizing crime statistics furnish even less support for that claim. In Northern Europe and the United States, when restrictions on sexual material were liberalized, rape rates either remained constant or increased more slowly than the overall rate of violent crime; the rates of other sexual offenses actually decreased.<sup>484</sup> Rape rates have historically been much lower in Japan than in the United States although violent pornography is much more prevalent there.<sup>485</sup> A study of the United States found that gender equality was highest in those states where

pornography circulated most widely. 486 Of course, it would be rash to conclude from such studies that pornography *causes* a decline in rape or an increase in gender equality. Many cultural factors no doubt affect rates of violence and attitudes toward women. But these studies at least cast doubt on the opposite claim that pornography causes violence or inequality. Id. at 363-365.

**Prof. Boyce's article was reviewed and commented on by Prof. Ann Bartow. Her review will be discussed, and can be viewed at <http://opiniojuris.org/2008/11/25/response-by-professor-ann-bartow-obscenity-and-community-standards/>**

**Prof. Boyce's reply to Prof. Bartow's review will also be discussed. His reply can be found at <http://opiniojuris.org/2008/11/25/reply-to-professor-bartow/>.**

**My conclusion, based on these sources and the extensive discussion in them of the relevant literature in this area, is that there is insufficient evidence to support the imposition of criminal penalties for the creation, distribution and reader ownership of graphic materials that are sexually explicit, regardless of whether the materials are viewed by adults or children – noting specifically that I am addressing materials that do not involve or depict real people of any age or gender.**

**b. Lastly, Why Pick on Comics, Their Creators, Distributors and Readers?**

**In this concluding section of the article, I address the very real human cost of the imposition of criminal penalties for the creation, distribution and mere collecting and reading of comics and graphic novels with sexually explicit content. Prison terms, financial penalties, psychological testing and monitoring of defendants, loss of families and businesses, are all the consequences of these prosecutions. Given the lack of a valid constitutional basis for removing this form of expression from First Amendment protection, and the chilling effect the threat of criminal penalties has had on the presentation of those free speech defenses, I argue for the elimination of criminal penalties in this context. Finally, I address the interesting social issue of why it is that this form of media, comics and graphic novels, stirs so much passion, fear and anger among its detractors, and what that response says about our culture and legal system.**

***This is a Rough Draft Prepared For Discussion Purposes Only at the 2011 IP Scholars Conference– Do Not Copy, Distribute or Circulate***