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IT'S ALL IN THE CARDS: SERIAL KILLERS, TRADING CARDS, AND THE FIRST AMENDMENT

I. INTRODUCTION

During recent years, trading cards have taken on a new look¹ as publishers created what they call "graphic journalism."² In addition to the traditional cards depicting sports heroes, cards featuring mobsters, serial killers, and mass murderers have hit the stores, and citizens and lawmakers around the country have hit back.³ Starting in the spring of 1992, lawmakers in at least eight states⁴ and Canada⁵ introduced legislation designed to limit the sale of the cards.⁶ In addition, the Board of Supervisors of Nassau County, New York, passed an ordinance prohibiting the sale of the cards to minors.⁷ The New York Civil Liberties Union, Nassau County Chapter, currently is challenging that ban in federal district court.⁸

1. See Dave Hoyer, *Trading Cards for Everything*, JACKSON CITIZEN PATRIOT, May 17, 1992, at B1, B2 (noting proliferation of non-sports cards focusing on movies, television soap operas, and the Persian Gulf War).

2. See Louis Trager, *Serial-killer Cards Eclipse Expectations*, S.F. EXAMINER, Mar. 1, 1992, at E1, E4 (describing "graphic journalism" as graphic non-fiction cards on topics such as "U.S. wars, scandals and news media"). But see Tracy Connor, *Mega Attacks 'Serial Killer' Cards*, BROOK. HEIGHTS PAPER, Apr. 24-30, 1992, at 1, 5 (noting that the first trading cards featuring criminals—called "Pirates of the Spanish Main"—were published in 1889, and that in 1938 a series focusing on gangsters was released called "G-Men and Heroes of the Law").

3. See *'True Crime' Cards Thriving Despite Outrage*, N.Y. TIMES, Dec. 6, 1992, at 44.

4. The states include New York, Maryland, North Carolina, Michigan, Arkansas, Florida, Hawaii, and New Jersey. See *Controversy Increases Sales of Trading Cards*, THE CAPITAL (Annapolis, Md.), June 1, 1992, at 5; Dave Hoyer, *Protests Spur Crime Card Orders: Publisher*, JACKSON CITIZEN PATRIOT, May 17, 1992, at B1; Jessica Seigel, *Trading Cards from the Bottom of Life's Deck*, CHI. TRIB., June 29, 1992, at C1.

5. This note will not address the efforts to ban the importation of trading cards into Canada. However, on June 10, 1992, Canadian Revenue Minister Otto Jelinek ordered Customs officials to halt shipments of the cards into Canada at the border. See Bart Kasowski, *'Serial-killer' Cards Go on Sale Today*, THE GAZETTE (Montreal), June 12, 1992, at A5.

6. See *'True Crime' Cards Thriving Despite Outrage*, *supra* note 3, at 44.

7. Nassau County, N.Y. Ordinance 11-1192 (June 16, 1992) [hereinafter Nassau County Ordinance]; see also Josh Barbanel, *County Limits Crime Trading Cards*, N.Y. TIMES, June 16, 1992, at B5.

8. See Kevin McCandless, *Nassau Sued Over 'Killer Card' Ban*, NEWSDAY, July 22, 1992, at 35.

These state efforts and the Nassau County ordinance pit the First Amendment rights of the card makers, sellers, and consumers against the police powers of the state and local governments. Part II of this note will place these trading cards in a historical perspective that includes more than a century of attempts by citizens and government officials to limit access to information, specifically information considered harmful to minors.⁹ Part III will examine the significant cases setting forth the criteria for limiting First Amendment protection generally and in relation to minors.¹⁰ Part IV will examine a representative sample of legislative proposals to control the cards in North Carolina, Maryland, Michigan, and New York.¹¹ Finally, Part V will discuss the Nassau County ordinance, which is the only one of its kind to be approved, and the status of the pending lawsuit challenging the ordinance.¹²

II. HISTORY

A. *Crime Trading Cards of the 1990s*

Although trading cards featuring criminals have been issued sporadically since the 1880s,¹³ four companies now produce cards featuring convicted criminals.¹⁴ When the cards were first released, they met with little resistance until news "leaked out," during the trial of confessed serial killer Jeffrey Dahmer,¹⁵ that Eclipse Enterprises would produce the True Crime Series.

Eclipse's True Crime Series contains 110 cards in two parts; fifty-five cards feature serial killers and mass murderers while the others

9. See *infra* notes 13-79 and accompanying text.

10. See *infra* notes 80-139 and accompanying text.

11. See *infra* notes 140-96 and accompanying text.

12. See *infra* notes 197-229 and accompanying text.

13. See Connor, *supra* note 2, at 1.

14. Ned Kilkelly, *Ban Sought on Sale of 'Serial Killer' Trading Cards to Kids*, UPI, Apr. 20, 1992, available in LEXIS, Nexis Library, UPI File (reporting that the companies are Bloody Vision/Shelton of Irvington, N.J., which produces "Mass Murderers/Serial Killers"; Mother Productions of Orange County, Cal., which produces "Famous Murderers and Assassins"; Rigomor Press of Studio City, Cal., which sells "Incredible True Life Murderers"; and Eclipse Enterprises of Forestville, Cal., which publishes "True Crime").

15. Hoyer, *supra* note 1, at B1.

concentrate on mobsters and G-men.¹⁶ The cards depict killers from the 19th and 20th centuries and include such notables as Ted Bundy, Jack the Ripper, and Jeffrey Dahmer.¹⁷ The cards feature "a shadowy painting of a criminal on the front with blood-like splatters across the lower half."¹⁸ On the other side is a "short biography of the criminal."¹⁹ For example, Dahmer is described as "a lonely, insecure child who studied chemistry, mutilated animals, and was reportedly molested by a neighbor boy at age eight. . . . After getting [his victims] drunk or drugging them, Dahmer had photographed, strangled, and dismembered his victims. . . . He confessed to murder, necrophilia, and cannibalism."²⁰ Another card describes 19th-century serial killer Herman Webster Mudgett, a.k.a. Harry H. Holmes:

In 1891 Mudgett built a 100-room hotel. As each section was done, he replaced the work crew, so only he had complete plans of the building. The result, later dubbed the "Murder Castle," contained hidden rooms, trapdoors, secret passages, a shaft with no elevator, and a chute leading to the basement. There he installed a dissecting table, quicklime and acid pits, and a crematory. He then placed ads for a female secretary-typist. Applicants were promised marriage, wooed into bed, and bilked of their life savings by Dr. Harry. He then anesthetized the women, dropped them into the shaft and gassed them, while watching through a glass lid. Bodies were dragged out and sent down the chute to the basement, where he dissected, cremated, and used acid to dispose of them.²¹

Although the information on the cards is also available through other sources,²² it is the medium of trading cards, with its connotations of innocent childhood, that raised the ire of parents, victims' rights

16. See Max A. Collins & George Hagenauer, *'True Crime' Series One: G-Men & Gangsters*, (Eclipse Enterprises, Forestville, Cal.); Valerie Jones & Peggy Collier, *'True Crime' Series Two: Serial Killers & Mass Murderers* (Eclipse Enterprises, Forestville, Cal.).

17. Jones & Collier, *supra* note 16, at 76, 88, 101.

18. *'True Crime' Cards Thriving Despite Outrage*, *supra* note 3, at 44. Other publishers use drawings "in varying degrees of quality and sophistication" to depict the individual. Barbanel, *supra* note 7, at B5.

19. Barbanel, *supra* note 7, at B5.

20. Jones & Collier, *supra* note 16, at 76.

21. *Id.* at 58.

22. See *Controversy Increases Sales of Trading Cards*, *supra* note 4, at 5.

advocates, and lawmakers.²³ In response, the victims' group, People Assisting Victims, organized a "grass-roots campaign" to protect children and prevent them from "consider[ing] these murderers as 'heroes' and perhaps aspir[ing] to reach comparable 'fame' through imitation."²⁴ Likewise, psychiatrists have protested the sale of the cards, charging that they would either "desensitize children to violence"²⁵ or teach them "specific acts of murder and sexual violence" that they may copy later.²⁶ Eclipse publisher, Catherine Yronwode, denied that the cards are targeted at children, saying instead that they are meant for "baby boomers"²⁷ and that children would probably not understand the text.²⁸

B. Dime Novels of the 1880s

Although crime trading cards are the current censorship battleground, similar debates have raged for more than a hundred years,²⁹ starting in 1873 when censorship crusader Anthony Comstock created the New York Society for the Suppression of Vice in order to battle obscenity.³⁰ A key target of Comstock and other purity campaigners of the late 1800s, such as the Watch and Ward Society in Boston,³¹ was dime novels, those inexpensive Wild West and crime magazines, which were "the functional equivalent" of today's comic books.³² In the eyes of Comstock and his

23. Seigel, *supra* note 4, at C1.

24. Victim Rights Groups Launch Grassroots Campaign Against True Crime Trading Cards (People Assisting Victims, Fayetteville, N.C.) at 1 (undated mailing urging readers to generate complaint calls and letters to publisher Eclipse Enterprises, demand legislative action against distribution of the cards to minors, alert the media, and discourage merchants from selling the cards) (copy on file with the *New York Law School Law Review*).

25. Letter from Paul A. Kettl, M.D., Director, Psychiatry Residency Training, College of Medicine, University Hospital, The Milton S. Hershey Medical Center, Hershey, Pa., to Edward J. Fitzpatrick Jr., Chief of Staff, Office of New York State Senator Alan G. Hevesi (Apr. 14, 1992) (copy on file with the *New York Law School Law Review*).

26. *Id.*

27. Connor, *supra* note 2, at 5.

28. See 'True Crime' Cards Thriving Despite Outrage, *supra* note 3, at 44.

29. See Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741 (1992).

30. See PAUL S. BOYER, *PURITY IN PRINT: THE VICE-SOCIETY MOVEMENT AND BOOK CENSORSHIP IN AMERICA* 2 (1968).

31. *Id.* at 5.

32. Blanchard, *supra* note 29, at 757.

followers, "these dime novels were leading youths down the path to destruction, for once a child had read such stories, no one could prevent a career of crime and the loss of an immortal soul."³³ Comstock was joined in his crusade by teachers, church workers, and judges who blamed dime novels for "the antisocial behavior exhibited by the youth of the day."³⁴

Although Comstock and his companions were not able to prevent the publishing of dime novels or to prove a causal link between the novels and the increase in crime in the cities, their efforts did have a substantial impact on the publishing business.³⁵ For example, one of the major publishers of dime novels, Erastus Beadle, voluntarily established a code for his writers.³⁶ The code prohibited "all things offensive to good taste . . . subjects or characters that carry an immoral taint and the repetition of any occurrence, which, though true, is yet better untold."³⁷

C. Motion Pictures of the 1900s and 1920s

Approximately twenty-five years after the dime-novel furor, the next wave of censorship hit, directed at the new medium of motion pictures.³⁸ The medium was different, but the argument was familiar: "[m]ovies were 'schools of crime where murders, robberies, and holdups are illustrated. The outlaw life they portray in their cheap plays tends to the encouragement of wickedness. . . . Not a single thing connected with them has influence for good.'"³⁹

Although a few short newsreel-type films were produced before the turn of the century, it was the 1903 release of *The Great Train Robbery* that sparked the phenomenal growth of nickelodeons.⁴⁰ By 1907, there were 5000 nickelodeons in operation, many open all night showing films such as *The Bigamist*, *College Boy's First Love*, *Child Robbers*, and *Gaieties of Divorce*.⁴¹ Along with the films came calls for censorship and for laws preventing anyone under the age of eighteen from viewing

33. *Id.*

34. *Id.*

35. *See id.*

36. *See id.*

37. *Id.* (quoting EDMUND PEARSON, DIME NOVELS (1926)).

38. *See id.* at 761.

39. *Id.* (quoting CHARLES FELDMAN, THE NATIONAL BOARD OF CENSORSHIP (REVIEW) OF MOTION PICTURES: 1909-1922, 3 (1977)).

40. *See* MURRAY SCHUMACH, THE FACE ON THE CUTTING ROOM FLOOR 16 (1974).

41. *See id.*

the films.⁴² Also in 1907, the city of Chicago approved the first local ordinance regulating movies,⁴³ which required the police chief to issue a permit certifying that a film was not immoral or obscene before it could be shown.⁴⁴

In 1909, New York City Mayor George B. McClellan joined the controversy by "order[ing] all movie houses closed to appease the flood of complaints about the morality of their offerings."⁴⁵ The ban, a form of prior restraint,⁴⁶ was lifted after a group of prominent city residents agreed to review the films before they were shown.⁴⁷ By 1913, this citizens' group had evolved into the National Board of Censorship of Motion Pictures, "which was sanctioned by the motion picture producers as the official clearinghouse for all films."⁴⁸ The board issued standards to evaluate films that contained obscenity, crime, or violence.⁴⁹ But the board failed after non-industry organizations dropped out, complaining that the board "was more interested in circulating movies than in cleaning them up."⁵⁰

As America moved into the 1920s, the criticism of films continued.⁵¹ "Church workers, teachers, physicians, and parents all joined the campaign to blunt the impact of movies, especially on the young [and t]he silver screen was denounced for causing most of the decade's problems."⁵² In the year 1921 alone, nearly 100 bills were introduced in thirty-seven state legislatures in an attempt to censor motion pictures.⁵³ Eventually, in 1948, the United States Supreme Court gave motion

42. *See id.*

43. Blanchard, *supra* note 29, at 761.

44. *See id.*

45. SCHUMACH, *supra* note 40, at 17.

46. The government cannot now, consistent with the First Amendment, prevent the dissemination of certain materials prior to their publication or release. *Near v. Minnesota*, 283 U.S. 697, 723 (1931) (striking down a statute prohibiting the publication of newspapers and magazines that printed "malicious, scandalous and defamatory" criticisms of government officials, because it "impose[d] an unconstitutional restraint upon publication").

47. *See* SCHUMACH, *supra* note 40, at 17.

48. Blanchard, *supra* note 29, at 762.

49. *See id.* at 762-63.

50. *See id.*

51. *See* SCHUMACH, *supra* note 40, at 18-19 (suggesting that movies "became the scapegoat . . . for the fury of those who felt the entire national moral structure was crumbling").

52. Blanchard, *supra* note 29, at 778.

53. *Id.* at 779.

pictures First Amendment protection⁵⁴ in *United States v. Paramount Pictures*,⁵⁵ but that was years after the industry began its own internal system for screening, rating, and censoring films.⁵⁶

D. Comic Books of the 1950s

After the movie controversy calmed down, the would-be censors turned their attention to comic books.⁵⁷ Like the movies of the 1920s, the dime novels of the 1880s, and the trading cards of the 1990s, comic books were attacked as a source of juvenile delinquency.⁵⁸ Critics assailed comics that "reveled in crime, lust, torture, and the butchering of men, women, and children."⁵⁹ These criticisms led quickly to demands for government action,⁶⁰ and by 1955 two states had passed statutes regulating the distribution and sale of crime comic books.⁶¹

Even the United States Senate became involved in the controversy, conducting hearings on the relationship between crime comic books and juvenile delinquency.⁶² The hearings, held in April and June of 1954, and the subsequent report issued in 1955, were part of a continuing study of juvenile delinquency and the factors contributing to it.⁶³ Although the Senate Judiciary Subcommittee did not blame the crime and horror comic books—more than 30 million of which were printed each month—for causing juvenile delinquency,⁶⁴ it did find that "the impact of these media does constitute a significant factor in the total problem."⁶⁵ The Senate report offered examples of horror and crime comic books.⁶⁶ For instance, *Stick in the Mud* by Story Comics includes the tale of:

[a]n extremely sadistic schoolteacher [who] gives special attention to one of her pupils in order to curry favor with the boy's rich,

54. *See id.* at 787.

55. 334 U.S. 131 (1948).

56. *See* Blanchard, *supra* note 29, at 787.

57. *See id.* at 788.

58. *See id.* at 789.

59. ROBERT W. HANEY, COMSTOCKERY IN AMERICA 83 (1960).

60. Note, *Crime Comics and the Constitution*, 7 STAN. L. REV. 237, 238 (1955).

61. *See id.* at 238 (noting that the states are New York and Maryland).

62. S. REP. NO. 62, 84th Cong., 1st Sess. (1955).

63. *See id.* at 1-2.

64. *See id.* at 2-3.

65. *Id.* at 2.

66. *See id.* at 8-10.

widowed father. In a year she succeeds in marrying the man, but he turns out to be a miser. She stabs him to death with a butcher knife approximately a foot and a half in length and 3 inches wide. The picture shows the body of the old man, limbs askew, falling to the floor, emitting a gurgle. There is a large hole in his back and blood is squirting in all directions. . . . She then covers up her crime by throwing him into a pen with a wild bull that gores his body to pieces. . . . The boy suspects that she killed his father and makes her chase him around the farm by calling her names. He leads her to some quicksand and she falls in. . . . A closeup is shown of the terrified woman, sunk into the quicksand which is flowing into her open mouth.⁶⁷

Despite testimony by psychiatrists that these comic books were a corrupting influence on America's youth,⁶⁸ the "subcommittee flatly reject[ed] all suggestions of governmental censorship as being totally out of keeping with our basic American concepts of a free press operating in a free land for a free people."⁶⁹ However, the Subcommittee report acknowledged the right of citizens groups to pressure vendors and wholesalers to stop carrying the comic books.⁷⁰ The Subcommittee also chastised the publishers of comic books for attempting to "shift all responsibility to parents"⁷¹ and stated that "the American people have a right to demand that [a high] degree of care be exercised at all times . . . with respect to all mass media"⁷² and its effects on children.

Despite the Senate Subcommittee's criticism of crime comic books, it decided that government could not censor the content of these books.⁷³ This conclusion was echoed in the 1959 California case, *Katzev v. County of Los Angeles*.⁷⁴ In *Katzev*, the California Supreme Court struck down a county ordinance that prohibited the "sale and circulation of crime 'comic' books to children under the age of eighteen."⁷⁵ The court held that the ordinance was an "unjustifiable abridgment of freedom of the

67. *Id.* at 9-10.

68. *See id.* at 12-14.

69. *Id.* at 23.

70. *See id.* at 24-25.

71. *Id.* at 27.

72. *Id.*

73. *Id.* at 23.

74. 341 P.2d 310 (Cal. 1959).

75. *Id.* at 312 (quoting L.A. COUNTY, CAL., CODE § 6633 (1955)).

press,"⁷⁶ because it was ambiguous⁷⁷ and overbroad.⁷⁸ But the court's primary reason for invalidating the ordinance was that "distribution of such crime comic books is protected by the state and federal Constitutions, and no showing had been made of a clear and present danger justifying suppression of the constitutional guarantee."⁷⁹

III. FREE SPEECH AND THE COURTS

Although the First Amendment⁸⁰ protects both verbal and non-verbal expression,⁸¹ it does not protect all expression.⁸² In *Chaplinsky v. New Hampshire*,⁸³ for example, the Supreme Court found that "certain well-defined . . . classes of speech . . . [such as] the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"⁸⁴ are not constitutionally protected.⁸⁵

This Part addresses whether crime trading cards fall within one of these categories of unprotected expression and are consequently subject to regulation, and if not, whether special circumstances exist that would nevertheless permit regulation. It will highlight the cases and tests used to analyze First Amendment disputes, concentrating on obscene and offensive language,⁸⁶ violent speech,⁸⁷ and children's access to such material.⁸⁸ If there are no special circumstances providing a clear justification for regulation, the courts typically will apply the strict

76. *Id.* at 313.

77. *See id.* at 317.

78. *See id.* at 315.

79. *Id.* at 313-14.

80. "Congress shall make no law . . . abridging the freedom of speech, or of the press" U.S. CONST. amend. I.

81. *See, e.g.,* *Stromberg v. California*, 283 U.S. 359 (1931) (overturning statute prohibiting display of red flag in protest against organized government).

82. *See, e.g.,* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1941) (finding no protection for "fighting words").

83. *Id.*

84. *Id.* at 571-72.

85. *Id.*

86. *See infra* notes 92-110 and accompanying text.

87. *See infra* notes 111-26 and accompanying text.

88. *See infra* notes 127-39 and accompanying text.

scrutiny test. This requires finding a compelling state interest⁸⁹ and means that are narrowly drawn⁹⁰ to advance that interest before content-based regulations on speech will be upheld.⁹¹

A. *Obscenity and Offensive Language*

Since 1941, when the *Chaplinsky* Court included obscenity in the list of unprotected speech,⁹² the definition of what is obscene both in society and in the law has changed. Well into the 20th century, some American courts had relied on the obscenity test set forth in the English case of *Regina v. Hicklin*,⁹³ which required that the work be measured by its effect on persons especially susceptible to "immoral influences" and allowed material to be judged obscene based on isolated passages.⁹⁴ However, in 1957, the United States Supreme Court rejected *Hicklin* and created a new obscenity test in *Roth v. United States*.⁹⁵

In *Roth*, the Court upheld the constitutionality of 18 U.S.C. § 1461,⁹⁶ which outlawed mailing "obscene, lewd, lascivious, or filthy"⁹⁷ written material. Roth, a New York publisher, had been convicted on four counts of "mailing obscene circulars and advertising"⁹⁸ for his publishing business. In upholding the conviction, the Court announced a new test for obscenity based on "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."⁹⁹ The

89. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that for content-based speech restrictions, the regulation must serve a compelling state interest); see also *Boos v. Barry*, 485 U.S. 312 (1988) (same).

90. See, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (striking down a statute that prohibited non-labor-related picketing near schools because it restricted expressive conduct based on content, and was not narrowly drawn).

91. See, e.g., *Widmar*, 454 U.S. at 270.

92. 315 U.S. at 573.

93. L.R. 3 Q.B. 360 (1868); see *MacFadden v. United States*, 165 F. 51 (3d Cir. 1908); *United States v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913) (applying the *Hicklin* test). *Contra* *Walker v. Popenoe*, 149 F.2d 511 (D.C. Cir. 1945); *Parmelee v. United States*, 113 F.2d 729 (D.C. Cir. 1940); *United States v. Levine*, 83 F.2d 252 (2d Cir. 1936) (rejecting the *Hicklin* test).

94. *Hicklin*, 3 Q.B. at 374-75.

95. 354 U.S. 476, *reh'g denied*, 355 U.S. 852 (1957).

96. 18 U.S.C. § 1461 (1955).

97. *Id.*

98. 354 U.S. at 480.

99. *Id.* at 489.

Court defined "prurient" as "material having a tendency to excite lustful thoughts."¹⁰⁰

Sixteen years later in *Miller v. California*,¹⁰¹ the Court refined and expanded the test for obscenity, requiring a determination of:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁰²

Using either the *Roth* or *Miller* standard, the crime cards are clearly not obscene because they do not "depict or describe" sexual conduct.¹⁰³

But obscenity is not the only touchstone for regulation of speech. A few cases have suggested that "offensive" speech may be more extensively regulated than other types of expression.¹⁰⁴ For example, in a 1978 plurality decision, *Federal Communications Commission v. Pacifica Foundation*,¹⁰⁵ the Supreme Court held that the "social value" of speech depends on its context,¹⁰⁶ and that language can be prohibited where it is particularly offensive.¹⁰⁷ In that case, the Court upheld the Federal Communications Commission's authority to sanction a radio station for broadcasting George Carlin's "seven dirty words" monologue during the afternoon when children were likely to listen.¹⁰⁸ In the opinion, Justice Stevens noted that broadcasting was "uniquely accessible to children"¹⁰⁹ and therefore susceptible to increased regulation.¹¹⁰ Even with this

100. *Id.* at 487 n.20.

101. 413 U.S. 15, *reh'g denied*, 414 U.S. 881 (1973).

102. *Id.* at 24 (citations omitted).

103. *See supra* notes 13-28 and accompanying text.

104. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding ordinance prohibiting adult theaters from being located within 1000 feet of a residential zone, school, church, or park); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding ordinance requiring adult-movie theaters to be dispersed throughout the city to prevent growth of a red-light district).

105. 438 U.S. 726 (1978), *reh'g denied*, 439 U.S. 883 (1978).

106. *Id.* at 747.

107. *See id.* at 749.

108. *See id.* at 749-51.

109. *Id.*

110. *Id.*

increased possibility for regulation of offensive speech, the crime trading cards probably would still be protected because they do not deal with sex or profanity, but rather with violence.

B. Violent Speech

Although the trading cards are neither sexually explicit nor profane, their restriction has been sought on other grounds. Lawmakers fear that the cards will promote juvenile crime because children might view the subject matter as glamorous, and consequently try to emulate those portrayed.¹¹¹ The preeminent United States Supreme Court case addressing this issue of restrictions on violent speech¹¹² is *Winters v. New York*.¹¹³

In *Winters*, a bookseller in New York¹¹⁴ was convicted of violating a statute that stated:

1. A person . . . who,
 2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime
-
- is guilty of a misdemeanor¹¹⁵

Winters was convicted under the statute for offering to sell a magazine titled "*Headquarters Detective, True Cases from the Police Blotter, June 1940*."¹¹⁶ The Court overturned the conviction, holding that the statute violated the First Amendment.¹¹⁷ Justice Reed stated "[t]hough we can see nothing of any possible value to society in these magazines, they are

111. See *infra* notes 140-229 and accompanying text.

112. The term "violent speech" is used here to mean expressions of violence, not speech intended to incite another person to commit a violent act.

113. 333 U.S. 507 (1948).

114. *Id.* at 508.

115. *Id.* (quoting N.Y. PENAL LAW § 1141 (Consol. 1938)).

116. See *id.* at 508 n.1.

117. See *id.* at 520.

as much entitled to the protection of free speech as the best of literature."¹¹⁸

At the same time, however, the Court "recognize[d] the importance of the exercise of a state's police power to minimize all incentives to crime, particularly in the field of sanguinary or salacious publications with their stimulation of juvenile delinquency."¹¹⁹ Despite this acknowledgement of a state's police power, the Court found that the statute was too vague to be enforced because of the possible chilling effects on publishers.¹²⁰ However, the Court concluded that "[t]o say that a state may not punish by such a vague statute carries no implication that it may not punish circulation of objectionable printed matter, assuming that it is not protected by the principles of the First Amendment, by the use of *apt words* to describe the prohibited publications."¹²¹

Significantly, the Court did not require that the "objectionable" material have a sexual content.¹²² Instead, the Court recognized the state's interest in preventing crime and juvenile delinquency.¹²³ Although later cases, most notably *Roth*¹²⁴ and *Miller*,¹²⁵ specifically allowed for limitations on sexually explicit material, *Winters* has not been overruled. Therefore, it seems it would be possible to create a well-drafted statute with "*apt words*"¹²⁶ to regulate objectionable material, presumably including offensive descriptions of crimes.

C. *Special Rules for Minors*

The Court in *Winters* had hinted¹²⁷ that a special standard might be applied in order to protect children from offensive speech. Twenty years later, in *Ginsberg v. New York*,¹²⁸ the Court confirmed that stance in

118. *Id.* at 510.

119. *Id.*

120. *See id.* at 519.

121. *Id.* at 520 (emphasis added).

122. *See id.* at 510.

123. *See id.*

124. 354 U.S. 476 (1957).

125. 413 U.S. 15, *reh'g denied*, 414 U.S. 881 (1973).

126. *See supra* note 121 and accompanying text.

127. 333 U.S. 507, 510 (1948) (recognizing importance of police power to prevent juvenile delinquency through control of crime magazines).

128. 390 U.S. 629 (1968).

regard to obscenity, holding that state governments have the power to treat minors differently from adults vis-à-vis the First Amendment.¹²⁹

In *Ginsberg*, the appellant was convicted of selling "girlie" magazines to a sixteen-year-old boy in violation of New York law.¹³⁰ The Court upheld his conviction¹³¹ in part because it acknowledged "that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'"¹³²

Even though *Ginsberg* recognized the state's power to limit children's access to obscenity, it left unanswered the companion issue of children's access to violent speech. That issue was addressed recently by the Court of Appeals for the Eighth Circuit in *Video Software Dealers Association v. Webster*.¹³³ There, the circuit court struck down a Missouri statute that restricted the rental or sale of violent videocassette tapes to minors.¹³⁴ The law stated in part:

1. Video cassettes or other video reproduction devices, or the jackets, cases or coverings of such video reproduction devices shall be displayed or maintained in a separate area . . . if:

(1) Taken as a whole and applying contemporary standards, the average person would find that it has a tendency to cater

129. See *id.* at 641.

130. See *id.* at 631, 645-47. The law stated in part:

It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) 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 nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

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

Id. at 647.

131. See *id.* at 633.

132. *Id.* at 638 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1936)).

133. 968 F.2d 684 (8th Cir. 1992).

134. See *id.* at 691.

or appeal to morbid interests in violence for persons under the age of seventeen. . . .¹³⁵

The statute was challenged by video producers, distributors, and retailers, and was found by the court to be unconstitutionally vague on its face.¹³⁶ The court specifically stated that the statute did not survive strict scrutiny analysis,¹³⁷ and went on to note that it was, therefore, not deciding "whether states can legitimately proscribe dissemination of material depicting violence to minors."¹³⁸ Moreover, the court left the door open for the Missouri legislature to create a well-drafted statute, when it stated that "[a] more precise law limited to slasher films and specifically defining key terms would be less burdensome on protected expression."¹³⁹

IV. STATE LEGISLATIVE PROPOSALS

In the spring of 1992, lawmakers struggled to draft legislation that would curb the distribution of trading cards they considered offensive without infringing on First Amendment rights.¹⁴⁰ This Part will outline a representative sample of these measures from Michigan, North Carolina, Maryland, and New York. Proposals ranged from a total ban on the sale of the cards¹⁴¹ or a ban on their sale to minors,¹⁴² to resolutions urging that the cards not be sold,¹⁴³ coupled with commendations for stores that agreed not to carry the cards.¹⁴⁴ Some of the proposals were approved in committee or by houses of state legislatures, but none has yet been signed into law.

135. *Id.* at 687 (quoting MO. REV. STAT. § 573.090 (Supp. 1991) making violation of the statute an infraction, which is punishable by a fine of \$200, MO. REV. STAT. § 560.016.1(4) (Supp. 1991)).

136. *See id.* at 690.

137. *See id.*

138. *Id.* at 689.

139. *Id.* (noting that the statute does not specifically target slasher films and therefore could be used to apply to violent cartoons, westerns, war movies, boxing stories or even suspense stories).

140. *See, e.g.,* Robert Digitale, *Curbs on Killer Cards Proposed*, SANTA ROSA DEMOCRAT, Feb. 20, 1992, at B1.

141. *See infra* notes 164-73 and accompanying text.

142. *See infra* notes 174-96 and accompanying text.

143. *See infra* notes 145-63 and accompanying text. A resolution is merely a formal expression of opinion by a legislative body, adopted by vote. BLACK'S LAW DICTIONARY 1178 (5th ed. 1979).

144. *See infra* notes 151-55 and accompanying text.

A. Michigan

At one end of the legislative spectrum, lawmakers in Michigan did not attempt to ban or limit distribution of the trading cards. Instead, they launched a campaign of legislative persuasion, using resolutions alternatively to praise or condemn individual companies' decisions about the cards.

One resolution, for example, introduced by state Senator Michael Bouchard, directly targeted Eclipse Enterprises, the publisher of the True Crime Series.¹⁴⁵ The resolution claimed that "[c]ompanies like Eclipse Enterprises give entrepreneurship a bad name. . . . This company is sending a subconscious and dangerous message to children by glorifying some of the most inhumane acts of the century."¹⁴⁶ In addition, the resolution stated that:

[e]ncouraging a child to trade a card featuring a favorite athlete for a 'Jeffrey Dahmer' is unconscionable. These cards may even prompt children to consider a serial killer successful in some distorted way. Clearly, this cheap exploitation will hurt many people and it will help only one—[the publisher].¹⁴⁷

The resolution therefore urged that Eclipse Enterprises stop selling its True Crime trading cards in Michigan and requested that stores refuse to carry the cards.¹⁴⁸ The resolution was adopted by the state Senate on March 5, 1992.¹⁴⁹

Approximately two months later, the state senators embarked on the second phase of their attack.¹⁵⁰ Two proposed resolutions offered tribute to Michigan retailers who refused to carry the True Crime Series trading cards.¹⁵¹ The commendations were in response to the decision of Meijer, Inc., a chain of sixty-five department stores in Michigan and

145. See S. Res. 371, 86th Leg., Reg. Sess. (1992).

146. *Id.*

147. *Id.*

148. See *id.*

149. *Id.* On the same day the Michigan Senate adopted a companion resolution containing the same provisions as Resolution No. 371, which was then sent to the House Committee on House Oversight. See S. Con. Res. 473, 86th Leg., Reg. Sess. (1992).

150. See S. Res. 459, 86th Leg., Reg. Sess. (1992); S. Con. Res. 606, 86th Leg., Reg. Sess. (1992).

151. *Id.*

Ohio, to stop selling the cards.¹⁵² State Senator Jack Welborn, who introduced the resolutions, urged other businesses and citizens to follow suit in halting sales of the cards.¹⁵³ The resolutions passed the same day they were introduced.¹⁵⁴

In many ways the approach taken by Michigan legislators was similar to the United States Senate's approach to the crime and horror comic books of the 1950s.¹⁵⁵ The thrust was to discourage the production, sale and purchase of the cards, but not to ban them officially.

B. North Carolina

A similar approach was attempted in North Carolina. State Representative William Hurley introduced a resolution urging the citizens of North Carolina to join the House of Representatives in "campaigning against True Crime Trading Cards."¹⁵⁶ The resolution, introduced at the request of Lynn Jett Minick, the founder and director of the North Carolina Victim Assistance Network,¹⁵⁷ called for citizens "to help safeguard the youth of this country from exposure to these cards and their potential harm and influence."¹⁵⁸ According to Jett Minic, they took this approach "[b]ecause we knew that Eclipse Enterprises is protected by the First Amendment."¹⁵⁹

Although the sponsor and proponents of the resolution acknowledged a potential First Amendment conflict,¹⁶⁰ they pursued the resolution, believing that the cards "pose[d] a danger to the youth of this country by exposing them to villains portrayed as heroes and presenting crime as nothing more than entertainment."¹⁶¹ The resolution moved quickly

152. See Jack Welborn (Mich. State Sen.), *Right to the Point: Dirty Way to Make a Buck*, OFFICIAL MICH., Apr. 20, 1992, at 7.

153. See *id.*

154. See S. Res. 459, 86th Leg., Reg. Sess. (1992); S. Con. Res. 606, 86th Leg., Reg. Sess. (1992).

155. See *supra* notes 57-79 and accompanying text.

156. H.R. Res. 1410, 139th Leg., Reg. Sess. (1991).

157. Letter from Lynn Jett Minick, Founder/Director, North Carolina Victim Assistance Network, to the author (Oct. 12, 1992) (on file with the *New York Law School Law Review*).

158. H.R. Res. 1410, *supra* note 156.

159. Letter from Lynn Jett Minick, *supra* note 157.

160. See *id.*; see also *Eclipsed Judgment*, FAYETTEVILLE OBSERVER-TIMES, June 6, 1992, at 14A (noting that State Representative Hurley admitted that the legislature could not ban the cards).

161. H.R. Res. 1410, *supra* note 156.

through the House Committee on Rules, Appointments and the Calendar, and was approved by the House two weeks after it was introduced.¹⁶² But it was never introduced to the Senate.¹⁶³

C. Maryland

Although Michigan and North Carolina legislators opted for resolutions urging manufacturers to voluntarily cease publication and citizens to join the fight against the cards, legislators in Maryland adopted a much tougher stance, attempting to ban the cards outright.¹⁶⁴ In February 1992, state Delegate Elizabeth S. Smith proposed an emergency bill that would have banned possession of the cards by both minors and adults.¹⁶⁵

As originally drafted, the bill stated:

(B) A person may not sell, buy, advertise, distribute, trade, exchange, or possess a trading card that has a picture of an individual who has been convicted of or who has pleaded guilty to a heinous crime, including an individual who is found not criminally responsible for criminal conduct concerning a heinous crime. . . .

(C) A court having jurisdiction over the person charged with a violation of Subsection (B) of this section may order the destruction of any [such] trading card.¹⁶⁶

Violation of the statute would have been a misdemeanor punishable on the first offense by a \$1000 fine and imprisonment for one year, and on the second offense by a fine of \$5000 and imprisonment for three years.¹⁶⁷ This version of the bill, however, was never submitted to committee.¹⁶⁸

Due to "a great deal of concern about the constitutionality of an outright ban,"¹⁶⁹ Smith amended the bill to prohibit only the sale or

162. *See id.*

163. *See* N.C. Bill Tracking, Information for Public Affairs, Inc., *available in* LEXIS, State Library, STTRCK File (search completed in the spring of 1995).


164. *See* John A. Morris, *Bill Would Ban Serial-killer Cards*, BALT. SUN, Feb. 18, 1992, at 5.

165. *See* H.D. 1393, 398th Leg., Reg. Sess. (1992).

166. *Id.*

167. *See id.*

168. *See* Letter from Elizabeth S. Smith, Delegate, Md. House of Delegates, to the author (Oct. 6, 1992) (on file with the *New York Law School Law Review*).

169. *Id.* 

delivery of the cards to minors.¹⁷⁰ Despite the change, the bill came under intense criticism at a public hearing.¹⁷¹ Stuart Comstock-Gay, executive director of the American Civil Liberties Union in Maryland, defended the cards, arguing that the bill "would be no more constitutional than would be a ban on books, magazines or newspapers describing the [same] heinous crimes"¹⁷² After the hearings, the bill was defeated by a sixteen-to-six vote in the House Committee on Judiciary.¹⁷³

D. *New York*

Unlike their Maryland counterparts, New York legislators attacked only the sale of the cards to minors.¹⁷⁴ Assemblyman Alan G. Hevesi and state Senator Christopher J. Mega spearheaded the New York campaign by introducing a joint Senate-Assembly bill¹⁷⁵ aimed at trading cards depicting "heinous crimes or heinous criminals."¹⁷⁶ The sponsors reasoned that "dissemination" of information about such crimes contributes to the rise in juvenile crime, making the trading cards "a clear and present danger" to New York citizens.¹⁷⁷ Both men admitted, however, that "production of violent crime trading cards is probably a constitutionally protected activity."¹⁷⁸ Nonetheless, they stressed that it was "an activity which should be denounced by all thoughtful and caring people."¹⁷⁹

170. H.D. 1393 as amended, 398th Leg., Reg. Sess. (1992).

171. See *States Try to Ban "Killer" Cards*, BASEBALL CARD NEWS, Apr. 13, 1992, at 28.

172. *Id.*

173. See *id.*

174. See, e.g., 'True Crime' Cards Thriving Despite Outrage, *supra* note 3, at 44.

175. See A. 10809-A, S. 7691-A, 214th Leg., 2d Sess. (1992).

176. *Id.* (defining "heinous crime" to include "murder, assault, kidnapping, arson, burglary, robbery, rape or other sexual offense" and a "heinous criminal" as a person who has been "convicted of [such a] crime or found not criminally responsible by reason of mental disease or defect for criminal conduct concerning the commission of a heinous crime").

177. *Id.*

178. Press release from Alan G. Hevesi, New York State Assemblyman (Apr. 20, 1992) (on file with the *New York Law School Law Review*).

179. *Id.*

The bill emphasized the connection between children and trading cards,¹⁸⁰ and provided that:

[a] person is guilty of disseminating indecent criminal materials to minors when, with knowledge of its character and content, he sells or loans to a minor for monetary consideration any trading card which depicts a heinous crime, an element of a heinous crime, or a heinous criminal and which is harmful to minors.¹⁸¹

The bill would have made dissemination of indecent material a Class A misdemeanor.¹⁸²

Debate over the bill was extensive, touching on many of the questions raised by the cards.¹⁸³ Senator Mega, the bill's sponsor, opened the debate by stating that the bill was crucial "because it deals with the long-term solutions"¹⁸⁴ to many societal problems, especially for young people.¹⁸⁵

Mega argued that the bill was constitutional and part of a "long legal tradition" of laws designed to protect children from pornography, liquor, and child labor, and that it would "in no way interfere with the rights of adults."¹⁸⁶ He relied on the 1964 Supreme Court opinion in *Jacobellis*

180. A. 10809-A, S. 7691-A, *supra* note 175 (stating that "[t]he legislature finds that for generations, children have purchased and collected trading cards depicting war heroes, sports heroes and other luminaries whom they revere and emulate. In such form, trading cards are not harmful to children.").

181. *Id.*

182. *See id.* Violation of a Class A misdemeanor in New York State is punishable by up to one year in jail and/or a fine not to exceed \$1000. N.Y. PENAL LAW §§ 70.15, 80.05 (McKinney 1989). However, the bill did allow for two affirmative defenses if the defendant had "reasonable cause" to believe the minor was 17 or older, or if the minor showed the defendant a document "purporting to establish" that the minor was of age. A. 10809-A, S. 7691-A, *supra* note 175.

183. *See* Debate on S. 7691-A, 214th Leg., 2d Sess. (June 3, 1992) (transcript of Pauline E. Williman, Certified Shorthand Reporter).

184. *Id.* For support Mega pointed to a news release from Dr. Myriam Miedzian, author of *BOYS WILL BE BOYS: BREAKING A LINK BETWEEN MASCULINITY AND VIOLENCE* (1991), in which she stated that in the "past 40 years, over 200 studies have been done on the effects of viewing violence, and there is no longer any question that entertainment which celebrates violence is a significant contributing factor . . . [in] our 'domestic national security crisis.'" Debate on S. 7691-A, *supra* note 183.

185. Debate on S. 7691-A, *supra* note 183.

186. *See id.* Mega also had a letter from a psychiatrist, Paul A. Kettl, supporting the bill, which he quoted during the debate. In it Dr. Kettl attested that "viewing and studying these playing cards could lead children to become desensitized to the acts of

v. *Ohio*,¹⁸⁷ where the Court recognized the "legitimate and indeed exigent interest of states and localities throughout the Nation in preventing the dissemination of material deemed harmful to children."¹⁸⁸

In opposition to the bill, state Senator Emanuel Gold attacked its wording as vague and overbroad.¹⁸⁹ Specifically, he criticized the definition of "heinous crime," which included both burglary and simple assault.¹⁹⁰ In addition, Gold argued that even if it were passed and upheld in the courts, the law would be easy to circumvent through carefully designed trading cards.¹⁹¹

Rejecting the notion that the bill was too vague, Mega argued that the bill "clearly spell[ed] out" what would be prohibited.¹⁹² Moreover, the bill referred specifically to trading cards, and therefore did not implicate newspapers, magazines, movies and other forms of publication.¹⁹³ Despite an extensive debate on the Senate floor, the bill passed by an overwhelming majority of fifty-three to five.¹⁹⁴ The courts have not had the opportunity to address the constitutionality of the bill, however, because it was held up in the Assembly and never became law.¹⁹⁵ Proponents have continued to reintroduce similar bills in the New York State Legislature each year.¹⁹⁶ If they are successful, the courts may yet be heard on this issue.

violence. A small number of children will become desensitized to actually commit more aggressive, especially sexually aggressive crimes." Kettl, *supra* note 25.

187. 378 U.S. 184 (1964) (finding that a motion picture was not obscene and therefore did not violate the Ohio obscenity law).

188. *Id.* at 195.

189. *See* Debate on S. 7691-A, *supra* note 183.

190. *Id.*

191. *See id.* (noting that the Mafia Family Trading Card, which feature pictures on one side and descriptions of the person's criminal background on the other, "doesn't depict anything").

192. *See id.*

193. *Id.*

194. *Id.*

195. *See* N.Y. Bill Tracking, Information for Public Affairs, Inc., *available in* LEXIS, States Library, STTRCK File.

196. In 1993, and again in 1994, similar bills were introduced in the New York State Legislature, two in the Assembly and one in the Senate. Both died without any action being taken. *See* A. 3722, 215th Leg., 1st Reg. Sess. (1993); S. 2132, 215th Leg., 1st Reg. Sess. (1993); A. 9214, 215th Leg., 2d Reg. Sess. (1994). A. 9214 was reintroduced in the Assembly in 1995. *See* A. 2152, 218th Leg., 1st Reg. Sess. (1995).

V. NASSAU COUNTY ORDINANCE

Although state legislatures considered and subsequently rejected laws pertaining to the crime trading cards, one law was passed on the county level.¹⁹⁷ On June 16, 1992, the Nassau County, New York, Board of Supervisors enacted Local Law 11-1992.¹⁹⁸ The ordinance, which is nearly identical to the New York State proposal,¹⁹⁹ labels the cards as "indecent" and bans their sale to minors.²⁰⁰

The Nassau County ordinance reads:

A person is guilty of disseminating indecent crime material to minors when, with knowledge of its character and content, he sells or loans to a minor for monetary consideration in Nassau County any trading card which depicts a heinous crime, an element of a heinous crime, or a heinous criminal and which is harmful to minors. Disseminating indecent crime material to minors shall be a Class A misdemeanor.²⁰¹

The ordinance tracks the wording of the Supreme Court's obscenity test in *Miller v. California*²⁰² by stating that a card is harmful to minors when it:

1. Considered as a whole, appeals to the depraved interest of minors in crime; and
2. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
3. Considered as a whole, lacks serious literary, artistic, political and scientific value for minors.²⁰³

In the introduction to the ordinance, the Board of Supervisors stated that because of children's limited development and susceptibility, they are especially vulnerable to the "influence of violence and criminal conduct

197. See 'True Crime' Cards Thriving Despite Outrage, *supra* note 3.

198. Nassau County Ordinance, *supra* note 7.

199. See *supra* notes 174-96 and accompanying text.

200. Nassau County Ordinance, *supra* note 7.

201. Nassau County Ordinance, *supra* note 7. Violation of the ordinance is punishable by up to a year in jail and/or a fine of up to \$1000. See McCandless, *supra* note 8.

202. 413 U.S. 15 (1973); see *supra* text accompanying note 102.

203. Nassau County Ordinance § 2 (E), *supra* note 7.

in our society.”²⁰⁴ Furthermore, the board found that “dissemination of materials devoted to the depiction of heinous crimes and heinous criminals”²⁰⁵ is a factor contributing to juvenile crime and “[the] impair[ment of] the ethical and moral development of our youth.”²⁰⁶ The board therefore concluded that the cards posed a clear and present danger to Nassau County citizens.²⁰⁷ The board’s emphasis was not on the information contained on the cards, but on the medium itself. This position is reflected in the introduction to the ordinance, which states:

[F]or generations, children have purchased and collected trading cards depicting war heroes, sports heroes and other luminaries whom they revere and emulate. In such form, trading cards are not harmful to children . . . [h]owever, [when] trading cards which depict heinous crimes and heinous criminals and which appeal to the depraved interest of minors in crime are disseminated to our youth, they are harmful.²⁰⁸

One month after the ordinance was passed, the New York Civil Liberties Union (NYCLU) challenged the law in federal district court²⁰⁹ on behalf of Eclipse Enterprises, and local comic book retailer Jim Wanser.²¹⁰ Barbara Bernstein, director of the NYCLU, Nassau County Chapter, agreed that “[w]e are right to be concerned about protecting our children from violence . . . ,”²¹¹ but went on to say that “censorship is not the answer.”²¹² The NYCLU argued in its complaint that the ordinance “impermissibly prohibits constitutionally protected expression on the basis of content, . . . is impermissibly vague, and for these reasons . . . violates the free speech, due process and equal protection provisions of the United States and New York State Constitutions.”²¹³ Specifically, the NYCLU contended that the ordinance violates the equal protection

204. *Id.* § 1.

205. *Id.*

206. *Id.*

207. *See id.*

208. *Id.*

209. *Eclipse Enters. v. Gulotta*, No. CV92-3416 (E.D.N.Y. filed July 20, 1992).

210. Owner and operator of Collectors Comics in Wantagh, N.Y.

211. Press release from the New York Civil Liberties Union, Nassau County Chapter (June 16, 1992) (on file with the *New York Law School Law Review*).

212. *Id.*

213. Plaintiff’s Civil Complaint at 2, *Eclipse Enters.*

clauses of the Fourteenth Amendment of the United States Constitution²¹⁴ and Article I, Section 11 of the New York State Constitution²¹⁵ because the ordinance "arbitrarily regulates the content of trading cards without imposing similar standards on video cassettes, magazines, newspapers and other forms of communication."²¹⁶ The ordinance was also challenged as violating the Due Process clauses of the Fifth²¹⁷ and Fourteenth²¹⁸ Amendments of the United States Constitution and Article I, Section 8 of the New York State Constitution²¹⁹ "in that it is vague and ambiguous and fails to provide fair and reasonable notice as to the conduct proscribed."²²⁰

Nassau County denied that the ordinance violates either the state or federal Constitutions,²²¹ and urged the court to recognize four affirmative defenses, including the plaintiffs' failure to state a cause of action.²²² The county also charged that the plaintiffs failed to overcome the ordinance's presumption of constitutionality,²²³ and that the county had a "valid governmental interest"²²⁴ in enacting the ordinance and did so under their "legislative prerogatives."²²⁵ Finally, Nassau County argued that the district court lacked subject matter jurisdiction because plaintiffs failed to set forth "a deprivation of constitutionally protected rights under 42 U.S.C. 1983."²²⁶

214. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1.

215. "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. CONST. art I, § 11.

216. Plaintiff's Civil Complaint at 7, *Eclipse Enters.*

217. "No person shall be . . . deprived of life, liberty, or property, without due process of law" U.S. CONST. amend. V.

218. "No State shall . . . deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1.

219. "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." N.Y. CONST. art. I, § 8.

220. Plaintiff's Civil Complaint at 7, *Eclipse Enters.*

221. Defendant's Verified Answer at 2, *Eclipse Enters.*

222. *Id.* at 2-3.

223. *Id.* at 3.

224. *Id.*

225. *Id.*

226. *Id.* 42 U.S.C. § 1983 (1988) provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within

In November of 1993 the district court denied both parties' motions for summary judgment and directed that the case be removed to a magistrate²²⁷ for an evidentiary hearing on the following matters:

- a) [w]hether Nassau County Local Law 11-1992 is narrowly tailored, i.e., employs the least restrictive means available, to serve the County's compelling interest in providing for the well-being of minors and otherwise serving the legislative intent underlying the statute; and
- b) whether the types of trading cards prohibited by the statute are "harmful to minors" as the term is defined in the statute.²²⁸

The parties argued these issues before the magistrate in the spring of 1994.²²⁹ As of the date of this publication, no decision had been handed down.

VI. CONCLUSION

The trading card controversy is an attempt to stretch the Supreme Court's definition of obscenity to include violent speech, particularly when it is directed at minors. In this way, it is similar to other campaigns waged throughout the past 100 years against dime novels, movies, and comic books.²³⁰ In each of these controversies, the courts rejected any restriction on violent speech.²³¹ The same result should be reached in Nassau County because the ordinance would turn the limited exception for obscene sexual material into a "tool for wholesale censorship" of indecent material.²³²

Nassau County stands alone in arguing that trading cards, which do no more than collect and repackage information, present a clear and

the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

227. The case was referred to United States Magistrate Judge Michael L. Orenstein pursuant to Fed. R. Civ. P. 43(e) for an evidentiary hearing.

228. *Eclipse Enters. v. Gulotta*, No. CV 92-3416 (E.D.N.Y. filed July 20, 1992), *summ. j. denied* (Nov. 12, 1993).

229. *Id.*

230. *See supra* notes 29-79 and accompanying text.

231. *See supra* notes 29-79 and accompanying text.

232. *McCandless, supra* note 8, at 35.

present danger to citizens. The county lacks sufficient evidence that trading cards adversely affect children.²³³ Furthermore, no state has successfully banned the sale of the cards.²³⁴ Even assuming content-based limitations might be appropriate in extreme cases of violent speech, the crime trading cards are not such a case.

Gail Johnston

233. *See supra* notes 140-229 and accompanying text.

234. *See supra* notes 140-96 and accompanying text.