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Hate Speech and Pornography: Do We Have to Choose between Freedom of Speech and Equality ?

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HATE SPEECH AND PORNOGRAPHY: DO WE HAVE TO CHOOSE BETWEEN FREEDOM OF SPEECH AND EQUALITY?†

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I. INTRODUCTION

Two important current controversies about free speech have been the focus of academic and public policy debates. Both involve unpopular types of speech that are said to cause harm to particular individuals and societal groups, but have been protected under traditional First Amendment principles. Recently, however, these two types of speech have been the focus of new arguments for suppression and have prompted calls for a re-examination and revision of traditional free speech principles.

The first of these two closely related categories of allegedly harmful speech is commonly called "hate speech." It conveys hatred or prejudice based on race, religion, gender, or some other social grouping. Advocates of suppressing hate speech claim that it promotes discrimination and violence against those it describes.[1]

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† This Article is based on the lecture Professor Strossen delivered at Case Western Reserve University School of Law on April 4, 1995. By way of introduction, Professor Strossen paid tribute to Sumner Canary, who was committed to effective representation of his clients, to public service, and to legal education and scholarship.

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1. *See, e.g.*, MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

The second, related type of controversial speech is a category of sexually explicit speech that some prominent feminist scholars call for censoring on the theory that it is, in essence, hate speech against women, promoting discrimination and violence against us.[2] Specifically, they want to suppress sexually explicit expression that is "subordinating" or "degrading" to women.[3] They label this expression "pornography" to distinguish it from the subset of sexual speech that the Supreme Court currently deems constitutionally unprotected, and hence subject to banning under the label "obscenity."[4] In contrast to the sexist harms that some feminists attribute to the pornography they want to ban, the alleged harm targeted by anti-obscenity laws is the undermining of the general moral tone of society.[5]

A central feature of U.S. free speech law, which distinguishes it from the law of other countries, is the protection of controversial and unpopular speech, including hate speech and pornography. Probably the best known case that reaffirmed this strong free speech concept was *Village of Skokie v. National Socialist Party of America*.[6] In *Skokie*, the American Civil Liberties Union (ACLU) argued that free speech rights extended even to neo-Nazis seeking to stage a peaceful demonstration in Skokie, Illinois.[7] Skokie had a large Jewish population, including many Holocaust survivors, who were profoundly upset by the prospect of the proposed demonstration.[8] The courts agreed with the ACLU that this demonstration

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2. *See, e.g.*, ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 24 (1981) (arguing that pornography has a pervading male-dominant theme and degrades women); Catharine MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985) (arguing that pornography should be considered a civil rights violation against women).

3. *See* Andrea Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 HARV. WOMEN'S L.J. 1, 25 (1985) (quoting a model anti-pornography law co-authored by Andrea Dworkin and Catharine MacKinnon).

4. *See* Miller v. California, 413 U.S. 15, 24 (1973). The Court set forth a tripartite test for proscribable "obscenity": the "average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest . . . ; the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* (citations omitted).

5. *E.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58-59 (1973).

6. 373 N.E.2d 21 (Ill. 1978).

7. *Id.* at 23.

8. *See* ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM 6-8, 27 (1979) (discussing the Jewish community's reaction to the proposed march in Skokie).

was constitutionally protected expression.[9]

More recently, the ACLU has been the prime opponent of a new incarnation of anti-hate speech laws that has become popular: codes adopted by colleges and universities that prohibit hate speech on their campuses. In these cases, too, we have been uniformly successful in challenging the codes on First Amendment grounds.[10]

The concept of suppressible pornography that some feminists advocate—pornography as a type of hate speech—was enacted into two municipal laws. The ACLU participated in lawsuits successfully challenging both of them.[11]

In the face of all these judicial rulings, there are intense pressures to re-examine and reformulate the traditional American approach to hate speech and pornography. Recently, some prominent legal scholars and liberal activists have joined forces with political and religious conservatives to renew their arguments for suppressing one or both types of speech.[12] In light of the changing political climate throughout this country and the many recent personnel changes on the U.S. Supreme Court, it is not clear whether our legal system will continue to protect both hate speech and pornography.[13]

The United States saw just a hint of possible changes in this

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9. Collin v. Smith, 578 F.2d 1197, 1201 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *Skokie*, 373 N.E.2d at 21.

10. Dambrot v. Cent. Mich. Univ., 839 F. Supp. 477 (E.D. Mich. 1993), *aff'd*, 55 F.3d 1177 (6th Cir. 1995); UWM Post, Inc. v. Board of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989). Likewise, in a fourth legal challenge to another campus hate speech code, the university agreed to rewrite its code to bring it into conformity with the First Amendment. Wu v. Univ. of Conn., No. Civ. H-89-649 PCD (D. Conn. 1990). The ACLU represented the parties that successfully challenged the hate speech codes in all of these cases except *Dambrot*.

11. American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316, 1326 (D. Ind. 1984) (holding that an Indianapolis, Indiana ordinance restricting pornography violated the First Amendment), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); Village Books v. City of Bellingham, No. C88-1470D (W.D. Wash. Feb. 9, 1989) (holding that a Bellingham, Washington ordinance restricting pornography violated the First Amendment); *see also* Nina Burleigh, *Porn Ordinance Faces Challenge*, CHI. TRIB., Dec. 18, 1988, § 6, at 7 (noting the ACLU's challenge to the Bellingham law).

12. *See* Nadine Strossen, *Legal Scholars Who Would Limit Free Speech*, CHRON. HIGHER EDUC., July 7, 1993, at B1 (discussing law school conferences and law professors' writings that explore strategies for limiting First Amendment protection of hate speech and pornography).

13. Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1120-22 (1993).

area only two days after the historic 1994 national elections.[14] On November 10, 1994, the Clinton Administration filed a brief in the Supreme Court in *United States v. Knox*, asserting a broad view of the government's power to suppress pornography.[15] This was the Clinton Administration's second Supreme Court brief in the *Knox* case, which had first come before the Supreme Court a year earlier. In its first brief, the Administration had advocated a narrow construction of the anti-pornography statute at issue.[16] As an anti-pornography activist noted, this about-face on the pornography issue "'is the first indication of how the . . . Clinton Administration will react in [the new, post-election] conservative world.'"[17]

II. OVERVIEW

I will first explain the traditional U.S. constitutional approach to hate speech and pornography. Under this approach, such speech is protected by a grand vision of the First Amendment that was initially set out in the early decades of this century by Supreme Court Justices Oliver Wendell Holmes and Louis Brandeis. This "free speech tradition"[18] has been carried forward by more recent

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14. *See Angry Public Gives U.S. Rightward List; Republican Majority in Both Houses; First Since Eisenhower*, CHI. TRIB., Nov. 9, 1994, at 1 (noting that angry voters made "40-year dream come true for Republicans and created a nightmare scenario for Democrats"); *First House Speaker Since 1960 Defeated*, ROCKY MTN. NEWS, Nov. 10, 1994, at A59 (remarking that the historic Republican sweep of Congress swept away Tom Foley); Paul West, *GOP Sweeps to Victory in Momentous Power Shift*, BALTIMORE SUN, Nov. 9, 1994, at A1 (recounting that the Republican success was "broad and deep," with Republicans winning governorships in seven of the eight most populous states and controlling the statehouses of the nine most populous states).

15. United States v. Knox, 32 F.3d 733, 745-47, 754 (3d Cir. 1994) (holding that the federal statute criminalizing "lascivious exhibition of the genitals or pubic area" of a minor outlaws any depiction that "appeals to the lascivious interest of the intended audience," even if the minor is clothed and the "the contours of the genitals or pubic area" are not "discernible . . . through the . . . clothing"; and rejecting a First Amendment overbreadth challenge to the statute as thus construed), *cert. denied*, 115 S. Ct. 897 (1995); *Justice: Nudity Not Issue in Child Porn*, UPI, Nov. 10, 1994, *available in* LEXIS, Nexis library, UPI file.

16. Respondent's Brief at 8-10, *Knox* (No. 92-1183), *available in* Westlaw, 1993 WL 723366; *Justice: Nudity Not Issue In Child Porn*, *surpa* note 15.

17. Linda Greenhouse, *U.S. Changes Stance in Case on Obscenity*, N.Y. TIMES, Nov. 11, 1994, at A15 (quoting John D. McMickle, attorney for National Law Center for Children & Families, which led a coalition that filed a brief urging the Supreme Court to affirm the Third Circuit's ruling in *Knox*).

18. This concept is examined by former University of Chicago Law School Professor Harry Kalven. *See* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (Jamie Kalven ed., 1988).

Supreme Court Justices including, preeminently, Hugo Black, William O. Douglas, and William J. Brennan, Jr..

After outlining this traditional free speech approach, I will address the new arguments that some prominent legal scholars have advanced for altering it. Although I ultimately reject these arguments, they are important and worthy of serious consideration. These arguments are based on another fundamental right under the U.S. Constitution, which is of equivalent importance to the free speech right: the right to equality before the law. The ACLU certainly takes the new equality-based arguments for restricting hate speech and pornography very seriously. We have always been in the forefront of defending equality rights,[19] including women's rights.[20] As I explain in Part IV, though, censoring hate speech and pornography would not effectively advance equality for women or other disempowered groups, but to the contrary, could well undermine their equality.

III. TRADITIONAL U.S. FREE SPEECH PRINCIPLES REGARDING HATE SPEECH AND PORNOGRAPHY

Before discussing the recent equality-based arguments for and against censoring hate speech and pornography, this Article will first outline the traditional First Amendment tenets that underlie our courts' current protection of these types of speech. While I welcome recent calls to re-examine these principles, my re-examination convinces me of their enduring soundness.

Our law's traditional protection of all types of hate speech,

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19. *See* Nadine Strossen, *In Defense of Freedom and Equality: The American Civil Liberties Union Past, Present, and Future*, 29 HARV. C.R.-C.L. L. REV. 143, 145-46 (1994) (describing the ACLU's efforts to advance racial justice, including through landmark court cases).

20. *See generally* Nadine Strossen, *The American Civil Liberties Union and Women's Rights*, 66 N.Y.U. L. REV. 1940 (1991) (detailing the ACLU's prominent role in defending women's rights in the Supreme Court and other forums through its Women's Rights Project and Reproductive Freedom Project).

I personally take the new equality-based arguments for restricting hate speech and pornography so seriously that I have recently written one book, and co-authored another, that specifically respond to these arguments. The book that I wrote alone focuses on pornography, *see* NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS (1995), and the book that I co-authored focuses on hate speech, *see* HENRY L. GATES, JR. ET AL., SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES (1995). My co-authors include members of racial and other minority groups who eloquently show that suppressing hate speech does not effectively advance equality or combat discrimination. Some passages in this article are drawn from these books.

including misogynistic speech, reflects two cardinal principles at the core of our free speech jurisprudence. The first specifies what is *not* a sufficient justification for restricting speech, and the second prescribes what *is* a sufficient justification.

A. Viewpoint Neutrality Requirement

The first basic principle requires "viewpoint neutrality." It holds that government may never limit speech just because any listener—or even the majority of the community—disagrees with or is offended by its content or the viewpoint it conveys.[21] The Supreme Court has called this the "bedrock principle" of the proud free speech tradition under American law.[22]

In three recent cases, the Court enforced this basic principle to protect speech with a viewpoint deeply offensive to many, if not most, Americans. The first two involved burning an American flag in political demonstrations against national policies[23] and the third involved burning a cross near the home of an African-American family that had recently moved into a previously all-white neighborhood.[24]

The viewpoint-neutrality principle reflects the philosophy that, in a free society, the appropriate response to speech with which one disagrees is not censorship but counterspeech—more speech, not less.[25] Rejecting this philosophy, the movements to censor

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21. *E.g.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547-49 (1992) (holding that a St. Paul, Minnesota anti-hate speech ordinance violated the First Amendment principle of viewpoint neutrality).

22. Texas v. Johnson, 491 U.S. 397, 414 (1989).

23. *See* United States v. Eichman, 496 U.S. 310, 312 (1990); Texas v. Johnson, 491 U.S. at 397.

24. *R.A.V.*, 112 S. Ct. at 2538. The Supreme Court held that burning a cross near the home of an African-American family could not constitutionally be punished under a hate speech law, which criminalized symbolic expression because of its viewpoint, thus violating the First Amendment. *Id.* at 2547-49. However, the Court stressed that the cross-burning could constitutionally have been punished under a law that—in contrast to the one at issue—did not single out expression based on its viewpoint or content. *Id.* at 2550 ("Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But [the government] has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire."). Viewpoint-neutral laws that might be invoked against such a cross-burning include those against arson, harassment, interference with the exercise of civil rights, intimidation, trespass, and vandalism.

25. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

> Those who won our independence . . . . knew that . . . the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones . . . . If there be

hate speech and pornography target speech precisely because of its viewpoint, specifically, its discriminatory viewpoint. For this reason, Seventh Circuit Judge Frank Easterbrook struck down an anti-pornography ordinance that the City of Indianapolis had adopted at the behest of some feminists.[26] Stressing that the law's fatal First Amendment flaw was its viewpoint discrimination, Judge Easterbrook explained that, under the ordinance,

> Speech treating women in the approved way—in sexual encounters "premised on equality"—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way.[27]

B. "Clear and Present Danger" Requirement

Any laws restricting hate speech or pornography would also violate the second core principle of U.S. free speech law: namely, that a restriction on speech can be justified only when necessary to prevent actual or imminent harm, such as violence or injury to others.[28] This is often summarized as the "clear and present danger" requirement. To satisfy this requirement, the restricted speech must pose an "imminent danger."[29] It may not just have a "bad tendency," that is, a more speculative, attenuated connection to potential future harm.[30]

> time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Id.

26. In advocating the Indianapolis ordinance, these feminists worked together with political and religious conservatives who also seek to stifle pornography. *See* Kathleen Currie & Art Levine, *Whip Me, Beat Me, and While You're at It Cancel My NOW Membership: Feminists War Against Each Other over Pornography*, WASH. MONTHLY, June 1987, at 17.

27. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325 (7th Cir.), *aff'd* 475 U.S. 1001 (1986).

28. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

29. *Id.* at 447-48.

30. *See id.*

If we banned the expression of all ideas that might lead individuals to actions that may adversely impact even important interests such as national security or public safety, then scarcely any idea would be safe, and surely no idea that challenged the status quo would be. This point was emphasized by Judge Easterbrook when he struck down the Indianapolis anti-pornography ordinance. For the sake of argument, Judge Easterbrook assumed the correctness of the law's cornerstone assumption that "depictions of [women's] subordination tend to perpetuate subordination."[31] Even so, he concluded, the law was unconstitutional.[32] Judge Easterbrook explained,

> If pornography is what pornography does, so is other speech . . . . Efforts to suppress communist speech in the United States were based on the belief that the public acceptability of such ideas would increase the likelihood of totalitarian government . . . .
>
> Racial bigotry, anti-Semitism, violence on television, reporters' biases—these and many more influence the culture and shape our socialization . . . . Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.
>
> Sexual responses often are unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect. But almost all cultural stimuli provoke unconscious responses. Religious ceremonies condition their participants. Teachers convey messages by selecting what not to cover; the implicit message about what is off limits or unthinkable may be more powerful than the messages for which they present rational argument . . . . If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.[33]

31. *Hudnut*, 771 F.2d at 329.
32. *Id.* at 329-30.
33. *Id.*

C. *Re-examination and Reaffirmation*

As earlier stated, I have accepted the call by current advocates of restricting hate speech and pornography to re-examine the landmark free speech rulings that set forth the foregoing two core principles concerning viewpoint neutrality and "clear and present danger." That re-examination has left me more impressed than ever with the universal, timeless force of these rulings. They remain relevant and persuasive, specifically in the context of the current hate speech and pornography debates.

For example, consider the powerful concurring opinion of Justice Brandeis in *Whitney v. California*.[34] The *Whitney* majority upheld a long prison sentence that had been imposed on a woman because she was a member of the Communist Labor Party, whose platform advocated the violent overthrow of the United States government.[35] Brandeis rejected the majority's approach in an opinion that a later Supreme Court endorsed.[36] While Brandeis was sympathetic to fears about potential speech-induced harms, he eloquently explained that the United States constitutional philosophy reflects and requires not fear, but rather courage, in the realm of ideas. He also anticipated and responded to the concerns about the relatively powerless status of certain members of our society, including women, expressed by those who now advocate restricting hate speech and pornography. Brandeis astutely warned that any fear-based repression will be used *against* precisely those who are relatively weak.

His words are familiar, but well worth considering again, as if they were answering current arguments:

> Those who won our independence . . . believed liberty to be the secret of happiness and courage to be the secret of liberty . . . . They recognized the risks to which all human institutions are subject. But they knew that . . . it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and

34. 274 U.S. 357.

35. *Id.* at 357-72.

36. In *Brandenberg*, 395 U.S. at 449, the Supreme Court unanimously adopted the view espoused in Brandeis's *Whitney* concurrence.

> proposed remedies; and that the fitting remedy for evil counsels is good ones . . . .
>
> Fear of serious injury cannot alone justify suppression of free speech . . . . Men feared witches and burned women. . . .
>
> Those who won our independence by revolution were not cowards . . . . They did not exalt order at the cost of liberty . . . . Only an emergency can justify repression.[37]

These themes were eloquently echoed several decades later by Justice Hugo Black, carrying forward the brave Brandeisian free speech tradition for new generations. For example, in a McCarthy-era case concerning laws restricting Communist ideas and speech, Justice Black made a statement that applies to all restrictions on any unpopular speech, including the current proposals to restrict hate speech and pornography:

> Ultimately all the questions . . . really boil down to one—whether we as a people will try fearfully and futilely to preserve democracy by adopting totalitarian methods, or whether in accordance with our traditions and our Constitution we will have the confidence and courage to be free.[38]

IV. CENSORING HATE SPEECH AND PORNOGRAPHY WOULD UNDERMINE, RATHER THAN ADVANCE, EQUALITY GOALS

As previously noted, before the government may restrict expression, it must show not only that the expression threatens imminent serious harm, but also that the restriction is necessary to avert the harm.[39]

Undeniably, the interests that advocates of censoring hate speech and pornography seek to promote—namely, the equality and safety of minority groups and women—are compellingly important. However, advocates of suppressive laws cannot even show that these laws would effectively promote the safety and equality of minority groups and women, let alone that they are the necessary means for doing so. To the contrary, from an equality perspective, these censorship measures would be at best ineffective, and at worst counterproductive.

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37. *Whitney*, 274 U.S. at 375-77.
38. Barenblatt v. United States, 360 U.S. 109, 162 (1959) (Black, J., dissenting).
39. *Brandenburg*, 395 U.S. at 447.

For precisely this reason, Justice Black dissented from a 1952 Supreme Court decision that upheld an anti-hate-speech statute.[40] Fortunately, this decision is no longer good law.[41] Alluding to the concept of a "pyrrhic victory," Black presciently wrote, "If there be minority groups who hail this holding as their victory, they might consider . . . this ancient remark: 'Another such victory and I am undone.'"[42]

As an overview, this Article will first list the many reasons for concluding that suppressing hate speech and pornography would do more harm than good, specifically in terms of equality values. It will then elaborate on several.

The reasons why suppressing hate speech does not promote, and may well undermine, racial and other forms of equality include the following. Because the pornography concept advocated by some feminists is a type of hate speech, these points apply to it as well.

- Censoring hate speech increases attention to, and sympathy for, bigots.[43]
- It drives bigoted expression and ideas underground, thus making response more difficult.[44]
- It is inevitably enforced disproportionately against speech by and on behalf of minority group members themselves.[45]
- It reinforces paternalistic stereotypes about minority group members, suggesting that they need special protection from offensive speech.[46]
- It increases resentment towards minority group members, the presumed beneficiaries of the censorship.[47]
- Censoring racist expression undermines a mainstay of the civil rights movement, which has always been

40. Beauharnais v. Illinois, 343 U.S. 250, 267-76 (1952) (Black, J., dissenting).

41. *Beauharnais* has implicitly been overruled by New York Times v. Sullivan, 376 U.S. 254 (1964) (holding that defamation actions are subject to First Amendment constraints when they punish and deter speech on matters of public concern, and requiring a public official bringing a defamation action to prove that the statement at issue was directed at the official individually and not just a unit of government).

42. *Beauharnais*, 343 U.S. at 275.

43. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 559.

44. *Id.* at 560.

45. *Id.* at 512, 515, 556-58.

46. *Id.* at 561.

47. *Id.* at 486, 567-69.

especially dependent on a robust concept of constitutionally protected free speech.[48]

- An anti-hate-speech policy curbs the candid intergroup dialogue concerning racism and other forms of bias, which is an essential precondition for reducing discrimination.[49]
- Positive intergroup relations will more likely result from education, free discussion, and the airing of misunderstandings and insensitivity, rather than from legal battles; anti-hate-speech rules will continue to generate litigation and other forms of controversy that increase intergroup tensions.[50]
- Finally, censorship is diversionary; it makes it easier to avoid coming to grips with less convenient and more expensive, but ultimately more meaningful, strategies for combating discrimination. Censoring discriminatory expression diverts us from the essential goals of eradicating discriminatory attitudes and conduct.[51]

The following list outlines the specific reasons why suppressing pornography does not promote, and may well undermine, the critically important goals of reducing discrimination and violence against women. Many of these parallel my analysis of anti-hate speech laws:

- Censoring pornography would suppress many works that are especially valuable to women and feminists.[52]
- Any pornography censorship scheme would be enforced in a way that discriminates against the least popular, least powerful groups in our society, including feminists and lesbians.[53]
- It would perpetuate demeaning stereotypes about women, including that sex is bad for us.[54]
- It would perpetuate the disempowering notion that women are essentially victims.[55]

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48. Strossen, *supra* note 43, at 567-69.
49. *Id.* at 561.
50. *Id.*
51. *Id.*
52. Strossen, *supra* note 13, at 1111, 1141-42, 1146, 1170.
53. *Id.* at 1111, 1141, 1143-47.
54. *Id.* at 1111, 1141, 1147-51.
55. *Id.* at 1111, 1141, 1151-53.

- It would distract us from constructive approaches to countering discrimination and violence against women.[56]
- It would harm women who voluntarily work in the sex industry.[57]
- It would harm women's efforts to develop their own sexuality.[58]
- It would strengthen the power of the right wing, whose patriarchal agenda would curtail women's rights.[59]
- By undermining free speech, censorship would deprive feminists of a powerful tool for advancing women's equality.[60]
- Finally, since sexual freedom and freedom for sexually explicit expression are essential aspects of human freedom, censoring such expression would undermine human rights more broadly.[61]

Before I elaborate on a few of the common reasons for concluding that censoring both hate speech and pornography undermines equality goals, I would like to quote Seventh Circuit Judge Richard Posner (since he, too, was one of your Canary Lecturers), who has recently supported one of the specific points I just listed concerning pornography. Specifically, Judge Posner concurs in my conclusion that censoring pornography would do more harm than good to the women who earn their living in the pornography business.[62] As even censorship advocates recognize, any censorship scheme would not prevent the production of all pornography, but rather, would drive that production underground. However, this development would be devastating to the women who would continue to work in the pornography business, as Judge Posner explained, from his law and economics perspective:

> When an economic activity is placed outside the protection of the law—as we know from Prohibition, prostitution, the campaign against drugs and the employment of illegal

56. *Id.* at 1112, 1141, 1153-61.
57. Strossen, *supra* note 13, at 1112, 1141, 1161-63.
58. *Id.* at 1112, 1141, 1163-64.
59. *Id.* at 1112, 1141, 1164-66.
60. *Id.* at 1112, 1141, 1166-71.
61. *Id.* at 1112, 1141, 1171-72.
62. Richard A. Posner, *Only Words by Catharine A. MacKinnon*, NEW REPUBLIC, Oct. 18, 1993, at 31 (book review).

> immigrants—the participants in that activity will resort to threats and violence in lieu of the contractual and other legal remedies denied them. The pimp is an artifact of the illegality of prostitution, and the exploitation of pornographic actresses and models by their employers is parallel to the exploitation of illegal immigrant labor by their employers. These women would be better off if all pornography were legal.[63]

I will now expand upon several of the common reasons why censoring hate speech or pornography would be as dangerous for equality rights as for free speech rights.

A. *Free Speech Is Especially Important to People Who Have Traditionally Suffered from Discrimination*

First and foremost, all groups who seek equal rights and freedom have an especially important stake in securing free speech. Throughout history, free speech consistently has been the greatest ally of those seeking equal rights for groups that have been subject to discrimination. For example, the Civil Rights Movement during the 1950s and 1960s depended on the vigorous enforcement of free speech rights by the U.S. Supreme Court under the leadership of Chief Justice Earl Warren.[64] This essential interrelationship was forcefully described in a 1965 book by University of Chicago law professor Harry Kalven, entitled *The Negro and the First Amendment*.[65]

Only strong principles of free speech and association could—and did—protect the drive for desegregation. These principles allowed protestors to carry their messages to audiences that found such messages highly offensive and threatening to their most deeply cherished views of themselves and their way of life. Martin Luther King, Jr. wrote his historic letter from a Birmingham jail,[66] but the Warren Court later struck down the Birmingham parade ordinance that King and other demonstrators had violated, holding that it had breached their First Amendment rights.[67]

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63. *Id.* at 34.

64. *See* Nadine Strossen, *Freedom of Speech in the Warren Court*, *in* THE WARREN COURT: A RETROSPECTIVE (Bernard Schwartz ed., forthcoming 1996).

65. HARRY KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1965).

66. MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, *in* WHY WE CAN'T WAIT 77 (1964).

67. Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969).

The more disruptive, militant forms of civil rights protest—such as marches, sit-ins, and kneel-ins—were especially dependent on the Warren Court's generous constructions of the First Amendment.[68] Notably, many of these speech-protective interpretations initially had been formulated in cases brought on behalf of opponents of civil rights.[69] The insulting and often racist language that some militant black activists hurled at police officers and other government officials was also protected under the same principles and precedents.[70]

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68. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 902, 928 (1982) (holding that the First Amendment protects the "emotionally charged rhetoric" of a speech to several hundred people urging compliance with a boycott by black citizens against white merchants and threatening violence against those who did not honor the boycott, including a statement that "If we catch any of you going in any of them racist stores, we're gonna break your damn neck," even though there were violent reprisals within weeks after this speech); Gregory v. Chicago, 394 U.S. 111, 111-12, 117, 128 (1969) (holding that the First Amendment protects a protest march seeking desegregation of Chicago public schools, even though an "unruly" crowd of 1200 people had gathered to throw rocks and eggs, and shout violent epithets at the marchers, such as "Get out of here niggers—go back to where you belong or we will get you out of here" and "Get the hell out of here or we will break your . . . head open"); Cox v. Louisiana, 379 U.S. 536, 548-49 n.12 (1965) (protecting, under the First Amendment, a protest march of 2000 supporters of integration where 250 hostile onlookers created an "explosive" situation in which police and other witnesses feared "bloodshed" and that "violence was about to erupt"); Edwards v. South Carolina, 372 U.S. 229, 242-44 (1963) (protecting, under the First Amendment, a "noisy demonstration in defiance of dispersal orders" where "200 youthful Negro demonstrators were being aroused to a 'fever pitch' before a crowd of some 300 people who undoubtedly were hostile," thus "creat[ing] a . . . danger of riot and disorder").

69. *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 4, 13, 16 (1949) (overturning, as violating the First Amendment, a breach of peace conviction of a man who made a race-baiting speech that "incited" his large friendly audience inside a meeting hall, and "provoked" a "hostile mob" of 1500 people outside the hall that the "[p]olice were unable to control" because the mob was "howling . . . epithets" and throwing bricks, bottles, stink bombs, and brickbats, breaking about 28 windows); Near v. Minnesota, 283 U.S. 697, 702, 722-23, 724-25 (1931) (upholding a First Amendment right to publish, despite a state law allowing an injunction against "a malicious, scandalous and defamatory periodical," a newspaper that printed anti-Semitic statements, such as "Practically every vendor of vile hootch, every owner of a moonshine still, every snake-faced gangster . . . in the Twin Cities is a JEW").

70. *See* Lewis v. New Orleans, 415 U.S. 130, 133-34, 138 (1974) (reversing the breach of peace conviction of a woman who had responded to a police officer who told her son, "Get your black ass in the god damned car . . . ," by stating, "[Y]ou god damn m. f. police—I am going to [the Superintendent of Police] about this," on the ground that the law was unconstitutionally overbroad); Gooding v. Wilson, 405 U.S. 518, 527-28, 534 (1972) (reversing the breach of peace conviction of a black demonstrator who made several threatening statements to police officers, including, "White son of a bitch, I'll kill you," on the ground that the law was unconstitutionally vague and overbroad); Brown v. State, 492 P.2d 1106, 1107 (Okla. 1971), *vacated and remanded by* Brown v. Oklahoma,

The foregoing history does not prove conclusively that free speech is an essential precondition for equality, as some respected political philosophers argue.[71] But it does belie the central contention of those who claim an incompatibility between free speech and equality: that equality is an essential precondition for free speech.[72] This history also shows the positive, symbiotic interrelationship between free speech and equality. As stated by Benjamin Hooks, former Executive Director of the NAACP, "The civil rights movement would have been vastly different without the shield and spear of the First Amendment."[73]

Like the Civil Rights Movement, the women's rights movement also has always depended on a vibrant free speech guarantee. This point was made by the lower federal court judge who initially struck down the Indianapolis anti-pornography law, in the ruling Judge Easterbrook affirmed in *American Booksellers Ass'n v. Hudnut*.[74] Interestingly, this federal district court judge was a woman, Sara Evans Barker. She emphasized that advocates of women's rights have far more to lose than to gain from suppressing expression: "It ought to be remembered by . . . all . . . who would support [this anti-pornography law] that, in terms of altering sociological patterns, much as alteration may be necessary and desirable, free speech, rather than being the enemy, is a long-tested and worthy ally."[75]

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408 U.S. 914 (1972) (vacating a breach of peace conviction of a Black Panther, who had referred to specific policemen as "mother-fucking fascist pig cops," on First Amendment grounds).

71. *See, e.g.*, Robert N. Beck, *Liberty and Equality*, 10 IDEALISTIC STUD. 24, 36 (1980) ("[L]iberty is more basic than equality . . . ."); Tibor Machan, *Equality's Dependence on Liberty*, *in* 2 EQUALITY & FREEDOM 663, 664-65 (Gray Dorsey ed., 1977) (arguing that liberty is an essential precondition for equality); D.D. Raphael, *Tensions Between the Goals of Equality and Freedom*, *in* 2 EQUALITY & FREEDOM 543, 555 (1977) ("[F]reedom appears to be a greater value than equality."). For the contrary view, that equality is the source of all rights and liberties, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 273-74 (1977), and John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164, 165-66 (1958). *But see* H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 845-46 (1979) (criticizing Dworkin's view that all liberties derive from the principle of equality).

72. *See, e.g.*, Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 467.

73. Statement of Benjamin L. Hooks, Executive Director and CEO, NAACP, *quoted in* Philip Morris Companies Inc., Press Release (May 7, 1990).

74. *See supra* text accompanying note 27.

75. American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316, 1337 (D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

B. *Censorship Has Especially Victimized Members of Politically Powerless Groups, Including Racial Minorities and Women*

Just as free speech has always been the strongest weapon to *advance* equal rights causes, censorship has always been the strongest weapon to *thwart* them. Ironically, the explanation for this pattern lies in the very analysis of those who want to curb hate speech and pornography. They contend that racial minorities and women are relatively disempowered and marginalized.[76]

I agree with that analysis of the problem and am deeply committed to working toward solving it. However, I strongly disagree that censorship is a solution. To the contrary, precisely because women and minorities are relatively powerless, it makes no sense to hand the power structure yet another tool that it can use to further suppress them, in both senses of the word.[77]

Consistent with the analysis of the censorship advocates themselves, the government will inevitably wield this tool, along with others, to the particular disadvantage of already disempowered groups.[78] This conclusion is confirmed by the enforcement record of all censorship measures, around the world, and throughout history. The pattern of disempowered groups being disproportionately targeted under censorship measures extends even to measures that are allegedly designed for their benefit. This is clearly illustrated by the enforcement record in the many countries that have outlawed hate speech, and the one country that has outlawed pornography as defined by some contemporary feminists.[79]

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76. *See, e.g.*, Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 1985 HARV. WOMEN'S L.J. 1, 20-21 ("Women have had to prove human status, before having any claim to equality. But equality has been impossible to achieve, perhaps because, really, women have not been able to prove human status.").

77. *See* Mark Tushnet, *Frontiers of Legal Thought I: Introduction*, 1990 DUKE L.J. 193, 198. Commenting on Professor Charles Lawrence's article supporting hate speech regulations and Professor Nadine Strossen's article opposing such regulations, Professor Tushnet suggests,

> Lawrence's essay . . . places much of what Strossen says under rather severe stress—with one, for me, decisive exception. Strossen emphasizes, in a way that Lawrence does not, that regulations of racist speech on campus are to be administered by the very authorities who, if such regulations are adopted, will have to be dragged into the regulations kicking and screaming. She is in my view rightly skeptical about the proposition that these people would administer the regulations in a way that Lawrence would find satisfying.

Id. at 198.

78. *See, e.g.*, Andrea Dworkin, *supra* note 76, at 21 ("[T]he status of women does not change . . . . Laws change, but our status stays fixed.").

79. *See* NADINE STROSSEN, DEFENDING PORNOGRAPHY 221-24, 229-32, 235-36 (1995)

First, consider the historical enforcement record of anti-hate-speech laws. The first individuals prosecuted under the British Race Relations Act of 1965,[80] which criminalized the intentional incitement of racial hatred, were black power leaders.[81] Rather than curbing speech offensive to minorities, this British law instead has been used regularly to curb the speech of blacks, trade unionists, and anti-nuclear activists.[82] In perhaps the ultimate irony, this statute, which was intended to restrain the neo-Nazi National Front, instead has barred expression by the Anti-Nazi League.[83]

The British experience is typical. Although French law then criminalized group libel, no one who made anti-Semitic statements against Captain Alfred Dreyfus was ever prosecuted, despite the tragic impact of these statements.[84] In contrast, Emile Zola was prosecuted for libeling the French clergy and military in his classic letter deploring the anti-Semitic vendetta against Dreyfus, "J'Accuse," and had to flee to England to escape punishment.[85] A similar enforcement pattern resulted under the German Criminal Code of 1871, which punished offenses against personal honor.[86] According to Professor Eric Stein, "[T]he German Supreme Court . . . consistently refused to apply this article to insults against Jews as a group—although it gave the benefit of its protection to such groups as 'Germans living in Prussian provinces, large landowners, all Christian clerics, and German officers . . . .'"[87]

In 1990, Canada's Supreme Court upheld an anti-hate-speech

(discussing enforcement experiences under censorship laws in other countries).

80. Race Relations Act, 1965, ch. 73 (Eng.). The Act was amended in 1976 to eliminate the requirement of proving intent. The amended law made it an offense to distribute literature or to use words likely to stir up hatred against any racial group. In 1986, Parliament enacted the Public Order Act, 1986, ch. 64, which was designed to further ease the prosecution's evidentiary burden in proving incitement to racial hatred. It criminalizes conduct that is *either* likely *or* intended to "stir up" racial hatred. *See* Kenneth Lasson, *Racism in Great Britain: Drawing the Line on Free Speech*, 7 B.C. THIRD WORLD L.J. 161, 166, 171-73 (1987) (describing the subsequent amendments and alterations to the Race Relations Act of 1965).

81. Lasson, *supra* note 80, at 169.

82. NEIER, *supra* note 8, at 153-55.

83. *See id.* at 157 (describing the banning of a planned march by the Anti-Nazi League).

84. AMERICAN CIVIL LIBERTIES UNION, WHY THE AMERICAN CIVIL LIBERTIES UNION DEFENDS FREE SPEECH FOR RACISTS AND TOTALITARIANS 8 (n.d.).

85. *Id.* at 8-9.

86. Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—and Other—"Lies,"* 85 MICH. L. REV. 277, 286 (1986).

87. *Id.* (quoting P. Paepcke, Antisemitismus und Strafrecht 86 (dissertation, Albert-Ludwiegs-Freiburg i. Br., 1962)).

law against a challenge under the free speech provision in Canada's Constitution.[88] Under this law, in 1993, Canadian customs officials detained at the U.S.-Canadian border a shipment of fifteen hundred copies of a book called *Black Looks: Race and Representations*, by the black feminist professor bell hooks.[89] These books had been en route to several Canadian universities.[90] Indeed, because Canada's anti-hate-speech law had previously been used to suppress important expression—including that on behalf of minority group rights—three Canadian Supreme Court Justices dissented from the Court's 1990 decision upholding such laws, leading to a closely split 4-3 ruling.[91] As the dissent explained,

> Although the [law] is of relatively recent origin, it has [already] provoked many questionable actions on the part of the authorities . . . . [T]he record amply demonstrates that intemperate statements about identifiable groups, particularly if they represent an unpopular viewpoint, may attract state involvement or calls for police action. Novels such as Leon Uris' pro-Zionist novel, *The Haj*, face calls for banning . . . . Other works, such as Salman Rushdie's *Satanic Verses*, are stopped at the border . . . . Films may be temporarily kept out, as happened to a film entitled "Nelson Mandela," ordered as an educational film by Ryerson Polytechnical Institute . . . . Arrests are even made for distributing pamphlets containing the words "Yankee Go Home."[92]

The foregoing examples simply illustrate a longstanding, ongoing global pattern. That was made clear in a book published in 1992 by Article XIX, the London-based International Centre Against Censorship, which takes its name from the free speech guarantee in the Universal Declaration of Human Rights, Article 19.[93]

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88. Regina v. Keegstra, 61 C.C.C.3d 1, 72 (Can. 1990).

89. Leanne Katz, *Censors' Helpers*, N.Y. TIMES, Dec. 4, 1993, §1, at 21. This author, bell hooks, writes her name without initial capital letters.

90. *Id.*

91. *Keegstra*, 61 C.C.C.3d at 73.

92. *Id.* at 120 (McLachlin, J., dissenting).

93. *See* STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION (Sandra Coliver ed., 1992). This valuable book was based on an international conference in 1991, in which I had the privilege of participating. It brought together legal experts from fourteen different countries to compare notes about their respective

Two conclusions clearly emerged from this book's comparative analysis. First, the enforcement of anti-hate speech laws does not correlate at all with successful national experiences in countering discrimination or promoting equality and tolerance among different racial, ethnic, and religious groups. Second, the enforcement of such laws often undermines the goals of promoting intergroup harmony and societal equality, for several reasons, including their disproportionate enforcement against minority group speakers.[94]

The general international pattern of disproportionate enforcement of legal measures curbing hate speech against minority group members also holds true on university and college campuses, where such measures have recently been most vigorously advocated in the United States. In 1974, in a move aimed at the neo-Nazi National Front, the British National Union of Students (NUS) resolved that "representatives of 'openly racist and fascist organizations' were to be prevented from speaking on college campuses 'by whatever means necessary (including disruption of the meeting).'"[95] A major motivation for the rule was to stem an increase in campus anti-Semitism.[96] Ironically, though, following the United Nations' cue,[97] some British students deemed Zionism a form of racism beyond the bounds of permitted discussion.[98] Accordingly, in 1975, British students invoked the NUS resolution to disrupt speeches by Israelis and Zionists, including the Israeli ambassador to England.[99] The intended target of the NUS resolution, the National Front, applauded this result.[100] The NUS itself, though, became disenchanted by this and other unintended consequences of its resolution and repealed it in 1977.[101]

The British experience under its campus anti-hate-speech rule parallels the more recent U.S. experience. The U.S. campus hate

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national experiences with various laws punishing hate speech.

94. *See id.*

95. NEIER, *supra* note 8, at 155 (quoting the British National Union of Students resolution).

96. *Id.*

97. *See* G.A. Res. 3379, U.N. GAOR, 30th Sess., Supp. No. 34, at 83, U.N. Doc. A/10034 (1975) (declaring Zionism a form of racism). The United Nations revoked that resolution in 1991. G.A. Res. 86, U.N. GAOR, 46th Sess., Supp. No. 49, at 39, U.N. Doc. A/46/86 (1991).

98. NEIER, *supra* note 8, at 155.

99. *Id.*

100. *Id.* at 156.

101. *Id.* at 155-56 (adding that some conservatives who were "very far from being Fascists" also were barred from speaking under the NUS resolution).

speech code about which we have the most enforcement data is one that was in effect at the University of Michigan from April 1988 until October 1989. Because the ACLU brought a lawsuit to challenge the code, the University was forced to disclose information, which otherwise would have been unavailable to the public, about how the code had been enforced.

During the year and a half that the University of Michigan rule was in effect, there were more than twenty cases of whites charging blacks with racist speech.[102] The only two instances in which the rule was used to punish racist speech, as opposed to other forms of hate speech, involved the punishment of speech by black students.[103] The only student who was subjected to a full-fledged disciplinary hearing under the Michigan rule was an African-American student accused of homophobic and sexist expression.[104] In seeking clemency from the punishment that was imposed on him after this hearing, the student said that he had received such harsh treatment in large part because of his race.[105]

Others who were punished at Michigan included several Jewish students accused of anti-Semitic expression and an Asian-American student accused of making an anti-black comment. The Jewish students wrote graffiti, including a swastika, on a classroom black-

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102. Jeff Gottlieb, *Banning Bigoted Speech: Stanford Weighs Rules*, SAN JOSE MERCURY-NEWS, Jan. 7, 1990, at 1B, 3B.

103. Plaintiff's Exhibit Submitted in Support of Motion for Preliminary Injunction at 1, Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (No. 89-CV-71683-DT) [hereinafter Plaintiff's Exhibit] (stating that a black student was punished for using the term "white trash" in an argument with a white student); *id.* at 5 (reporting that, in a faculty-led small group discussion designed to "identify concerns of students" in a dentistry course, a student was punished under hate speech code for saying that his minority roommate had told him that minorities were treated unfairly in the course—the faculty member, who was black, complained that the student was accusing her of racism).

104. *Id.* at 6 (describing a social work student who was charged with violating the code because he said in class that homosexuality is an illness that needs to be cured and that he had developed a model to move gay men and lesbians toward a heterosexual orientation).

105. Letter from an undisclosed student to James J. Duderstadt, President, University of Michigan (the name and signature of the student were deleted from the copy produced during litigation, to protect the student's privacy) (May 23, 1989), *reprinted in* Plaintiff's Exhibit, *supra* note 103, at 852. The student wrote,

> [T[he charges were pretexual [sic] and a coverup for vindictiveness based on my refusal to support any radical movements . . . . Moreover, these few students knew that a black student would have no chance of wining [sic] a favorable decision against such charges. These charges will haunt me for the rest of my life . . . . [T]hey will be used against me to prevent me from becoming a certified Social Worker . . . .

board, saying they intended it as a practical joke.[106] The Asian-American student's allegedly hateful remark was to ask why black people feel discriminated against; he said he raised this question because the black students in his dormitory tended to socialize together, making him feel isolated.[107]

The available information indicates that other campus hate speech codes are subject to the same enforcement patterns. For example, the ACLU successfully represented the student who challenged the University of Connecticut's hate speech code.[108] This student, who had been penalized for an allegedly homophobic remark, was Asian-American. She claimed that other students had engaged in similar expression but that she had been singled out for punishment because of her ethnic background.[109]

C. *Censorship of Sexual Expression Has Particularly Harmed Women and Women's Rights Advocates*

What lesson do we learn from the anti-hate-speech enforcement record that I have outlined? It is this: If you belong to a group that has traditionally suffered discrimination, including women, restrictions on hate speech are especially likely to be wielded against your speech. In fact, all forms of censorship have consistently been used to suppress speech by, about, and for women. Of particular importance for the current pornography debate, laws permitting the suppression of sexually-oriented information have often been used to suppress information essential for women's rights, including reproductive freedom.

In the United States, anti-obscenity laws consistently have been used to suppress information about contraception and abortion. The first federal anti-obscenity statute in this country, the "Comstock Law" enacted in 1873, was repeatedly used to prosecute pioneering feminists and birth control advocates early in this century.[110] Its targets included Margaret Sanger, the founder of Planned Parenthood.[111]

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106. Plaintiff's Exhibit, *supra* note 103, at 1-2.

107. *Id.* at 2-3.

108. Wu v. Univ. of Conn. (No. Civ. H89-649 PCD) (D. Conn. 1989).

109. Letter from Martin Margulies, Connecticut Civil Liberties Union, to author 5 (Jan. 23, 1990) (on file with author).

110. *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, 748 (1992).

111. *See id.* at 766-67 (describing attacks on Sanger under the Comstock Law for pub-

Sanger also had the dubious distinction of being one of the first victims of a new form of censorship that was applied to a then-new medium early in this century. The U.S. Supreme Court had ruled in 1915 that movies were not protected "speech" under the First Amendment.[112] One of the first films banned under that decision was *Birth Control*, a 1917 picture produced by and featuring Margaret Sanger.[113]

The banning of films concerning birth control and other sexually-oriented subjects of particular interest to feminists continued in the United States into the second half of this century. This fact was stressed by UCLA Law Professor Kenneth Karst when he urged pro-censorship feminists to think twice about arguing that pornography should not be constitutionally protected speech.[114] Karst noted that, until the 1950s, censors routinely banned films that treated sexual themes of particular concern to women, including pregnancy, birth control, abortion, illegitimacy, prostitution, and divorce.[115]

We now have actual experience with a feminist-style anti-pornography law in one country: Canada. In 1992, the Canadian Supreme Court incorporated the pro-censorship feminists' definition of pornography into Canada's obscenity law in *Butler v. The Queen*.[116] The court held that, henceforth, the obscenity law would bar sexual materials that are "degrading" or "dehumanizing" to women.[117]

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lishing information on birth control in a newspaper). Just before this article went to press, in February 1996, Congress enacted and President Clinton signed into law, the Communications Decency Act, which extends the Comstock Law's criminal prohibitions on expression concerning abortion to on-line communications technology. The ACLU immediately sought a temporary restraining order against the law, on behalf of clients including the Planned Parenthood Foundation of America, on the ground that it violates both free speech and women's rights. *See* ACLU v. Reno, No. 96-963, 1996 LEXIS 1617 (E.D. Pen. Feb. 16, 1996) (granting a temporary restraining order).

112. Mutual Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 244 (1915), *overruled by* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

113. *See* Message Photo-Play Co. v. Bell, 166 N.Y.S. 338 (1917).

114. Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 136.

115. *Id.* at 129.

116. 1 S.C.R. 452 (1992) (Can.).

117. *Id.* at 478-81. The Canadian Supreme Court construed the statutory requirement that obscenity involves "the undue exploitation of sex" as being satisfied by "degrading or dehumanizing" depictions of sex, because "a substantial body of opinion . . . holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women . . . ." *Id.*

Alas for women, though, the enforcement record under this law has followed the familiar pattern; it has harmed the very groups that it was supposed to help. The particular victims of Canada's new censorship regime have been the writings and bookstores of women, feminists, lesbians, and gay men.[118] Within the first two and a half years after the *Butler* decision, approximately two-thirds of all Canadian feminist bookstores had materials confiscated or detained by customs.[119] *Butler's* supposed rationale is to protect women from works that harm them; it is hard to understand how the feminist writings that have been seized under this decision would harm women.

Ironically, some feminist material has been suppressed under *Butler* on the ground that it is allegedly degrading and harmful not to women, but to men.[120] In the ultimate irony, two books written by a leading U.S. anti-pornography feminist, the New York writer Andrea Dworkin, were seized at the U.S.-Canada border.[121] According to Canadian customs officials, they illegally "eroticized pain and bondage."[122]

Although the primary targets of Canada's post-*Butler* enforcement efforts have been feminist, lesbian, and gay materials, *Butler* has also emboldened customs officials to seize other works, including serious mainstream books. Canadian Customs has seized books by critically acclaimed authors such as Kathy Acker, Ambrose Bierce, Marguerite Duras, Langston Hughes, Zora Neale Hurston, David Leavitt, Audre Lorde, Anne Rice, Gertrude Stein, and Oscar Wilde.[123]

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118. *Canada Customs Hits Feminist Stores and Others*, FEMINIST BOOKSTORE NEWS, Mar./Apr. 1993, at 11, 21.

119. *Id.* at 22 (noting that 5,000 titles had been banned in Canada by 1992).

120. *See, e.g., id.* at 21 (stating that Canadian Customs seized a book entitled *Weenie Toons: Women Artists Mock Cocks*, on the ground that it was degrading to the penis); Bill Redden, *O for Christ's Sake Canada*, PDXS (PORTLAND), Aug. 30-Sept. 12, 1993, at 3 (discussing the banning of books featuring the cartoon character Lesbian Hothead Paisan, a "lesbian terrorist avenger," who attacks certain men).

121. Pierre Berton, *How Otto Jelinek Guards Our Morals*, TORONTO STAR, May 29, 1993, at H3; *see also* Albert Nerenberg, *Fear Not, Brave Canadian, Customs Stands on Guard for Thee*, GAZETTE (MONTREAL), Jan. 22, 1993, at A2 (reporting that the two books by Dworkin that were seized were *Pornography: Men Possessing Women* and *Woman Hating*).

122. Sarah Scott, *Porn Police: Who Decides What to Ban at the Border?*, GAZETTE (MONTREAL), Apr. 14, 1993, at A1, A15.

123. STROSSEN, *supra* note 79, at 238-39; *see also* Tim Kingston, *Canada's New Porn Wars: "Little Sister" Gay/Lesbian Bookstore Battles Canadian Customs*, S.F. BAY TIMES, Nov. 4, 1993, at 1 (discussing Canada's banning of books by Marguerite Duras and

D. Restricting Sexual Expression Undermines Human Rights More Broadly

I will now turn to one final example of the adverse impacts on equality goals that follow from censoring any hate speech, including pornography. Recall that the pro-censorship feminists' conception of suppressible pornography is sexually explicit sexist expression. To highlight the dangers of this concept, I would like to underscore the positive role that sexual expression plays in advancing human freedom.

Sexual expression is an integral aspect of human freedom. Hence, governments that repress human rights in general have always suppressed sexual speech. Correspondingly, laws against sexual speech have always targeted views that challenge the prevailing political, religious, cultural, or social orthodoxy.[124]

Sexually explicit speech has been banned by the most repressive regimes, including Communism in the former Soviet Union, Eastern bloc countries, and China, apartheid in South Africa, and fascist or clerical dictatorships in Chile, Iran, and Iraq. Conversely, recent studies of Russia have correlated improvements in human rights, including women's rights, with the rise of free sexual expression.

In places where real pornography is conspicuously absent, tellingly, political dissent is labeled as such. The Communist government of the former Soviet Union suppressed political dissidents under obscenity laws. In 1987, when the Chinese Communist government dramatically increased its censorship of books and magazines with Western political and literary messages, it condemned them as "obscene," "pornographic," and "bawdy." The white supremacist South African government banned black writing as "pornographically immoral."[125] In Nazi Germany and the former Soviet Union, Jewish writings were reviled as "pornographic," as were any works that criticized the Nazi or Communist party, respective-

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Ambrose Bierce); Jerald Moldenhauer, Books and Periodicals Seized by Canada Customs Since the Introduction of Memorandum D9-1-1 in 1985 (unpublished, on file with author) (cataloging books seized by Canadian Customs).

124. *See* Pete Hamill, *Women on the Verge of a Legal Breakdown*, PLAYBOY, Jan. 1993, at 140, 189; *see also* Alan Dershowitz, *What Is Porn?*, ABA J., Nov. 1, 1986, at 36 (discussing how anti-pornography laws have historically protected the prevailing majority view).

125. STROSSEN, *supra* note 79, at 219.

ly.[126]

Even in societies that generally respect human rights, including free speech, the terms "obscenity" and "pornography" tend to be used as epithets to stigmatize expression that is politically or socially unpopular. Obscenity laws have been enforced against individuals who have expressed disfavored ideas about political or religious subjects.[127] One of the earliest British obscenity prosecutions, in the eighteenth century, was brought by the Tory government to imprison its leading Whig opponent, John Wilkes.[128] In early American history, anti-obscenity laws targeted speech that was offensive to the prevailing religious orthodoxy.[129]

The pattern holds today. Obscenity laws in the United States regularly have been used to suppress expression of those who are relatively unpopular or disempowered, whether because of their ideas or because of their membership in particular societal groups.[130] Recent major obscenity prosecutions have targeted expressions by or about members of groups that are powerless and unpopular, including rap music of young African-American men and homoerotic photographs and other works by gay and lesbian artists.[131] Likewise, the National Endowment for the Arts (NEA) has been subject to many political attacks for its funding of art exploring feminist or homoerotic themes.[132] This point was recognized by the federal district court judge in the "NEA Four" case, in which the ACLU represented four artists whose NEA grants were cut off because of their works' controversial political and sexual themes. He wrote, "The NEA has been the target of congressional critics . . . for funding works . . . that express women's anger over male dominance in the realm of sexuality or which endorse equal legitimacy for homosexual and heterosexual practices."[133]

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126. Dershowitz, *supra* note 124, at 36.

127. STROSSEN, *supra* note 79, at 220.

128. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§12-16 (2d ed. 1988).

129. STROSSEN, *supra* note 79, at 57.

130. *Id.* at 56-57.

131. *See id.* at 54-55 (discussing recent prosecutions involving the music of 2 Live Crew and the photographs of Robert Mapplethorpe).

132. *See id.* at 20, 37, 55, 101-02, 104-05, 156 (summarizing recent right-wing attacks on the National Endowment for the Arts in which, for example, NEA grants were criticized in general as being "inconsistent with 'traditional family values'" and where the funding of Robert Mapplethorpe's photographs was specifically attacked by Senator Jesse Helms who said "There is a big difference between 'The Merchant of Venice' and a photograph of two males of different races on a marble table top").

133. Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1461 (C.D. Cal.

One recent obscenity prosecution in Ohio vividly displayed the characteristic hallmarks of such prosecutions—specifically, the targeting of expression with an unpopular political message and the persecution of gays and lesbians. During the summer of 1994, the City of Cincinnati brought obscenity charges against a gay and lesbian bookstore, the Pink Pyramid, and its owner, its manager, and its clerk. These individuals, who were arrested and handcuffed, faced sentences of up to six month's imprisonment and fines of up to $1,000.[134]

Their "crime"? They had rented out a video of the film "Salo, 120 Days of Sodom," by Pier Paolo Pasolini, a world-renowned Italian filmmaker, novelist, and poet. The film's sexual-political subject is the dark aspect of sexuality that had served Italian fascism.[135] According to film critic Peter Bondanella, *Salo* "is a desperate . . . attack against . . . a society dominated by manipulative and sadistic power."[136]

Just as the allegedly obscene video itself had a deeply political message, so too did the charges against those who rented it out. These prosecutions were announced on the opening day of a federal lawsuit brought by the ACLU and Lambda Legal Defense & Education Fund challenging a referendum that had overturned gay and lesbian civil rights legislation.[137] As the National Coalition Against Censorship commented, "At best, the timing suggests indifference to the possibility that these prosecutions would exacerbate already existing prejudices and intolerance."[138] At worst, given the frivolous nature of obscenity charges based on a film of such indisputably serious value, the prosecution was a calculated act of harassment. Accordingly, the ACLU filed a brief on behalf of an impressive array of individuals and organizations from the worlds of film, art, and academia, urging the court to dismiss these charg-

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1992).

134. STROSSEN, *supra* note 79, at 105.

135. *Id.*

136. Letter from Jeremiah Gutman, Jo List Levinson, and Leanne Katz to Terrence Robert Cosgrove, Cincinnati Prosecutor 2 (July 27, 1994) (quoting Peter Bondanella) (on file with author).

137. *See* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995). The Plaintiff challenged the city charter amendment prohibiting enactment of any ordinance that could be construed as giving preferential treatment or special status to gay men or lesbians. The lower court ruled that the amendment was unconstitutional. *Id.* at 830, 836, 844.

138. Letter from Jeremiah Gutman, Jo List Levison, and Leanne Katz to Terrence R. Cosgrove, *supra* note 135, at 3.

es before subjecting the defendants to a pointless and chilling criminal trial.[139] The judge rejected this argument.[140]

The historical and ongoing enforcement record of laws against sexual speech make clear that what is at stake is more than freedom of sexual expression, important as that is. Even beyond that, the freedom to produce or consume anything called "pornography" is an essential aspect of the freedom to defy prevailing political and social mores. As Stanford University Law Professor Kathleen Sullivan wrote, "In a world where sodomy may still be made a crime, gay pornography is the samizdat of the oppressed."[141] Furthermore, just as gay pornography is the samizdat of individuals who are oppressed or dissident sexually, pornography in general is the samizdat of those who are oppressed or dissident in any respect.

UCLA Law Professor Kenneth Karst provides intriguing insights into the link between sexual freedom, including free sexual expression, and freedom from discrimination:

> The suppression of Unreason is rooted in the same fears that produce group subordination: men's fear of the feminine, whites' fear of blackness, heterosexuals' anxiety about sexual orientation. Historically, all these fears have been closely connected with the fear of sexuality. It is no accident that the 1960s, a period of sexual "revolution," also saw the acceleration of three movements that sought major redefinitions of America's social boundaries: the civil rights movement, the gay liberation movement, and the women's movement.[142]

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139. Memorandum of *Amici Curiae* the Film Society of Lincoln Center et al. in support of Defendants' Motions to Dismiss, City of Cincinnati v. The Pink Pyramid, No. 94CRB021247.

140. City of Cincinnati v. The Pink Pyramid, Docket No. 94CRB021245 (Hamilton County Municipal Court, Nov. 3, 1994). However, the judge subsequently granted a motion to dismiss the indictment on another ground: that the videotape had been seized in violation of the Fourth Amendment.

141. Kathleen M. Sullivan, *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius*, NEW REPUBLIC, Sept. 28, 1992, at 35 (book review). "Samizdat" refers to underground publications, containing dissident political views, in the former Soviet Union. *See* ROY D. LAIRD & BETTY A. LAIRD, A SOVIET LEXICON: IMPORTANT CONCEPTS, TERMS, AND PHRASES 97 (1988) ("Samizdat" is an "unofficial publication and duplicating of manuscripts by copying stories, poems, plays, articles, novels, and even nonfiction works . . . . The practice was particularly stimulated in the 1960's by the fear of the restoration of Stalin's image.").

142. Karst, *supra* note 114, at 103-04.

For the reasons Professor Karst articulates, free sexual expression is intimately connected with equality—hardly at odds with it, as argued by the anti-pornography feminists. Indeed, free sexual expression is an integral aspect of all human freedom, even beyond freedom from discrimination. This vital interconnection was eloquently stated by Dr. Gary Mongiovi, who teaches at St. John's University in New York:

> Sexual expression is perhaps the most fundamental manifestation of human individuality. Erotic material is subversive in the sense that it celebrates, and appeals to, the most uniquely personal aspects of an individual's emotional life. Thus, to allow freedom of expression and freedom of thought in this realm is to . . . promote diversity and nonconformist behavior in general . . . .
>
> It is no coincidence that one of the first consequences of democratization and political liberalization in the former Soviet Union, Eastern Europe and China was a small explosion of erotic publications . . . . Suppression of pornography is not just a free-speech issue: Attempts to stifle sexual expression are part of a larger agenda directed at the suppression of human freedom and individuality more generally.[143]

V. CONCLUSION

I would like to close by quoting a powerful, timeless statement by former Supreme Court Justice Black. Significantly, Black is as justly remembered for his heroic championship of equality rights as for his staunch free speech absolutism.[144] In this 1951 statement, Justice Black was specifically referring to the ideology of Communism, which was then seen as especially harmful, and hence especially worthy of suppression. However, Justice Black's wise words apply equally to the ideologies of racism and sexism, which are now seen as especially harmful, and hence especially worthy of suppression.

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143. Gary Mongiovi, Ph.D., *Letters to the Editor*, CIVIL LIBERTIES, Spring/Summer 1991, at 2.

144. *E.g.*, Raymond G. Decker, *Justice Hugo L. Black: The Balancer of Absolutes*, 59 CAL. L. REV. 1335, 1335 (1971) (noting that Black was "a staunch defender of dissident voices during the McCarthy era . . . [and] a proponent for rights of racial equality").

With twenty-twenty hindsight, we now see how exaggerated our earlier fears were that Communist authoritarianism would defeat individual liberty. I fervently hope that, in the near future, we will have a similar view about current concerns that racism and sexism could triumph over individual equality. In both cases, free speech plays a vital role in defeating doctrines at odds with human rights. Thus, as Supreme Court Justices such as Brandeis and Black repeatedly reminded us, in the very situations when it seems we have the most to fear in *defending* free speech—then, above all, do we actually have even more to fear in *not* defending free speech. As Justice Black wrote,

> Fears of [certain] ideologies have frequently agitated the nation and inspired legislation aimed at suppressing . . . those ideologies. At such times the fog of public excitement obscures the ancient landmarks set up in our Bill of Rights. Yet then, of all times, should [we] adhere most closely to the course they mark.[145]

145. American Communications Ass'n v. Douds, 339 U.S. 382, 453 (1950) (Black, J., dissenting).