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Words, Conduct, Caste

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How do we know what counts as speech and what counts as conduct? When is government disabled from regulating conduct that is intended to express ideas? What is the relationship between constitutional principles of equality and constitutional principles of free expression? And how do these questions bear on current controversies over pornography and hate speech? In this Essay, I propose some answers to these questions. I offer these general propositions:

1. As a matter of history and principle, the constitutional commitment to equality should be understood as a prohibition against systems with caste-like features. Courts should play a cautious role

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in eliminating the caste-like features of current society; the job of implementation belongs mostly to the elected branches of government. Although speech is hardly the principal culprit, some forms of expression can contribute to the maintenance of such systems.

2. Whether words or not, symbols count as speech within the meaning of the First Amendment if they are intended and received as part of the exchange of ideas.

3. Whether words or not, symbols count as "high value" speech—regulable only under the rarest circumstances—if they are intended and received as part of public deliberation about some issue. Through this distinction, I mean to reassert the line between political speech on the one hand and other forms of communication on the other.

4. Even if they are words, symbols not intended and received as part of the exchange of ideas are not protected by the First Amendment at all.

5. Some speech does not merely cause but actually *is* an independent unlawful act.

To decide First Amendment cases, these propositions are hardly enough. It is necessary to look not only at whether and how "speech" is involved, but also at the means by which government regulates speech. There are three principal kinds of restrictions on speech: viewpoint-based, content-based, and content-neutral.[1] Government cannot regulate speech on the basis of viewpoint; that is, it may not single out for approval or disapproval a particular point of view. Content-based but viewpoint-neutral regulation is presumed unconstitutional, but it is acceptable in certain, narrow circumstances. Content-neutral restrictions are evaluated through a balancing test, one that looks at the extent of the harm, the existence of alternative outlets, the availability of less restrictive means of regulation, and so forth.

These general propositions lead to some concrete conclusions for hate speech and pornography:

1. Racial hate speech, including cross-burning, often qualifies as speech. In some circumstances, it is high-value speech. Much racist speech belongs at the free speech core because it is a self-conscious contribution to social deliberation about political issues. Government may, of course, regulate such speech through the trespass laws or through other content-neutral methods. In many of

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[1] The best discussions are Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189 (1983); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U Chi L Rev 46 (1987).

the hard cases, the question is whether the relevant regulation is adequately neutral.

2. Courts should uphold very narrow, content-based restrictions on hate speech if the speech in question is not reasonably taken to be part of the exchange of ideas. Colleges and universities ought to have mildly broader authority over hate speech, because restrictions on some such speech may be necessary to the educational mission.

3. Certain forms of pornography count as speech, but they are not plausibly intended or received as a contribution to political deliberation, and they fall within the low-value category. They may be regulated on the basis of a lesser showing of harm than the First Amendment requires for regulation of political speech.

4. Sexual and racial discrimination in the workplace can be analyzed in either of two ways. We might treat discrimination, if purely verbal, as low-value speech, regulable because of the distinctive harms it causes. Alternatively, we might say that some forms of discrimination amount to the commission of acts that may be prohibited by law.

There is a broader agenda behind these claims. Sometimes constitutional doctrine seems to have lost sight of the point of central constitutional commitments. Sometimes the commitment to free speech seems like an abstraction insufficiently closely connected with democratic goals, or indeed with any clearly describable set of governing aspirations. A good first step is to insist that the First Amendment has a point, or a set of points, that this includes the promotion of a well-functioning democratic system, and that the interpretation of the Amendment should have this goal in mind. Similarly, the commitment to equality sometimes seems to have lost sight of its original foundations in the commitment to the rejection of the system of caste. Sometimes it seems as if equality, as a constitutional concept, has no clear connection to this commitment, or to any identifiable commitment at all. Of course there are sharp institutional limits on the capacities of courts to promote the goals of the Civil War Amendments, as the framers were well aware.[2] Enforcement of those goals now seems to have fallen to other branches—a highly salutary development—and when Congress and the President have attempted to carry forward their constitutional responsiblities, courts should be hospitable rather than grudging.

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[2] See text accompanying notes 9-11.

This Essay is organized into five sections. Section I briefly sets out an equality principle that bears on free speech problems. Using conventional doctrinal categories, Section II offers an argument for allowing regulation of certain forms of pornography and hate speech. Section III discusses the view that regulation of this kind is impermissibly selective. Section IV attempts to sort out some complex issues involving the distinction between words and conduct. Section V outlines some possible directions for the future; it pays special attention to the possibility of preventing harms through strategies that do not raise First Amendment problems.

I. The Anticaste Principle—and Free Speech

A. Caste

I am concerned here with the relationship between equality and free speech. To discuss that relationship, we must first identify the appropriate conception of equality. At the origin, the central target of the Fourteenth Amendment was not irrational distinctions based on race, but rather the system of racial caste in American society.[3] For those who ratified the post–Civil War Amendments, the problem was that the law had contributed to a system of caste based on race, thought to be a morally irrelevant characteristic.

Those who framed and ratified these Amendments were aware that the system of racial hierarchy had often been attributed to nature. Thus in the aftermath of the American Civil War, it was expressly urged, "God himself has set His seal of distinctive difference between the two races, and no human legislation can overrule the Divine decree."[4] In the same period, antidiscrimination law was challenged squarely on the ground that it put the two races in "*unnatural* relation . . . to each other."[5] The post–Civil War Amendments thus rejected the supposed naturalness of racial hierarchy. The framers thought this hierarchy was a function not of natural difference but of law, most notably the law of slavery and

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[3] See Charles Fairman, *Does The Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 Stan L Rev 5, 21-24, 138-39 (1949); Cass R. Sunstein, *The Partial Constitution* 340-41 (Harvard, 1993).

[4] Speech of Representative M.I. Southard, 43d Cong, 1st Sess (Jan 7, 1874), in 2 Cong Rec app 1, 3.

[5] 43d Cong, 2d Sess (Fed 4, 1875), in 3 Cong Rec 983 (statement of Representative Eldredge).

the various measures that grew up in the aftermath of abolition.[6] The animating purpose of the Civil War Amendments was an attack on racial caste.

We might similarly understand the problem of sex discrimination as the existence of a caste-like system, based on gender and often operating through law. That system, like the racial caste system and others as well, is often attributed to "nature" and "natural differences." Consider here Mill's remarks:

> But was there any domination which did not appear natural to those who possessed it? . . . So true is it that unnatural generally means only uncustomary, and that everything which is usual appears natural. The subjection of women to men being a universal custom, any departure from it quite naturally appears unnatural.[7]

A principal feature of the caste system based on gender consists of legal and social practices that translate women's sexual and reproductive capacities into a source of second-class citizenship. Consider, for example, inequalities in political influence, the disproportionate subjection of women to poverty and sexual violation, and differences in educational opportunity and health care.[8]

In these circumstances, I suggest that the appropriate equality principle in the areas of both race and sex equality is an opposition to caste. The legal objection should be understood as an effort to eliminate, in places large and small, caste-like discrimination rooted in race and gender. The controlling principle is not that blacks and women must be treated "the same" as whites and men, but that blacks and women must not be second-class citizens.

With respect to vindication of the anticaste principle, there are important differences between the obligations of the courts and

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[6] Consider, for example, Senator Pratt's remarks during debate on proposed amendments to the Civil Rights Act of 1875: "You object because they have been a servile race and are as yet unfit to perform the duties of citizenship. But who made them slaves and kept them in ignorance?" 43d Cong, 1st Sess (May 20, 1874), in 2 Cong Rec 4082.

[7] John Stuart Mill, *The Subjection of Women*, reprinted in John M. Robson, ed, 21 *Collected Works of John Stuart Mill* 259, 269-70 (Toronto, 1984). Compare this description of attitudes in prerevolutionary America:

> So distinctive and so separated was the aristocracy from ordinary folk that many still thought the two groups represented two orders of being. . . . Ordinary people were thought to be different physically, and because of varying diets and living conditions, no doubt in many cases they were different. People often assumed that a handsome child, though apparently a commoner, had to be some gentleman's bastard offspring.

Gordon S. Wood, *The Radicalism of the American Revolution* 27 (Knopf, 1992).

[8] See Mary Becker, *Politics, Differences and Economic Rights*, 1989 U Chi Legal F 169, for a discussion of many of these inequalities.

the obligations of legislatures. It should not be forgotten that the nation originally anticipated legislative enforcement of the obligations of the Civil War Amendments.[9] Indeed, the judicial enforcement of the Fourteenth Amendment stands as one of the most profound ironies in constitutional history. In the aftermath of the *Dred Scott* decision, the ratifiers anticipated legislative rather than judicial implementation of the Civil War Amendments, and Section 5 of the Fourteenth Amendment was thought especially important.[10]

History aside, a high degree of judicial caution is justified on many grounds. Courts lack the relevant factfinding abilities and policymaking competence. Because their judgments are not self-implementing, judges often fail when they attempt to produce large-scale social reform.[11] There are also serious problems of democratic legitimacy when courts seek to introduce large changes on their own. For these reasons, courts ought to play a cautious role in the elimination of caste. But the need for judicial caution should not obscure the substantive point: The anticaste principle lies at the heart of the constitutional prohibition, and that principle imposes substantial duties on Congress and the President.

The concept of caste by no means defines itself. I will have to offer a brief and inadequate account here.[12] In so doing I do not suggest that the caste-like features of all societies containing race and sex inequality are the same. Certainly, the American system of race and sex discrimination is far less oppressive than most systems of racial and gender caste. But I do claim that the caste-like features are what justify social and legal concern.

The motivating idea behind an anticaste principle is, broadly speaking, Rawlsian in character.[13] It holds that without very good reasons, social and legal structures ought not to turn morally-irrelevant differences into social disadvantages, and certainly not if the disadvantage is systemic. A difference is morally irrelevant if it has no relationship to individual entitlement or desert. Race and sex are certainly morally irrelevant characteristics in this sense; the bare fact of skin color or gender does not entitle one to social superiority. Of course, individual needs may depend in part on race or

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[9] See Fairman, 2 Stan L Rev at 21-24 (cited in note 3).

[10] Id at 57-58.

[11] See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 13-21 (Chicago, 1991); Donald Horowitz, *The Courts and Social Policy* 255-93 (Brookings, 1977).

[12] For more detail, see Sunstein, *The Partial Constitution* at 338-46 (cited in note 3).

[13] See John Rawls, *A Theory of Justice* § 3 at 12 (Harvard, 1971).

gender, and those needs may bear on what government should do.[14]

A systemic disadvantage is one that operates along standard and predictable lines in multiple important spheres of life, and applies in realms that relate to basic participation as a citizen in a democracy. These realms include education, health care, freedom from private and public violence, wealth, political representation, and political influence.[15] The anticaste principle means that one group ought not to be systematically beneath another with respect to basic human capabilities and functionings.[16] A particular concern is that self-respect and its social bases ought not to be distributed along the lines of race and gender.[17] The social practices in a system of caste produce a range of obstacles to the development of self-respect, largely because of the presence of the morally irrelevant characteristic that gives rise to caste-like status.

In the areas of race and sex discrimination, the problem is precisely this sort of systemic disadvantage. A social or biological difference systematically subordinates the relevant group—not because of "nature," but because of social and legal practices. The resulting inequality occurs in multiple spheres and along multiple indices of social welfare: poverty, education, health, political power, employment, susceptibility to violence and crime, and so forth.[18] That is the caste system to which the legal system should respond. This point does not deny the fact of biological difference or even biological disadvantage. I do not claim that there would be equality in the state of nature, a question that is irrelevant for our purposes.[19] The point is that social and legal practices make biological differences count, or matter, and this point is not falsified by showing what would happen in "nature." What is at issue is whether the social and legal practices are justified.

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[14] See Amartya Sen, *Inequality Reexamined* 113 (Harvard, 1992).

[15] Compare John Rawls, *Political Liberalism* 227-30 (Columbia, 1993) (discussing "constitutional essentials").

[16] On capabilities and functionings, see Sen, *Inequality Reexamined* at 39-55; Amartya Sen, *Commodities and Capabilities* 51-71 (Elsevier Science, 1985); Martha C. Nussbaum, *Aristotelian Social Democracy*, in R. Bruce Douglass, Gerald R. Mara, and Henry S. Richardson, eds, *Liberalism and the Good* 203, 208-17 (Routledge, 1990).

[17] Self-respect is emphasized in Rawls, *A Theory of Justice* § 67 at 440-42; and Rawls, *Political Liberalism* at 318.

[18] Some of the relevant data is catalogued in Joni Seager and Ann Olson, *Women in the World: An International Atlas* (Pluto, 1986); Debbie Taylor, *Women in Analysis*, in *Women: A World Report* 1-98 (Oxford, 1985).

[19] See John Stuart Mill, *Nature*, in *Three Essays on Religion* 3, 46-54 (Henry Holt, 1884).

B. Speech

Very provisionally, I propose that the free speech principle attempts to protect all symbols, whether or not words, that contribute to the exchange of ideas. (I offer many refinements and qualifications below.) Thus understood, the free speech principle can march hand-in-hand with the anticaste principle, and there is usually no tension between them. When tension does arise, courts ought to minimize infringements on either principle. But it is certainly imaginable that unrestricted speech can contribute to gender and racial caste. For example, a principal feature of a caste system consists of disproportionate subjection to public and private violence. Acts that are symbolic and expressive in character—like some lynchings and some rapes—are important features of a constitutionally unacceptable caste system. But the problem is not limited to expressive acts. It is plausible that in their production and use, some forms of pornography are associated with violence against women.[20] It is also plausible that both pornography and racial hate speech have corrosive consequences on the self-respect of women and blacks. In these circumstances, unrestricted speech may contribute to the maintenance of a system with caste-like features.

The constitutional task then is to interpret the free speech and anticaste principles in such a way as to accommodate both aspirations. We might perform this task in two ways. First, the definition of protected speech could seek to exclude the most damaging forms of expression, on the theory that those forms do not belong in the "top tier" of constitutional protection and can be regulated because they cause sufficient harms. Second, the government might be permitted to justify certain narrow restrictions on speech by reference to the Civil War Amendments, by claiming that the interest in equality is sufficiently neutral and weighty to support those restrictions.[21] I will invoke both of these strategies below.

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[20] See text accompanying notes 55-57.

[21] See Akhil Reed Amar, *The Supreme Court, 1991 Term—Comment: The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 Harv L Rev 124, 151-60 (1992).

II. Conventional Doctrine

In this Section, I set the debate over pornography and hate speech in the context of general First Amendment doctrine.[22] Current law distinguishes between low-value and high-value speech; it treats bribery, perjury, unlicensed medical and legal advice, misleading commercial speech, and much else as bannable on the basis of a lesser showing of harm.[23] An approach of this sort is not only embedded in current law; it is also practically unavoidable. There is no way to run a system of free expression without making distinctions between different forms of speech in terms of their centrality to free speech ideals. I suggest that much pornography stands far afield of those ideals and is regulable because of the tangible harms that it causes. Hate speech often does stand at the free speech core, but it can be regulated (a) in a content-neutral way, as through the trespass laws, and (b) with narrow controls on epithets amounting to "fighting words." I also suggest that colleges and universities should have mildly greater authority over this form of speech.

A. Pornography

A now-familiar position, originally developed by Andrea Dworkin and Catharine MacKinnon, has emerged on the question of legal control of pornography.[24] The precise nature of this position is of course a matter of controversy. As I shall present the argument here, the basic claim is that sexually explicit speech should be regulated not because it is sexually explicit (the problem of "obscenity") but because and when it merges sex with violence (the problem of "pornography"). The problem of pornography does not stem from offense, from public access to sexually explicit materials, from an unregulated erotic life, or from violation of traditional values or community standards. Instead, the problem consists of tangible real-world harms, caused by the portrayal of women and children as objects for the control and use of others, most prominently

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[22] I draw here on Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 Colum L Rev 1, 13-29 (1992), and Cass R. Sunstein, *Democracy and the Problem of Free Expression* ch 5 (Free Press, 1993).

[23] See, for example, *Chaplinsky v New Hampshire*, 315 US 568, 571-72 (1942); *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*, 425 US 748, 770-73 (1976); *Gertz v Robert Welch, Inc.*, 418 US 323, 339-40 (1974).

[24] See Andrea Dworkin, *Pornography: Men Possessing Women* (Perigree, 1981); Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 146-62 (Harvard, 1987).

through sexual violence. The objection to pornography is thus closely associated with the anticaste principle, as that principle manifests itself in many efforts to prevent sex-related violence.[25]

1. Pornography, coercion, and violence.

My argument here thus deals with pornography that involves violence or coercion[26] and with the claim that pornography should be regulated because and when it harms women. Not all of those who focus on this problem understand it in this way. Some people treat pornography as a problem of sex discrimination not only because of its association with coercion and violence, but also because it is connected with subordination and dehumanization more generally.[27] It is certainly reasonable to think that non-violent material might portray women in a subordinate way, or treat women as objects for the use and control of others, and that here too there is reason for legal concern. If we moved beyond coercion and violence, we might ask more broadly about the role of pornography in creating inequality through the sexual subordination or objectification of women. I restrict the discussion here, however, to pornography that is associated with violence or coercion either in its production or in its use. I do so for two reasons. First, subjection to violence and coercion is an important ingredient in sexual inequality. Second, the broader understanding of the harms that pornography produces raises trickier First Amendment difficulties; it is helpful to begin with a relatively narrow understanding.

2. Civil vs. criminal remedies.

The approach I am discussing involves not a criminal ban, but a civil remedy for those who can prove actual harm as a result of pornography.[28] This remedy would work most simply on behalf of women abused in the production of pornography. It would also offer a tort-like remedy for women who can prove, under normal le-

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[25] See MacKinnon, *Feminism Unmodified* at 32-45, 166-95.

[26] I use the words "violence" and "coercion" in their most conventional sense. It is possible that someone could be coerced to participate in nonviolent pornography, and this could be tortious under the approach I am suggesting.

[27] See, for example, Rae Langton, *Whose Right?: Ronald Dworkin, Women, and Pornographers*, 19 Phil & Pub Aff 311, 335-36 (1990) (interpreting MacKinnon's argument). MacKinnon's own position on this is complex. Subordination is her principal target, not simply violence; but I think that violence or coercion in some form underlies much of the argument and almost all of her examples. See MacKinnon, *Feminism Unmodified* at 32-45, 166-95.

[28] See MacKinnon, *Feminism Unmodified* at 175-95, 200-05.

gal standards, that they have been harmed by the use of pornography to stimulate sex crimes.[29] In both cases, the usual remedy would be an award of monetary damages for actual harm. In some circumstances, a victim might also seek an injunction to prevent continued distribution or use of harmful material. For example, a woman forced to participate in a pornographic movie might be permitted to enjoin further sale of the movie.

Under this approach, the category of regulable speech might be relatively broad or extremely narrow. We might, for example, adopt the basic approach but decide to ensure protection for all material with serious social value. We might also refuse to regulate speech unless it has little real cognitive content. Or we might seek to regulate a subcategory of obscenity defined in terms of harms to women. In any case, the category of regulable speech could prove to be much smaller than the category now subject to regulation under the antiobscenity approach. This important point is often missed. The real difference between this approach and the current focus on obscenity[30] lies not in greater breadth of coverage but in its emphasis on discrimination and harm to women rather than offense or contemporary community standards.[31]

How is the First Amendment issue affected if women injured by pornography are given a civil action and if criminal prosecutors have no enforcement authority? In some ways, the civil action helps alleviate the First Amendment concerns. There is a special problem whenever the government proceeds against speech that it deems harmful, and a private suit does not pose this problem. In particular, there might seem to be no free speech problem if a woman injured in the production of pornography brings suit to recover damages for the harms done to her.[32] On the other hand, the

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[29] See Marianne Wesson, *Girls Should Bring Lawsuits Everywhere . . . Nothing Will be Corrupted: Pornography as Speech and Product*, 60 U Chi L Rev 845 (1993) (in this issue).

[30] See *Miller v California*, 413 US 15 (1973). The *Miller* standard defines obscenity as material that (a) under contemporary community standards appeals to the prurient interest; (b) "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (c) taken as a whole "lacks serious literary, artistic, political, or scientific value." Id at 24.

[31] See Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U Chi L Rev 873, 878-79 (1993) (in this issue).

[32] To be sure, it is sometimes the case that the state cannot punish speech that is produced through illegality; it may punish the illegality but not the publication. See *New York Times v United States*, 403 US 713, 730-40 (1971) (White concurring) ("Pentagon Papers" case). This idea makes most sense when (a) the speech is high-value; (b) the punishment of the illegality should provide sufficient deterrence, that is, there are no special reasons to think that a ban on publication is a necessary adjunct to the criminal law; or (c) both.

state is unquestionably involved when it awards damages for harms done by speech, and we know from *New York Times v Sullivan*[33] that the First Amendment imposes barriers to government efforts to force speakers to pay for the real costs that their speech produces. The parallel to *New York Times* is very close if the government says that anyone who produces art and literature must pay for injuries that result from his work. The question is not limited to material containing sexual violence. Dostoevsky's *Crime and Punishment* is said to have been followed by a series of copycat murders in Russia.

Serious constitutional problems would arise if government were to say that all speakers must pay the victims to restore losses from any crimes proximately resulting from their speech. First, any judge or jury decision about causation might well be unreliable, suspect, or affected by bias of various sorts. Second, the actor, not the speaker, should normally bear the burden for harm, at least when the normal First Amendment standards have not been met.[34] (This concern does not arise when the actor *is* the speaker.) And at least if we are talking about speech that is genuinely in the First Amendment core, *New York Times* seems to say that government may not require speakers to "internalize" the costs of what they say.[35] The Court's rationale is that cost-internalization will impose an excessive chilling effect on valuable speech.[36] It is possible to question this view,[37] but it seems to be the law, and so long as it is, a civil action for harms that result from speech is not fundamentally different from criminal prosecution. Aside from the case of a damage remedy for harms to participants in pornography, as to which the free speech concerns seem minimal,[38] I will therefore proceed on the assumption that as far as the First Amendment is concerned, the civil and criminal remedies stand on the same basic ground. The assumption may not be accurate insofar as we are dealing with speech far afield from the free speech core. But I will put this point to one side.

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[33] 376 US 254, 267-83 (1964).

[34] See *Brandenburg v Ohio*, 395 US 444 (1969) (articulating the current standard for punishing speech that constitutes "seditious advocacy").

[35] 376 US at 267-83.

[36] Id.

[37] See Frederick Schauer, *Uncoupling Free Speech*, 92 Colum L Rev 1321 (1992) (discussing non-speech-chilling methods of compensating victims of speech-related harms).

[38] See note 32 and accompanying text.

3. Antipornography vs. antiobscenity.

It is often suggested that the antipornography position raises especially serious free speech questions and that the antiobscenity and "no regulation" positions are far preferable.[39] In fact, however, there is a quite straightforward argument for regulating at least some narrowly defined class of pornographic materials. The first point, made by traditional obscenity law as well, is that much pornographic material lies far from the center of First Amendment concern.[40] Under current doctrine, and under any sensible system of free expression, speech that lies at the periphery of constitutional concern may be regulated on a lesser showing of harm than speech that lies at the core.

To be sure, it is not simple to define the core and the periphery. Debates over that issue are a staple of First Amendment controversy.[41] Familiar organizing theories look to whether the speech at issue is connected with the exchange of ideas,[42] or is intended and received as a contribution to social deliberation about some issue.[43] This latter position, with roots in James Madison, seems to me most plausible,[44] but under nearly any standard, at least some pornographic materials will be easily classified in the free speech periphery. Such materials fall in the same category as misleading commercial speech, libel of private persons, conspiracies, unlicensed medical or legal advice, bribes, perjury, threats, and so forth. These forms of speech do not appeal to deliberative capacities about public matters, or about matters at all—even if this category is construed quite broadly, as it should be, and even if we insist, as we should, that emotive and cognitive capacities are frequently intertwined in deliberative processes and that any sharp split between "emotion" and "cognition" would be untrue to political discussion. Many forms of pornography are not an appeal to

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[39] See, for example, Ronald Dworkin, *Two Concepts of Liberty*, in Edna Ullmann-Margalit and Avishai Margalit, eds, *Isaiah Berlin: A Celebration* 100, 103-09 (Chicago, 1991).

[40] See *Miller*, 413 US at 34-36.

[41] See, for example, Frederick Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge, 1982); Martin H. Redish, *The Value of Free Speech*, 130 U Pa L Rev 591 (1982); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 Phil & Pub Aff 204 (1972); T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U Pitt L Rev 519 (1979).

[42] See *Abrams v United States*, 250 US 616, 630 (1919) (Holmes dissenting); Richard A. Posner, *Economic Analysis of Law* § 27.1 at 665 (Little, Brown, 4th ed 1992).

[43] This is an attempted description of the political conception defended in Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper, 1948).

[44] I defend this position in depth in Sunstein, *Democracy and the Problem of Free Expression* ch 5 (cited in note 22).

the exchange of ideas, political or otherwise; they operate as masturbatory aids and do not qualify for top-tier First Amendment protection under the prevailing theories.[45]

An important qualification is necessary here. Those who write or read sexually explicit material can often claim important expressive and deliberative interests.[46] Sexually explicit works can be highly relevant to the development of individual capacities. For many, they are important vehicles for self-discovery and self-definition.[47] In light of the complexity of sexuality, the same might be said of some of the most graphic forms of sexually explicit material, even if they feature violence. Perhaps such speech is not intended and received as a contribution to democratic debate. But the development of individual capacities is instrumental to democratic characteristics,[48] and in any case it might be urged that the presence of expressive and deliberative interests qualifies material for treatment as within the free speech core.

In this space I cannot fully evaluate this view. No one has set out an approach to free speech value based on expressive and deliberative value. Such an approach would, however, have a questionable historical pedigree. Wherever it may stand in philosophy, it appears to be something of a newcomer to our constitutional tradition. Moreover, it does not connect well with an understanding of when government's motives are least likely to be trustworthy.[49] In any case, the approach appears to fit poorly with both existing law and ordinary convictions about particular cases. For example, child pornography and scientific speech might well be able to claim expressive and deliberative interests, and it seems hard to claim

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[45] To be sure, pornography is political in the sense that it has political consequences. But this does not mean that it is political in the First Amendment sense of that word. Much speech that does not belong in the top tier—misleading commercial speech, attempted bribery of public officials—has political consequences. If speech qualifies for the top tier whenever it has such consequences, almost all speech would so qualify, and First Amendment doctrine would be made senseless. Instead, the test is whether it is intended and received as a contribution to democratic deliberation—and much pornography fails that test. It is true that the recent attack on pornography has drawn attention to its political character, but this fact does not undermine the First Amendment argument, since the First Amendment conception of "the political" is properly and importantly different from the conception of "the political" in popular discussion.

[46] See Joshua Cohen, *Freedom of Expression*, 23 Phil & Pub Aff (forthcoming, 1993).

[47] See Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 Wis Women's L J 81, 116-33 (1987).

[48] As Meiklejohn urged in his extended conception of the political. See Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 S Ct Rev 245.

[49] I discuss the relevance of these concerns in Sunstein, *Democracy and the Problem of Free Expression* ch 5 (cited in note 22).

that they belong in the free speech core. If they did, they could not be regulable in light of the stringent standards applied to material within the core. To be sure, such materials are associated with harm; but for material in the core, the proper approach would be to attack the offending conduct directly rather than the speech, and to allow the speech so long as the *Brandenburg v Ohio*[50] standard has not been met. These considerations suggest that material ought not to belong in the free speech core, or in any top tier of protection, by virtue of its connection with deliberative and expressive interests, even if it is assumed that pornography is well-connected with those interests.

I do not claim that expressive and deliberative interests are irrelevant. When they are at stake, the material at issue is entitled to at least a degree of constitutional protection. It cannot be banned or controlled without a showing of genuine harm—much like commercial speech, private libel, and scientific speech. But because at least some sexually explicit material is far from the center of constitutional concern, it can be regulated on the basis of a lesser showing of harm.

Pornographic material causes sufficient harms to justify regulation under the more lenient standards applied to speech that does not fit within the free speech core. Of course it is possible to question the extent of the relevant harms; the empirical debates are complex, and I will only summarize some of the evidence here. But the harms do create a far stronger case for regulation than underlies the antiobscenity position, which relies on less tangible aesthetic goals and on the more vague idea of adherence to conventional moral standards. Notably, the relevant harms consist of acts committed against women by men. The category of regulable speech would therefore less plausibly include homosexual pornography, for which the same showing of harm cannot be made (so far as I am aware).

The harms fall in three categories.[51] First, the existence of the pornography market produces a number of harms to models and actresses.[52] Many women, usually very young, are coerced into pornography. Others are abused and mistreated, often in grotesque ways, once they enter the pornography "market." To be sure, most

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[50] 395 US 444 (1969).

[51] The following argument draws upon Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L J 589, 591-602.

[52] See the summary in US Department of Justice, Attorney General's Commission on Pornography, 1 *Final Report* 888-89 (US GPO 1986).

women who participate are not so abused. It is therefore tempting to respond that government should adopt a less restrictive alternative. Rather than regulating the speech, government should ban the coercion or mistreatment, as indeed current state law does. Usually this strategy is indeed better and even constitutionally required.[53] But in this peculiar setting, such an alternative would be a recipe for disaster, because it would simply allow existing practices to continue. The enforcement problems are so difficult that restrictions on the material are necessary to supplement the criminal ban.[54]

Second, it is reasonable to think that there is a causal connection between pornography and violence against women.[55] The extent of the effect and the precise relationship between exposure to pornographic and sexual violence are sharply disputed.[56] No one suggests that sexual violence would disappear if pornography were eliminated, or that most consumers of violent pornography act out what they see or read. But a review of the literature suggests a reasonable legislature could conclude that pornography does increase the incidence of sexual violence against women. The evidence includes laboratory experiments, longitudinal studies of the effects of increased availability of pornography, and victim and po-

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[53] It is by no means clear that government can ban speech merely because there is illegality in its production or acquisition. See *New York Times v United States*, 403 US 713 (1971) (allowing publication of material that was acquired unlawfully). Especially when the material belongs in the free speech top tier, the proper remedy is to prevent the illegality rather than to prevent the publication, at least if the *Brandenburg* standard cannot be met. In most cases, government should be required to proceed against the offending conduct. But in the context of pornography, these strictures should not apply. By hypothesis, the material is not in the top tier, and for reasons stated in the text, it seems inadequate to require the government to proceed against the conduct.

[54] The Court recognized this point in the context of child pornography in *New York v Ferber*, 458 US 747, 759-61 (1982).

[55] See generally Edward Donnerstein, Daniel Linz, and Steven Penrod, *The Question of Pornography: Research Findings and Policy Implications* 86-107 (Free Press, 1987); Mary R. Murrin and D.R. Laws, *The Influence of Pornography on Sex Crimes*, in W.L. Marshall, D.R. Laws, and H.E. Barbaree, eds, *Handbook of Sexual Assault: Issues, Theories, and Treatment of the Offender* 73 (Plenum, 1990); Edward Donnerstein, *Pornography: Its Effect on Violence Against Women*, in Neil M. Malamuth and Edward Donnerstein, eds, *Pornography and Sexual Aggression* 53 (Academic Press, 1984); Attorney General's Commission on Pornography, 1 *Final Report* at 888-89. On the problem of causation, see Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 Am Bar Found Res J 737.

[56] See Donnerstein, Linz, and Penrod, *The Question of Pornography* at 172; Anthony D'Amato, *A New Political Truth: Exposure to Sexually Violent Materials Causes Sexual Violence*, 31 Wm & Mary L Rev 575 (1990); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 Cal L Rev 297, 325-26 (1988).

lice testimony.[57] All three sources indicate a plausible connection between exposure to sexually violent material and sexually violent acts.

Evidence of this kind presents severe methodological problems. Laboratory experiments may inadequately connect to the real world, longitudinal studies cannot easily control for other variables, and victim and police testimony is anecdotal. Even if there were a close causal connection between pornography and real-world violence, social science would have a hard time proving it. But the current evidence is sufficiently suggestive to indicate that the real question is not the existence of a causal connection but its degree. In light of current information, it would be reasonable for a legislature to think that there would be genuine benefits from regulation of violent pornography.

These first two arguments—harm to participants and a causal connection with violent acts—suggest that antipornography legislation should be addressed only to movies and pictures, and not the written word. Of course it is only in movies and pictures that abuse of participants will occur. (One might similarly support a law against child pornography in movies and print while allowing written essays that amount to child pornography.) Moreover, the evidence on pornography as a stimulus to violence deals mostly with movies and pictures, and the immediacy and vividness of these media suggest a possible distinction from written texts. I do not discuss the exact breadth of an antipornography statute here. But the possibility of exempting written texts, no matter what they contain, suggests the weakness of the objection from neutrality: a statute that exempts written texts is very plausibly treated as harm-based rather than viewpoint-based.[58]

The third and most general point is that pornography promotes degrading and dehumanizing behavior toward women. Significantly, this behavior includes a variety of forms of illegal conduct, prominent among them sexual harassment. The pornography industry operates as a conditioning factor for some men and women, a factor that has consequences for equality between men and women. These conditioning effects are associated with harmful consequences for self-respect. Of course, pornography is more symptom than cause; but it is cause as well. One need not believe

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[57] Two reviews, reaching different conclusions, can be found in Richard A. Posner, *Sex and Reason* 366-74 (Harvard, 1992); and Sunstein, 1986 Duke L J at 597-601 (cited in note 51).

[58] See Section III.A.

that the elimination of pornography would bring about sexual equality, eliminate sexual violence, or change social attitudes in any fundamental way in order to agree that a regulatory effort could reduce violence and diminish views that contribute to existing inequalities.

Invoking the injury to self-respect, a common argument holds that this dehumanizing behavior has the effect of "silencing" women: making them believe that their opinions are of less importance, will be ignored, will meet social sanctions, or worse.[59] It is surely reasonable to think that such silencing occurs. But hard questions are raised by the claim that the argument from "silencing" properly plays a significant role in the First Amendment inquiry. This form of silencing is produced by social attitudes resulting from speech itself, and perhaps one cannot find that to be a reason for regulation without making excessive inroads on a system of free expression. Many forms of speech do indeed have silencing effects, and this is not a sufficient reason to regulate them.[60] There are two problems here. First, it is uncertain whether the form of silencing that results from speech itself should be, in principle, a basis for regulating speech. Certainly in general it seems right to say that people intimidated by the speech of others should learn not to be intimidated, rather than receive a right to silence intimidating speech.[61] Second, even if we resolve the question of principle in favor of the "silencing" argument, government institutions are peculiarly unlikely to be able to make reliable judgments on this issue. It is plausible to think that would-be speakers are often silenced by especially vigorous challenges, and government regulation of those challenges, based on "silencing," might well be rooted in objectionable motivations and untrustworthy conclusions. Much remains to be done on this difficult subject. But in the area of pornography regulation, it seems best to avoid the most controversial and adventurous claims, and so I will not rely on the silencing argument here.

Taken as a whole, these considerations suggest a quite conventional argument for regulation of pornography, one that fits well with the rest of free speech law. For example, misleading commercial speech is regulable because it is not entitled to the highest

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[59] See MacKinnon, *Feminism Unmodified* at 181, 188-89 (cited in note 24).

[60] See Dworkin, *Two Concepts of Liberty* at 107-09 (cited in note 39).

[61] Under some narrow circumstances, this conclusion may not hold. The university setting is a possible example in that certain sorts of abusive faculty speech may silence student speech.

form of protection and because the harms produced by such speech are sufficient to allow for regulation. The same is true of libel of private persons, criminal solicitation, unlicensed legal or medical advice, and conspiracy. Certain forms of pornography should be approached similarly. Indeed, the argument for regulation—in view of the nature of the material and the evidence of harm—seems more powerful than the corresponding argument for many forms of speech now subject to government control. Thus far, then, the hard issues have to do with the appropriate breadth and clarity of any prohibition, not with the basic approach.

B. Hate Speech

Hate speech raises quite different issues from pornography. Hate speech is often part and parcel of public debate on certain questions; pornography is not. Many forms of pornography are far from the center of constitutional concern; nothing of this sort can be said for the many kinds of hate speech that are designed and received as judgments about certain social questions. If restrictions on hate speech cover not merely epithets but also speech that is part of social deliberation, they appear overbroad and unconstitutional for that very reason.[62] Speech that is intended and received as a contribution to social deliberation is constitutionally protected even if it amounts to hate speech—even if it is racist and sexist.

In a famous case, Justice Frankfurter, speaking for a 5-4 majority, seemed to reject this view. *Beauharnais v Illinois*[63] upheld an Illinois law making it unlawful to publish or exhibit any publication that "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, which [publication] exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots."[64] The law was applied to ban circulation of a petition urging "the need to prevent the white race from becoming mongrelized by the negro," and complaining of the "aggressions, rapes, robberies, knives, guns and marijuana of the negro."[65]

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[62] *Doe v University of Michigan*, 721 F Supp 852, 864-66 (E D Mich 1989) (invalidating university hate speech regulation); *UWM Post, Inc. v Board of Regents of the University of Wisconsin*, 774 F Supp 1163, 1172-78 (E D Wis 1991) (same).

[63] 343 US 250 (1952).

[64] Id at 251, quoting Ill Rev Stat ch 38(1) § 471 (1949), codified at Ill Crim Code § 224a (1979).

[65] 343 US at 252.

In upholding the law, Justice Frankfurter referred to the historical exclusion of libel from free speech protection, to the risks to social cohesion created by racial hate speech, and to the need for judicial deference to legislative judgments on these complex matters.[66] Many countries in Europe accept the same analysis and do not afford protection to racial and ethnic hate speech.[67] But most people think that after *New York Times v Sullivan*, *Beauharnais* is no longer the law.[68] In *New York Times*, the Court indicated that the law of libel must be evaluated in accordance with the constitutional commitment to robust debate on public issues.[69] The conventional view—which the Supreme Court has not directly addressed—is that racial hate speech contains highly political ideas, and that it may not be suppressed merely because it is offensive or otherwise harmful.

There are real complexities here. In its strongest form, the defense of *Beauharnais* would point not only to Justice Frankfurter's argument, but also to the contribution of hate speech to the maintenance of a caste system based on race. A principal point here would be the effect of such speech on the self-respect of its victims and its relationship to fears of racially-motivated violence.[70] I cannot fully discuss this issue here, but I think that the conventional view on the matter is probably correct.[71] No one should deny that distinctive subjective and objective harms are produced by racial hate speech, especially when it is directed against members of minority groups. It is only obtuseness—a failure of perception or empathetic identification—that would enable someone to say that the word "fascist" or "pig" produces the same feelings as the word "nigger." In view of our history, invective directed against minority groups, and racist speech in general, creates fears of violence and subordination that are not plausibly described as mere offense. It might be added that some forms of hate speech amount to a denial of the premise of political equality that is central to a well-func-

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[66] Id at 254-66.

[67] See, for example, Public Order Act of 1986 § 23 (United Kingdom); Strafgesetzbuch [STGB] § 131 (Federal Republic of Germany).

[68] See, for example, *Collin v Smith*, 578 F2d 1197, 1204 (7th Cir 1978) (questioning whether "*Beauharnais* would pass constitutional muster today").

[69] 376 US at 270.

[70] See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L J 431, 457-76; Mari Matsuda, *Public Response to Racist Speech*, 87 Mich L Rev 2320, 2320-41 (1989); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 Harv CR-CL L Rev 133, 135-49 (1982).

[71] For a more detailed description, see Sunstein, *Democracy and the Problem of Free Expression* ch 6 (cited in note 22).

tioning democracy. In this light, there is nothing obvious about the view that the law should be banned from guarding against speech that causes racial hatred. As noted above, most European countries, including flourishing democracies committed to free speech, make exceptions for such expression. In many countries, including our own, it is possible to think that racial and ethnic hate speech is really *sui generis*, and that it is properly treated differently from other forms of political speech.

On the other hand, a good deal of public debate involves racial or religious bigotry or even hatred, implicit or explicit. If we were to excise all such speech from political debate, we would severely curtail our discussion of such important matters as civil rights, foreign policy, crime, conscription, abortion, and social welfare policy. Even if a form of hate speech is involved, it might well be thought a legitimate part of the deliberative process—it bears directly on politics. Foreclosure of such speech would probably accomplish little good, and by stopping people from hearing certain ideas, it could bring about a great deal of harm. These are the most conventional Millian arguments for the protection of speech.[72]

These general propositions do not resolve all of the questions raised by restrictions on hate speech, but they do suggest that distinctions must be drawn between different forms of speech that fall within the category. It seems to follow that many imaginable restrictions on hate speech cut too broadly. Consider, for example, the University of Michigan's judicially invalidated ban on "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status, and that . . . [c]reates an intimidating, hostile, or demeaning environment for educational pursuits . . . ."[73] This sort of broad ban forbids a wide range of statements that are part of the exchange of ideas. It also fails to give people sufficient notice of what statements are allowed. For both reasons, it should be invalidated.

But some restrictions on hate speech do not run afoul of these principles. For example, Stanford now forbids speech that amounts to "harassment by personal vilification."[74] (Stanford is a private

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[72] See John Stuart Mill, *On Liberty*, reprinted in John M. Robson, ed, 18 *Collected Works of John Stuart Mill* 213, 257-58 (Toronto, 1984).

[73] Quoted in *Doe*, 721 F Supp at 856.

[74] See Thomas C. Grey, *Civil Rights vs. Civil Liberties*, in Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, eds, *Reassessing Civil Rights* 81, 106 (Blackwell, 1991).

university, free from constitutional restraint; but it has chosen to comply with its understanding of what the First Amendment means as applied to public universities.)[75] Under the Stanford rule, speech qualifies as regulable "harassment" if it:

> (a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and (b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and (c) makes use of insulting or "fighting" words or nonverbal symbols.[76]

To qualify under (c), the speech must by its "very utterance inflict injury or tend to incite to an immediate breach of the peace," and must be "commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of" one of the grounds enumerated in (b).[77]

The Stanford regulation should not be faulted for excessive breadth. It is quite narrowly defined. Unlike the Michigan rule, it does not reach far beyond epithets to forbid the expression of views on public issues. On an analogy to the obscene telephone call, which is without constitutional protection,[78] official restrictions of the sort represented by the Stanford regulation should not be invalidated under the First Amendment. If this general approach is correct, the problem of hate speech should turn on whether the speech at issue plausibly qualifies as a contribution to the exchange of ideas.[79] If it does not, it can be regulated on the basis of the relevant showing of harm.

III. NEUTRALITY

I have not yet discussed the issue of selectivity. The Supreme Court has made clear that discrimination on the basis of viewpoint lies at the heart of the free speech prohibition.[80] For example, the government may not draw lines between libel of conservatives and

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[75] Id at 90-105.

[76] Id at 106.

[77] Id at 107.

[78] *Sable Communications of California v FCC*, 492 US 115, 124 (1989) (making a distinction between obscene phone calls, which are unprotected under the *Miller* test, and phone calls that are merely indecent and hence protected by the First Amendment).

[79] I suggest below somewhat broader authority in education. See Section III.C.

[80] See, for example, *Texas v Johnson*, 491 US 397, 414 (1989); *United States v Eichman*, 496 US 310, 317-19 (1990); *Perry Education Ass'n v Perry Local Educators' Ass'n*, 460 US 37, 62 (1983) (Brennan dissenting).

libel of liberals—even if the relevant libel is generally without constitutional protection. Similarly, the government could not impose special penalties on fighting words directed against Republicans.

Under current law, the prohibition on selectivity is fatal to many possible restrictions on pornography and hate speech. I think that the principle is unobjectionable—indeed, it is extremely salutary. But the principle should not be used, as it now is, to doom narrowly drawn regulation of pornography and hate speech.

A. Pornography

The antipornography position remains poorly represented not only in popular debate but also in current constitutional law. Above all, the position is said to run afoul of the prohibition on viewpoint discrimination. I suggest that part of what has made the antipornography approach so controversial is that it is rooted in a belief that there is something like a caste system based on gender—that women are treated unequally to men, that the sexual and reproductive status quo, as between men and women, is itself sometimes a place for inequality, that sexual violence by men against women is a greater social problem than sexual violence by women against men, and that social inequality can be both expressed and perpetuated through sexuality. The rejection of these propositions—a refusal to recognize existing inequality, transmuted into a claim of partiality—has proved to be critical for constitutional law. The objection here is that the antipornography position is selective (especially compared with the antiobscenity approach), and that in its selectivity lies its partisanship, which is what makes it fatally inferior to its competitors.

In the leading decision on the subject, the United States Court of Appeals for the Seventh Circuit, in a case affirmed summarily by the Supreme Court, invalidated an antipornography ordinance.[81] The court reasoned that an argument that would allow regulation of pornographic materials by reference to the harms referred to above is worse, not better, than the obscenity approach. Indeed, it would be worse than the obscenity approach even if the category of speech suppressed turned out to be far narrower than the category that can be suppressed under existing law. According to the court's reasoning, any statute that imposed penalties on a

[81] *American Booksellers Ass'n v Hudnut*, 771 F2d 323 (7th Cir 1985), aff'd mem, 475 US 1001 (1986).

subcategory of obscene speech, defined by reference to these harms, would be unconstitutional.[82]

For the court, the key point is that such an approach would constitute impermissible "thought control," since it would "establish[ ] an 'approved' view of women, of how they may react to sexual encounters, [and] of how the sexes may relate to each other."[83] Under the antipornography approach, depictions of sexuality that involve rape and violence against women may be subject to regulation, whereas depictions that do not are uncontrolled. It is the nonneutrality of antipornography legislation—its focus on violence against women—that is its central defect. People with the approved view can speak; people with the disapproved view cannot. That, in the court's view, is what the First Amendment centrally prohibits.[84]

The general point seems correct; the prohibition on viewpoint discrimination does lie at the heart of the free speech guarantee.[85] But especially in this setting, the category of viewpoint neutrality proves far more difficult to understand than it appears at first glance. First Amendment law contains several categories of speech that are subject to ban or regulation even though they are nonneutral in very much the same sense as antipornography legislation. Imagine, for example, that government bans advertising in favor of gambling at casinos. This restriction seems viewpoint-based. Such bans do not simultaneously prohibit advertising aimed *against* gambling. Nonetheless, the Supreme Court has upheld this unquestionably viewpoint-based restriction.[86]

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[82] Id at 330-32.

[83] Id at 328.

[84] Id at 328-32.

[85] See Stone, 25 Wm & Mary L Rev at 198 (cited in note 1).

[86] *Posadas v Tourism Co. of Puerto Rico*, 478 US 328 (1986). Perhaps it would be possible to argue that the restriction is not really viewpoint-based, because there is no real category called "advertisements against gambling." Speech of that kind is really a public-interest announcement. Real viewpoint discrimination would consist of a ban on "pro-gambling" messages, which are not banned. The prohibition on advertisements for casino gambling does not prevent people from advertising their view that gambling is a good idea. On this view, the ban on casino gambling—and the other examples offered in the text—are not real examples of viewpoint discrimination.

I do not believe that this is a persuasive response. It amounts to a reshuffling of the categories, and does not come to terms with the real discrimination in the examples. People cannot buy advertising time or space to stimulate demand for certain activities, whereas people can do precisely this in order to dampen demand for those activities.

Courts have also upheld restrictions on cigarette or liquor advertising on television[87]—even though there are no restrictions on the plentiful advertising aimed against the smoking of cigarettes or the drinking of liquor. These restrictions constitute another example of acceptable viewpoint discrimination. Perhaps the most vivid illustration of such discrimination is the ban on advertising of unlawful products or activities.[88] I cannot sell an advertisement for cocaine or heroin, even though the government permits and even encourages advertisements designed to stop the use of drugs. There is unambiguous viewpoint discrimination in this state of affairs.

Most people agree that these kinds of regulation present no constitutional problem. The reason is that the restriction is based on such obvious harms that the notion that it is viewpoint-based does not even register. Casino gambling, cigarette smoking, drinking, and use of illegal drugs all pose obvious risks to both self and others. Governmental controls on advertising for these activities are a means of controlling these risks.

Or consider, as another example of viewpoint discrimination, the area of labor law, where courts have held that government may ban employers from speaking unfavorably about the effects of unionization in the period before a union election if the unfavorable statements might be interpreted as a threat against workers who support unionization.[89] Regulation of such speech is plausibly a form of discrimination on the basis of viewpoint, because it does not proscribe employer speech favorable to unionization. As a final example, consider the securities laws, which regulate speech in proxy statements. Restrictions on viewpoint can be found here, too. Favorable views toward a company's prospects are banned, while unfavorable views are permitted and perhaps even encouraged.[90]

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[87] See *Oklahoma Telecasters Ass'n v Crisp*, 699 F2d 490 (10th Cir 1983), rev'd on other grounds, *Capital Cities Cable v Crisp*, 467 US 691 (1984) (alcohol); *Dunagin v City of Oxford*, 718 F2d 738 (5th Cir 1983) (alcohol); *Capital City Broadcasting Co. v Mitchell*, 333 F Supp 582 (D DC 1971) (three-judge court), aff'd mem, 405 US 1000 (1972) (cigarettes).

[88] See *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*, 425 US 748, 772 (1976).

[89] See *NLRB v Gissel Packing Co.*, 395 US 575, 618-20 (1969).

[90] Compare 17 CFR § 240.14a-9 (1992) (prohibiting false or misleading statements in proxy statements and offering as an example "predictions of specific future market values"); and 15 USC § 78n(e) (1988) (prohibiting untrue statements of fact or omissions of material facts in proxy statements); with Regulation S-K § 503, codified in 17 CFR § 229.503 (1992) (requiring disclosure of high-risk factors in a prospectus).

We should conclude from all this that there is no per se barrier to viewpoint discrimination. Laws that silence one side in a debate are given a strong presumption of invalidity, but the presumption can be overcome in certain narrow circumstances. Those circumstances appear to occur when there is no serious risk of illegitimate government motivation, when low-value or unprotected speech is at issue, when the skewing effect on the system of free expression is minimal, and when the government is able to make a powerful showing that it is responding to genuine harm. When these requirements are met, the partisanship of the regulation is not apparent because there is so firm a consensus on the presence of real-world harms that the objection from neutrality does not even register. The spectre of partisanship does not arise because a decision to control the speech in question has obvious legitimate justifications, and an extension of the prohibition to other areas appears not compelled by neutrality but instead to be an unnecessary form of censorship.

The point suggests that the *Hudnut* court proceeded to its conclusion too quickly; it should have investigated the many cases in which apparent viewpoint discrimination is acceptable. Indeed, the current law of obscenity might readily be regarded as non-neutral. Along some dimensions, antiobscenity law is not a bit less partisan than antipornography legislation. The line drawn by existing law makes it critical whether the speech in question is prurient and patently offensive by reference to contemporary community standards.[91] But if contemporary community standards are, with respect to offensiveness and prurience, themselves partisan and reflective of a particular viewpoint (and it would be most surprising if they were not), then a decision to make contemporary standards the basis for regulation is impermissibly partisan. (Imagine if the government said that contemporary community standards would be the basis for regulating depictions of race relations.) On what theory, then, can antiobscenity law be treated as neutral and antipornography law as impermissibly partisan?

I suggest that the answer lies in the fact that antiobscenity law takes existing social consensus as the foundation for decision, whereas antipornography law is directed against that consensus. Existing practice is the target of the antipornography approach, or what that approach seeks to change; existing practice is the very basis of the antiobscenity approach, or what that approach seeks

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

to preserve. Obscenity law, insofar as it depends on community standards, is deemed neutral only because the class of prohibited speech is defined by reference to existing social values. Anti-pornography legislation is deemed impermissibly partisan because the prohibited class of speech is defined by less widely accepted ideas about equality between men and women—more precisely, by reference to a belief that equality does not always exist even in the private realm, that sexual violence by men against women is a greater problem than sexual violence by women against men, and that the sexual status quo is an ingredient in sexual inequality.

Along the axis of neutrality, however, there is no sharp distinction between antiobscenity and antipornography law. That distinction would be plausible only if existing norms and practices themselves embodied equality. Because they do not, the distinction fails. Indeed, one could imagine a society in which the harms produced by pornography were so widely acknowledged and so generally condemned that an antipornography ordinance would not be regarded as viewpoint-based at all but instead as a perfectly natural response to harm—much as the Supreme Court now views the ban on child pornography.[92]

I conclude that the argument for regulating materials that combine sex with violence is more powerful than the corresponding argument for regulating obscenity. Since perfectly conventional measures regulating speech are similarly partisan and have properly been upheld, the objection from non-neutrality is unpersuasive here as well. More particularly, the standards for accepting laws that contain viewpoint discrimination seem to be met here. There are sufficient justifications based on tangible harms. By hypothesis, the regulated speech is low-value under any plausible approach to valuation under the First Amendment.

Moreover, it is not impermissibly selective to aim at material that contains and promotes violence against women. This is so especially in light of the Constitution's commitment to the elimination of caste, a commitment that is violated by disproportionate violence against any social group defined in terms of a morally irrelevant characteristic. It should be recalled here that the Equal Protection Clause was originally conceived as an effort to counteract the disproportionate subjection of black people to private and public violence. An effort to counteract the disproportionate subjection of women to such violence is very much in keeping with the

[92] *New York v Ferber*, 458 US 747, 756-61 (1982).

aspirations of the Equal Protection Clause. Such an effort should not be deemed inconsistent with neutrality.

I do not claim that it will be easy to design regulations with sufficient clarity and narrowness. But it is those questions that we should be addressing, not the question of neutrality. So long as any emerging law has the requisite clarity and narrow scope, the appropriate forum for deliberation on this contested subject is the democratic process, not the judiciary. The Constitution should not bar a narrowly defined prohibition on material that combines sex with violence against women.

A final note. Nothing I have said here argues in favor of regulation of sexually explicit material in general, or, to take an important and revealing example, of the work of Robert Mapplethorpe, an artist who was recently subject to criminal prosecution for his art depicting, among other things, homosexual relations.[93] As I have understood it here, the antipornography argument is quite specific in its aims. It is not directed against sexually explicit material as a whole. The antipornography argument, rightly understood, calls for strong protection of speech that complains explicitly or implicitly about discrimination against homosexuals, because that speech is "high value" in the relevant sense and because it contains few or none of the harms that call for regulation of pornography.

B. Hate Speech

Are restrictions on hate speech impermissibly selective? In *R.A.V. v City of St. Paul*,[94] the Court invalidated a law directed against a certain kind of hate speech, principally on the ground that it discriminated on the basis of subject matter. As interpreted by the Minnesota Supreme Court, the relevant law banned any fighting words that produced anger or resentment on the basis of race, religion, or gender.[95] The *R.A.V.* Court emphasized that the law at issue was not a broad or general proscription of fighting words.[96] Instead, the law reflected a decision to single out a certain category of "fighting words," defined in terms of audience reactions *to speech about certain topics*.[97] Is this constitutionally ille-

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[93] See *City of Cincinnati v Contemporary Arts Center*, 57 Ohio Misc 2d 9, 566 NE2d 207 (1990).

[94] 112 S Ct 2538 (1992).

[95] Id at 2541.

[96] Id at 2547-48.

[97] Id.

gitimate? The point bears on almost all efforts to regulate hate speech.[98]

Subject matter restrictions are not all the same. We can imagine subject matter restrictions that are questionable ("no one may discuss homosexuality on the subway") and subject matter restrictions that seem legitimate ("no high-level CIA employee may speak publicly about classified matters relating to the clandestine affairs of the American government."[99]) As a class, subject matter restrictions appear to occupy a point somewhere between viewpoint-based restrictions and content-neutral ones. Sometimes courts uphold such restrictions as a form of permissible content regulation. For example, the Court has permitted prohibitions of political advertising on buses[100] and of partisan political speech at army bases.[101] These cases show that there is no per se ban on subject matter restrictions. When the Court upholds subject matter restrictions, it is either because the line drawn by government gives no real reason for fear about lurking viewpoint discrimination, or (what is close to the same thing) because government is able to invoke neutral, harm-based justifications for treating certain subjects differently from others. In raising this issue, hate speech restrictions pose many of the same problems discussed above in connection with pornography.

If the subject matter restriction in the cross-burning case is acceptable, it must be because the specified catalogue of regulated speech is sufficiently neutral and does not alert the judge to possible concerns about viewpoint discrimination, or because (again a closely overlapping point) it is plausible to argue that the harms, in the specific covered cases, are sufficiently severe and distinctive to justify special treatment. This was the issue that in the end divided the Supreme Court.

In his separate opinion in *R.A.V.*, Justice Stevens argued that the harms were indeed sufficiently distinctive. He wrote: "Just as Congress may determine that threats against the President entail more severe consequences than other threats, so St. Paul's City

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[98] In the following discussion, I draw on Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv L Rev 741, 759-66 (1993), though I have made a number of new points here. See also Sunstein, *Democracy and the Problem of Free Expression* ch 7 (cited in note 22), which discusses *R.A.V.* and the issue of viewpoint discrimination in more detail.

[99] This example comes from *Snepp v United States*, 444 US 507, 510-13 (1980) (per curiam) (upholding the imposition of a constructive trust on a book produced by a former CIA agent in contravention of a nondisclosure agreement with the government).

[100] *Lehman v Shaker Heights*, 418 US 298, 304 (1974).

[101] *Greer v Spock*, 424 US 828, 838 (1976).

Council may determine that threats based on the target's race, religion, or gender cause more severe harm to both the target and society than other threats."[102] In his view, "[t]hreatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot . . . such threats may be punished more severely than threats against someone based on, for example, his support of a particular athletic team."[103] Thus there were "legitimate, reasonable, and neutral justifications" for the special rule.[104] Justice Stevens' argument is highly reminiscent of the claim that antipornography legislation should be seen as an acceptable response to harm rather than an imposition of a point of view.

In its response, the Court said that this argument "is wordplay."[105] The reason that a race-based threat is different "is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive method. The First Amendment cannot be evaded that easily."[106] But at first glance, it seems that a legislature could reasonably decide that the harms produced by this narrow category of hate speech are sufficiently severe as to deserve separate treatment. Surely it seems plausible to say that cross-burning, swastikas, and the like are an especially distinctive kind of "fighting word"—distinctive because of the objective and subjective harm they inflict on their victims and on society in general. An incident of cross-burning can have large and corrosive social consequences. A reasonable and sufficiently neutral government could decide that the same is not true for a hateful attack on someone's parents, union affiliation, or political convictions.

A harm-based argument of this kind suggests that in singling out a certain kind of regulable speech for special controls, the legislature is responding not to ideological message, but to real-world consequences. Unlike in most cases of viewpoint discrimination, it appears that we have no special reason for suspecting government's motives. According to Justice Stevens, a state is acting neutrally if it singles out cross-burning for special punishment, because this

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[102] *R.A.V.*, 112 S Ct at 2565 (Stevens concurring in the judgment). The relevant statute is 18 USC § 871 (1988). See also 18 USC § 879 (1988) (regulating threats against former presidents). Justice Stevens was responding to the majority's argument that laws increasing the penalty for threats against the President are permissible because the reasons for these laws relate to the justification for punishing threats in the first place. See text accompanying note 92.

[103] 112 S Ct at 2561 (Stevens concurring in the judgment).

[104] Id.

[105] Id at 2548 (majority opinion).

[106] Id.

kind of "fighting word" has especially severe social consequences. According to the Court, on the other hand, a state cannot legitimately decide that cross-burning is worse than (for example) a vicious attack on your political convictions or your parents. A decision to this effect violates neutrality. But the Court's conception of neutrality seems wrong. There is nothing partisan or illegitimate in recognizing that this unusual class of fighting words causes distinctive harms.

My claim here is very narrow; I do not argue for broad bans on hate speech. Most such bans would indeed violate the First Amendment because they would forbid a good deal of speech that is intended and received as a contribution to public deliberation. But here we are dealing with hate speech limited to the exceedingly narrow category of admittedly unprotected fighting words. The argument on behalf of this kind of restriction might benefit from Justice Stevens's analogy to the especially severe legal penalties directed toward threats against the President.[107] Everyone seems to agree that this restriction is permissible, because threats against the President cause distinctive harms and can therefore be punished more severely. But if the government can single out one category of threats for special sanction because of the distinctive harm that those particular threats cause, why cannot the same be said for the fighting words at issue here?

Justice Scalia's response is probably the best that can be offered: "[T]he reasons why threats of violence are outside the First Amendment (protecting individuals from fear of violence, from the disruption that fear engenders, and from the possibility that threatened violence will occur) have special force when applied to the President."[108] But exactly the same could be said of the hate speech ordinance under discussion: the justification for the fighting words exemption has special force because of the context of racial injustice. Here, as in cases involving threats against the President, we are dealing with a subcategory of unprotected speech challenged as involving impermissible selectivity, and the justification for the selectivity involves the particular harms of the unprotected speech at issue. That justification seems sufficiently neutral.

Consider another analogy. Supplemental criminal penalties for racially-motivated "hate crimes" seem to be a well-established part of current law, appearing in the statutes of the vast majority of

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[107] Id at 2565-66 (Stevens concurring in the judgment). See note 102.

[108] Id at 2546 (majority opinion).

states.[109] Do those penalties violate the First Amendment? In *Wisconsin v Mitchell*,[110] a unanimous Supreme Court said that they do not, and I believe the Court was right. But consider the fact that the government imposes the additional penalty because it thinks that hate crimes create distinctive subjective and objective harm. The distinctive harm is produced in part because of the symbolic or expressive nature of hate crimes. This justification is the same as that in the cross-burning case. This does not mean that it is impossible to draw distinctions between enhanced penalty statutes and "hate speech" laws. But it does mean that if the justification for the hate crimes measures is sufficiently neutral, the same should be said for narrow restrictions on hate speech.

Perhaps we can respond to this claim with the suggestion that hate crimes are not speech—not because of discredited versions of the "speech/conduct" distinction, but because hate crimes are not intended and received as contributions to deliberation about anything and do not communicate ideas of any kind.[111] This was one of the Supreme Court's major arguments in the *Mitchell* case. According to the Court, cross-burning is speech, whereas hate crimes are unprotected conduct.[112] Perhaps laws that regulate conduct are permissible even if some of the relevant conduct is communicative. Moreover, it may well be true that most hate crimes do not have a communicative intention or effect. But some certainly do. The lynching of black people, for example, is thoroughly communicative. When a hate crime has a communicative purpose, are enhanced penalties invalid if the reason for enhancement is what I have described? I do not believe that there is anything illegitimate about the state's belief that the subjective and objective harm justify enhancement.

In *Mitchell*, the Supreme Court relied heavily on this belief.[113] For this reason, the line between *R.A.V.* and *Mitchell* seems quite thin. As I have emphasized, all the justices in *R.A.V.* agreed that

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[109] See, for example, 46 Fla Stat Ann § 775.085 (West 1992); 720 ILCS 5/12-7.1 (West 1993); 76 Utah Code 1953 ch 3 § 203.3 (Michie 1992 Supp). As of June 23, 1992, forty-six states had enacted some form of hate crime statute. David G. Savage, *Hate Crime Law is Struck Down*, LA Times A1 (June 23, 1992). A penalty-enhancement bill for federal criminal cases is currently pending in Congress. Hate Crimes Sentencing Enhancement Act of 1993, HR 1152, 103d Cong, 1st Sess (March 1, 1993). See also Hate Crimes Sentencing Enhancement Act of 1992, Hearing on HR 4797 before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 102d Cong, 2d Sess (1992).

[110] 113 S Ct 2194 (1993).

[111] See Section IV.A.

[112] 113 S Ct at 2199.

[113] Id at 2200-01.

the expressive acts at issue were unprotected by the First Amendment, because the state court had said that the statute was limited to unprotected "fighting words." *R.A.V.* therefore involved constitutionally unprotected acts, just as *Mitchell* did. And everyone in *Mitchell* agreed that the First Amendment issue did not disappear simply because conduct was involved. The Court said that "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment"[114]; but it rightly added that a genuine First Amendment issue is raised when a state "enhances the maximum penalty for conduct motivated by a discriminatory point of view."[115]

Understood in these terms, *R.A.V.* and *Mitchell* are very close, and the Court did not adequately explain the difference between them. Perhaps the major distinction between the two cases is that the Minnesota law in *R.A.V.* covered speech as well as expressive conduct, and cross-burning is characteristically expressive —whereas the enhancement statute was directed only at conduct, and many hate crimes are not intended or received as a communication on anything at all. For this reason, the enhancement penalty can perhaps be seen as a content-neutral restriction on conduct that is not ordinarily expressive, while the Minnesota law was a content-based restriction on speech, including expressive conduct. This is a reasonable distinction. But it is not clear that the distinction really rescues the *R.A.V.* outcome. The question remains whether the state had a legitimate justification for doing what it did. The *Mitchell* Court emphasized that the state treated "bias-inspired" conduct more severely because that conduct inflicts "greater individual and societal harm."[116] This was Justice Stevens's argument in *R.A.V.*, and it seems to have equal weight in both cases.

One final analogy seems to suggest that *R.A.V.* is wrong on the neutrality issue. The civil rights laws say that you may not fire someone because of his race, even though you may fire him for many other reasons.[117] On one view, the civil rights laws are therefore unconstitutional, because they penalize someone for his politi-

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[114] Id at 2199.

[115] Id.

[116] Id at 2201.

[117] See Civil Rights Act of 1964, § 703(a)(1), as amended, codified at 42 USC § 2000e-2(a)(1) (1988); *McDonnell Douglas Corp. v Green*, 411 US 792, 800-03 (1973) (discussing burdens of proof in employment discrimination cases and noting that although an employee does not have a right to a job, she has the right to a workplace free from unfair discrimination).

cal convictions. In this respect, they are similar to a prohibition on flag-burning. They single out conduct (or mere words) for special penalty simply because of the message communicated by that conduct.

To be sure, most discriminatory discharges are not intended to communicate a general political message, but some discharges do have such an intention. It would be most adventurous, to say the least, to claim that the First Amendment prohibits application of the civil rights laws to politically-motivated discrimination. But if *R.A.V.* is right on the issue of neutrality, it is not simple to explain why the civil rights laws survive constitutional attack. Perhaps it could be said that most discriminatory discharges are not communicative in nature, and that the claim that such discharges are distinctly harmful has a sufficiently neutral justification. Perhaps it could be said that the civil rights laws sweep up communicative discharges as an incidental part of an effort to prevent a class of activities defined in terms of conduct rather than expression. But if the justification behind the civil rights laws is in fact sufficiently neutral, the same seems to be true of the statute in the *R.A.V.* case.

The arguments from these analogies are not decisive. Plausible distinctions can be drawn. But some of the distinctions seem thin. I conclude that as the *Mitchell* Court held, the First Amendment is not violated by laws enhancing the punishment of hate crime. I also conclude that no serious First Amendment problem is raised by the civil rights laws, even though those laws sometimes punish speech. And a restriction on cross-burning and other symbolic hate speech is a permissible subject-matter classification, so long as the restriction is narrowed in the way described.

In *R.A.V.* the Supreme Court offered a tempting and clever response:

> In its practical operation, moreover, the ordinance goes even beyond mere content discrimination to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But 'fighting words' that do not themselves invoke race, color, creed, religion, or gender—aspersions based upon a person's mother, for example—would be seemingly usable ad libitum in the placards of those arguing in favor of racial, color, etc. tolerance and equality, but could not be used by that speaker's opponents. . . . St. Paul has no such authority

> to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.[118]

The short answer to this argument is that the ordinance at issue does not embody viewpoint discrimination as that term is ordinarily understood. Viewpoint discrimination occurs if the government takes one side in a debate, as in, for example, a law saying that libel of the President will be punished more severely than libel of anyone else. Viewpoint discrimination is not established by the fact that in some hypotheticals, one side has greater means of expression than another, at least—and this is the critical point—if the restriction on means has legitimate, neutral justifications.

We can make this point by reference to the fact that it is a federal crime to threaten the life of the President. Recall that the Supreme Court said in *R.A.V.* that such statutes are permissible even though they make distinctions within the category of unprotected threats. Imagine the following conversation: John: "I will kill the President." Jill: "I will kill anyone who threatens to kill the President." John has committed a federal crime; Jill has not. In this sense, the presidential threat case involves the same kind of de facto viewpoint discrimination as the *R.A.V.* case. If it is not unconstitutional for that reason[119]—and the Court indicated that it is not—the Court should not have found the statute in *R.A.V.* viewpoint discriminatory.

The point has general implications. It suggests that the state can attack hate speech dealing with certain matters, as Stanford has done, without running afoul of the prohibition on impermissible selectivity. It also suggests that some narrowly drawn viewpoint discriminatory restrictions—protecting against hate speech directed at blacks or women—might well be permissible.[120] Thus, for example, a locality might decide that cross-burning and hate speech directed against blacks pose special risks not posed by hate speech directed against whites. For the reasons I have outlined, I do not believe that there is anything illegitimate about a public judgment that hate speech against blacks creates distinctive subjective and objective harm.

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[118] 112 S Ct at 2547-48.

[119] See the discussion of pornography in Section III.A.

[120] See Amar, 106 Harv L Rev at 151-61 (cited in note 21).

C. Hate Speech, Neutrality, and the University

In the previous Section, I argued for the constitutionality of narrow restrictions on hate speech, but *R.A.V.* suggests that courts might invalidate such restrictions as unacceptably selective. After *R.A.V.*, a university might well be forbidden to single out for punishment speech that many universities want to control: (a) a narrowly defined category of insults toward such specifically enumerated groups as blacks, women, and homosexuals; or (b) a narrowly defined category of insults directed at individuals involving race, sex, and sexual orientation. Under current law, a restriction that involves (a) is viewpoint-based, and to that extent worse than the restriction in *R.A.V.* itself. A restriction that involves (b) is a subject-matter restriction, not based on viewpoint,[121] but it is still impermissibly selective in the same sense as the restriction invalidated in the *R.A.V.* case. We might think that the conclusions in *R.A.V.* are incorrect in principle, because there are sufficiently neutral grounds for restrictions (a) and (b): A public university could neutrally decide that epithets directed against blacks, women, and homosexuals cause distinctive harms.[122] But this conclusion is hard to reconcile with the *R.A.V.* decision.

If such conclusions are to be resisted—if *R.A.V.* does not apply to the campus—it must be because public universities can claim a degree of insulation from judicial supervision. The principal point here is that colleges and universities are often in the business of controlling speech, and their controls are hardly ever thought to raise free speech problems.[123] There are major limits on what students can say in the classroom. For example, they cannot discuss the presidential election if the subject is math. The same is true for faculty members. Universities also impose restrictive rules of decorum and civic participation. A teacher can even require students to treat each other with basic respect. It would certainly be legitimate to suspend a student for using consistently abusive language in the classroom, even if that language would receive firm constitutional protection on the street corner.

The problem goes deeper. A paper or examination that goes far afield from the basic approach of the course can be penalized without offense to the First Amendment. Usually the penalty is a

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[121] But see *R.A.V.*, 112 S Ct at 2545.

[122] Recall that a private university can do whatever it likes.

[123] See Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U Colo L Rev 975 (1993). I am very grateful to Mary Becker for helpful discussion of the subject in this section.

form of subject-matter restriction, but it may well turn out to be viewpoint-based in practice. In many places, a student who defends fascism or communism is unlikely to receive a good grade, and not only because it is hard to argue well on behalf of fascism or communism. Viewpoint discrimination is undoubtedly pervasive in practice, and even though it is usually objectionable, courts cannot and perhaps should not attempt to police it. This is not so only for judgments about student performance. Initial hirings, tenure, and promotion all involve subject matter restrictions, and in practice viewpoint discrimination as well.

These examples do not mean that any and all censorship is acceptable in an academic setting. It does not even mean that existing viewpoint discrimination is constitutionally acceptable. A university can have a good deal of power over what happens in the classroom, so as to promote the educational enterprise, without also being allowed to decree a political orthodoxy by discriminating on the basis of viewpoint. If a public university were to ban students from defending certain causes in political science classes, a serious free speech issue would be raised. There are therefore real limits to permissible viewpoint discrimination within the classroom, even if it is hard for courts to police the relevant boundaries.

Certainly the university's legitimate control over the classroom does not extend to the campus in general. A university could not say that outside of class, students can talk only about subjects of the university's choice (excluding, say, a war, or feminism, or race relations, or AIDS). From these various propositions, we might conclude that *the university can impose subject-matter or other restrictions on speech only to the extent that the restrictions are reasonably related to its educational mission.* If a university is to educate, it must discriminate on the basis of quality and subject matter, and these forms of discrimination will inevitably shade over into certain forms of viewpoint discrimination.[124] But in cases in which the educational mission is not reasonably at stake, restrictions on speech should not stand. Certainly this would be true in most cases in which a university attempts to impose an orthodoxy, whether inside or outside the classroom.

How does this bear on the hate speech issue? Perhaps a university could permissibly conclude that its educational mission requires unusually firm controls on this kind of speech, so as not to

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[124] In this respect, the question of speech restrictions in the university is close to the question of selective funding of art. See Sunstein, *The Partial Constitution* at 308-15 (cited in note 3).

compromise the values of education itself. The university might think, for example, that it has a special obligation to protect its students as free and equal members of the community. It might believe that certain narrowly defined forms of hate speech are highly destructive to the students' chance to learn. Perhaps a university should have more leeway to restrict hate speech than a state or locality, precisely because it ought to receive the benefit of the doubt when it invokes concerns of this kind. At least courts should be reluctant to second-guess judgments of this sort when the university can plausibly claim that it needs a relatively narrow restriction in order to safeguard the educational mission.

This point bears on two issues. First, it suggests that universities might be allowed to enact mildly broader restrictions than states and localities. The educational mission ought to grant the university somewhat greater room to maneuver, especially in light of the complexity and delicacy of the relevant policy questions. Second, the point suggests that courts should be reluctant to find viewpoint discrimination or impermissible selectivity. Perhaps there should be a presumption in favor of a university's judgment that hate speech directed at blacks or women, or showing racial or gender hatred, produces harm that is especially threatening to the educational enterprise.

This conclusion is buttressed by two additional factors. First, there are numerous colleges and universities; many students can choose among a range of alternatives, and a restriction in one, two, or more imposes an extremely small incursion into the system of free expression. Colleges that restrict a large amount of speech may find themselves with few students. Second, the Constitution is itself committed to the elimination of second-class citizenship, and this commitment makes it hard to say that an educational judgment opposed to certain narrowly described forms of hate speech is impermissibly partisan.

I think that an analysis of this kind makes sense for narrowly defined hate speech restrictions. Consider the Stanford regulation described above. If a public university adopted that restriction, the major constitutional problem, fueled by the outcome in *R.A.V.*, would not be breadth but unacceptable selectivity. Why has the university not controlled other forms of "fighting words," like the word "fascist," or "commie," or "bastard"? Does its selectivity show an impermissible motivation? Should we find its selectivity to be impermissibly partisan? I do not think that we should. Notwithstanding *R.A.V.*, a university could reasonably and neutrally decide that the harms caused by the regulated fighting words are,

at least in the university setting, more severe than the harms caused by other kinds of fighting words.

IV. Conduct As Speech, Words As Conduct

Free speech law has been bedeviled by the "speech-conduct" distinction. In this Section, I argue that some forms of conduct should be treated as speech, but that some words should not be treated as speech. A general conclusion follows from the argument: The constitutional protection of "speech" refers to something that we should consider a term of art. That term covers all symbols that are intended and received as expressing messages. Under this view, some words are not "speech" within the meaning of the First Amendment, and some "conduct" does qualify as speech. Under this view, we should make no rigid distinction between "speech" and "conduct." We should distinguish instead between words and conduct, with the understanding that the Constitution protects speech, a term that includes some, but hardly all, words and conduct. And under this view, a theory of free speech value, referred to in Section I, helps explain why some conduct is regulable only (a) on a content-neutral basis or (b) when government can make the ordinary showing required for restriction of political speech.

A. Conduct As Speech

What counts as speech within the meaning of the First Amendment? Justice Black famously thought that the Constitution protected "speech" absolutely and "conduct" not at all.[125] But no purely formal test can tell us what falls within the two categories. Someone burns a flag as part of a war protest. The "conduct" communicates ideas. Moreover, it communicates ideas in a distinctive way. Should it be excluded from the category of "speech"? Surely not. "Speech" consists of symbols that communicate messages.[126] Words are simply one kind of symbol. The category of speech is not coextensive with the category of words. Flag-burning, insofar as it is a symbol that communicates a message, is speech. It may be regulable on a content-neutral basis, or even on the basis

[125] See *Cohen v California*, 403 US 15, 27 (1971) (Blackmun dissenting) (an opinion that Justice Black joined, arguing that petitioners' action was unprotected because it was conduct and not speech); see also Thomas Emerson, *The System of Freedom of Expression* 8, 17-18 (Random House, 1970) (making an expression-action distinction).

[126] See Amar, 106 Harv L Rev at 133-37 (cited in note 21).

of content when there is harm of a certain nature and degree, but that is a different matter.

Words then are signs—symbols of expressive meaning. But the category of symbols of expressive meaning is not limited to words. Sign language, for example, does not consist of words, but it is entitled to constitutional protection. The same is true for the "act" of wearing an armband,[127] or of joining a demonstration.[128] The constitutional protection of speech should not stop with words. The term "speech" is best understood to include all symbols of expressive meaning, whatever the form of those symbols.

The point seems inescapable if we accept the view that speech qualifies for protection if it is intended and received as a contribution to social deliberation about some issue. If speech is entitled to special protection because and when it does this, any sharp line between "words" and "expressive conduct" becomes extremely artificial. Some forms of conduct, like flag-burning, have an expressive and communicative character. Their purpose and effect are to express a political message. They are part of social deliberation. In this way they qualify as "speech," regulable only if the government can generate a strong, sufficiently neutral justification. Or suppose that we accept a narrower understanding of the free speech principle, believing speech to be protected, or specially protected, if and only if it is connected with democratic processes. A sharp line between words and expressive acts cannot be justified in terms of democratic values, for much expressive conduct is intended and received as a contribution to democratic discussion. The constitutional protection covers "speech"; acts that qualify as signs with expressive meaning should qualify as speech within the meaning of the Constitution.

This is hardly to say that the government can never regulate expressive conduct. On the contrary, government often does have a special and sufficiently neutral justification for regulating such conduct. Protection of the President from assassination, or the Lincoln Memorial from graffiti,[129] can be supported by reference to powerful, legitimate reasons, such as keeping the peace and protecting public monuments. When the government regulates expressive conduct, it is usually trying to promote a purpose entirely unrelated to the suppression of communication. But some restrictions on expressive conduct, like those on flag-burning, may well not be

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[127] *Tinker v Des Moines Community School District*, 393 US 503, 505-07 (1969).

[128] *Edwards v South Carolina*, 372 US 229, 235-38 (1963).

[129] *Texas v Johnson*, 491 US 397, 434 (1989) (Rehnquist dissenting).

supportable in this way. Thus in the flag-burning cases, the Supreme Court emphasized that the government did not have a reason for regulation independent of the government's objection to the ideas that flag-burning embodies. The justification for regulation was illegitimate.[130]

On this view, the speech-conduct distinction has been made necessary not because expressive conduct is undeserving of protection, but because government frequently has a sufficiently strong and neutral justification for regulating conduct. The key to the distinction, often thought to lie in the determination of whether the conduct qualifies for initial protection, actually lies in the fact that government often has good reasons for regulating it—just as it has good reasons for applying the trespass laws to political demonstrations.[131] Now that much expressive conduct has been understood to qualify for protection, courts can focus on what is really the central question: the existence of acceptably strong and neutral justifications.

Thus far, then, we have seen that conduct carrying a political message qualifies as speech within the meaning of the First Amendment. The same conclusion rightly follows for other conduct, like dance, that is both expressive and communicative even if nonpolitical. When it is expressive and communicative but nonpolitical, such conduct belongs in a second tier of protection, at least if we accept a two-tier view of the First Amendment.[132] Such speech is regulable more easily than political speech, but it is protected in the absence of neutral justifications.[133]

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[130] See id at 410-14; *United States v Eichman*, 496 US 310, 315-18 (1990).

[131] See *Adderley v Florida*, 385 US 39 (1966).

[132] See Sunstein, *Democracy and the Problem of Free Expression* ch 5 (cited in note 22). On this view, government would have the power to regulate some forms of (for example) nude dancing. Such dancing does warrant at least a degree of First Amendment protection. It is both communicative and expressive. But a state could plausibly decide that some kinds of nude dancing are associated with a range of serious real-world harms, including prostitution, criminal activity of various sorts, and sexual assault. See *Barnes v Glen Theatre*, 111 S Ct 2456, 2468-71 (1991) (Souter concurring). At least this is so if government can muster evidence that the regulated form of nude dancing does produce these harms, which would be sufficient to justify regulation under the lower-tier speech standards. I conclude that the Supreme Court was probably correct to rule that the First Amendment did not protect nude dancing in the Kitty Kat Lounge. Id at 2463. This is so even if the majority erred in emphasizing the state's moral reservations about public nudity rather than the existence of more tangible harms. See id at 2461-63. Of course, a quite different issue would be raised in a case in which nude dancing was part of a political protest, or if the particular acts could not plausibly be associated with real-world harms.

[133] It is insufficient to respond that if people want to convey a message, they should be required to do so through words rather than action. A message cannot be so readily separated from the particular means chosen to express it; if the means are changed, the message

I conclude that what is apparently conduct should qualify as speech for First Amendment purposes if it is intended and received as an effort to communicate a message. This conclusion might seem to have extreme consequences—for example, an attempted assassination of the President may well qualify as speech. It does not raise anything like a serious free speech question, however, because government can invoke strong content-neutral reasons for protecting the President's life. But under this test, flag-burning, draft-card burning, and cross-burning all qualify as speech; indeed this classification is the easy part of the relevant cases.

B. Words As Conduct

We have seen that some of what is familiarly characterized as "conduct" actually counts as speech. The converse may also be true. Suppose that the head of a computer company asks the head of other computer companies whether they might not agree to fix prices. Suppose we have nothing but talk, but the talk produces a conspiracy in violation of the Sherman Act. Or suppose that an employer discharges an employee by saying, "I don't want people of your religion to work for me." There is no free speech problem in either case. But it is not easy to explain why.

I suggest that we might distinguish among (a) speech that amounts to the commission of an independently illegal act or that is evidence that the act has been committed; (b) speech that creates or constitutes conditions that can constitutionally be made illegal; (c) speech that leads immediately to illegality; (d) speech that is produced as a result of illegality; and (e) speech that leads proximately, but not immediately, to illegality or otherwise to constitutionally cognizable harm. My hypothesis is that speech falling in category (a) is properly treated as action, even if it consists solely of words. Words and conduct that fall within categories (b), (c), (d), and (e) all qualify as speech, and they may be regulable only under the standards set out in Sections I and IV.A.

Let us start with a straightforward explanation for the words-conduct distinction. Perhaps words are classified as conduct when they offer no ideas. If the First Amendment protects the exchange

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changes too. Form and content cannot be distinguished so simply. Flag-burning conveys the relevant message more sharply and distinctively than anything else. If the speaker says instead, "My country is doing wrong," the message will be so muted as to be fundamentally transformed. The availability of purely verbal alternative forms of expression cannot therefore justify failing to protect expressive conduct.

of ideas, then price-fixing agreements, threats, bribes, and unlawful discharges probably do not count as speech within the meaning of the Amendment. Alternatively, suppose that the First Amendment protects speech that is intended and received as a contribution to social deliberation about some issue,[134] or that words deserve to be treated as speech when their regulation would be an insult to the moral autonomy of the speaker or the listener.[135] On either of these views, the suppression of some words may not threaten the values that underlie a system of free expression and may be justified if there are sufficient real-world harms.

On this view, the treatment of some words as "conduct" provides a shorthand, if misleading, description of a more extended argument that the speech at issue does not promote First Amendment values and creates sufficient harms to be regulable under the appropriate standards. Here, the regulation of the relevant forms of speech does not really stem from a distinction between speech and conduct, but instead from an argument about value and harms. When it is said that certain speech is regulable as "conduct," what is actually meant is that the speech at issue lies far from the center of constitutional concern and that it is harmful enough to be regulable.

This much seems true; but I want to try a different argument. Perhaps some cases involve something that is properly characterized as conduct rather than speech. The written or oral statement, "You're fired," is an act,[136] not merely speech, in the sense that the words are simply a way of committing an unlawful discharge. The statement, "I agree to fix prices with you," is a way of fixing prices, indeed the most efficient way of doing so. These words do not merely cause action; they constitute the relevant action. The same appears to be true of purely verbal sexual harassment. If someone says to an employee, "Sleep with me or lose your job," we say that he is committing an act of harassment. The words do not *cause* the act. The words *are* the act. The same is plausibly true of bribery, perjury, and threats. Most free speech cases—even those in which people lose their free speech claims—are very different. If a political revolutionary encourages someone to take over a building, we may have incitement, and it may be regulable; but it is not action.

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[134] See Scanlon, 1 Phil & Pub Aff at 214-15, 222-24 (cited in note 41).

[135] David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum L Rev 334, 353-60 (1991).

[136] The argument here obviously has connections with J.L. Austin, *How to Do Things With Words* (Clarendon, 2d ed 1975), but I will not deal with those connections here.

This argument suggests that some statements are properly classified as conduct because they amount to the commission of acts that are legitimately and independently made unlawful. For example, a racially motivated discharge is low-value speech that creates harms sufficient to justify regulation. But we can also say that the discharge is an independently unlawful act. A purely verbal discharge is simply a means of committing the unlawful act.

We are now prepared to offer some distinctions. The statement, "You're black, and therefore fired," is a version of (a). The words are simply a means of committing an independently unlawful act; they *are* that act. Sexual harassment can be analyzed in a broadly similar fashion. If someone says, "Sleep with me or lose your job," the statement is a way of violating the civil rights laws. Or suppose that an employer posts violent pornography all over the workplace, so that wherever a woman goes, she sees sexual violence aimed against women. It would be fully plausible to say that posting the pornography violates the civil rights laws.[137] We could conclude not that the posting "leads to" or "causes" such a violation, but that it *is* a violation.

But, on reflection, the sexual harassment cases fall in category (b) rather than (a). They differ from a discriminatory discharge in that the latter is independently illegal, and the words are simply evidence that a discriminatory discharge has taken place. They are evidence of the illegality because a pretextually work-related but really discriminatory discharge is also illegal, even if discriminatory words were not used. When the words are used in court, they are evidence of the underlying illegality, that is, the discharge based on a discriminatory motive. It is the discharge itself that is unlawful. There remains the question whether a discriminatorily motivated discharge can be made unlawful consistently with the First Amendment; I have discussed this issue in Section III, and in any case *R.A.V.* seems to suggest that Congress can constitutionally outlaw a general category of acts that includes some expressive conduct. My basic claim here is that certain verbal expression is a way of performing an illegal act, and that there is no problem in classifying such expression as the act itself, at least when the words are evidence that the illegality has occurred.

Purely verbal sexual harassment can be made illegal, but it is not evidence of an independently illegal act. Instead it creates or

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[137] See *Robinson v Jacksonville Shipyards*, 760 F Supp 1486, 1524-25 (M D Fla 1991). This case is currently on appeal before the Eleventh Circuit. See Howard Troxler, *What More Unlikely Foes? NOW vs. ACLU*, St Petersburg Times 1B (Nov 4, 1991).

constitutes conditions that can be made unlawful. This is true for quid pro quo harassment; it is also true of the "hostile-environment" harassment, including the pornography case. Both of these are versions of (b), and in an important way different from (a). Cases that fall in category (b) are harder than those in category (a). They are harder because the government is targeting words themselves rather than words as evidence of an independent illegality. Often the government might want to claim that a statement amounts to the commission of an illegal act, or helps create conditions that violate some law. Whether it can do so depends on the ordinary standards applied to regulation of speech. In other words, government must say something about the issues of value and harm. The view that sexual harassment is regulable under (b) depends on a resolution of those issues.

At least in the ordinary run of cases, no serious free speech question is raised by legal controls on purely verbal sexual harassment. This is not because such harassment is conduct, but because it belongs in a lower tier of protection, and because the relevant harms are sufficient to justify regulation. A full justification of these claims would require a more extended statement than I can offer here. But it seems clear that workplace harassment is not intended and received as a contribution to the exchange of ideas, and also that it is not closely connected with speaker or (especially) listener autonomy. It is for this reason that the prevention of discrimination seems clearly sufficient to override the relatively weak free speech interests.

Many cases of "speech brigaded with action"[138] are really versions of (c). Consider the words "Ready, Set, Fire" said to a firing squad; or, "Kill, Rover" said to a trained attack dog.[139] These cases do not involve conduct, and they are also quite different from (a) and (b). We should think of them as low-value speech causing immediate harm, and therefore as readily bannable. But they do not count as conduct or action standing by themselves.

How do pornography and hate speech fare under this approach? I believe that they generally fall in categories (d) and (e). Category (c) is inapplicable because imminent harm, let alone intended harm, can rarely be connected with any particular material.[140] If the government is trying to regulate the material because

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[138] See *Brandenburg v Ohio*, 395 US 444, 456 (1969) (Douglas concurring).

[139] See MacKinnon, *Feminism Unmodified* at 156 (cited in note 24) ("But which is saying 'kill' to a trained guard dog, a word or an act?").

[140] Thus the standards in *Brandenburg* are not likely to be met.

it was produced through illegality—case (e)—it is trying to regulate speech, not conduct. If there is illegality in the production of the material, the case may involve acceptable regulation under category (d) but not because the material is itself "conduct." Under existing law, category (e) does not allow for regulation.[141] It follows from all this that we cannot justify regulation of hate speech and pornography on the ground that these forms of speech constitute action—although the presence of action in the production of materials, or action as a result of the use of the materials, may be relevant to the First Amendment inquiry. An interesting question is whether we can use the pornography in the workplace example—category (b)—as a ground for saying that some pornography is action, analytically speaking. At this point it is not easy to see how this argument can be made persuasively. I conclude that most pornography is speech, not conduct, but that it is sometimes bannable for the reasons stated in Sections I and IV.A.

V. Future Strategies

I have questioned the outcomes in both *R.A.V.* and *Hudnut*. But so long as those decisions stand, there are sharp constitutional limits on regulation of hate speech and pornography. It is, of course, important to inquire whether current law is correct, especially in light of the fact that free speech doctrine sometimes changes rapidly. But it would be most disappointing if those interested in eliminating the harms caused by pornography and hate speech were to restrict themselves to criticizing what may well become firmly entrenched law. An important task for the future will be to develop responses to the new legal developments. When pornography is harmful, what approaches should be taken by those concerned with minimizing the relevant harms? If we aim to eliminate caste-like features of current systems, what approaches would make sense?

It is clear that the prevention of violence against women—an important aspect of these caste-like features—might be made a greater priority of state and federal government. There are substantial initiatives in this direction, quite outside of the category of speech.[142] These initiatives, sometimes criticized as an unjustified incursion into the federal structure, fit exceedingly well with the

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[141] See *Brandenburg*, 395 US at 447 (speech must incite or produce "imminent lawless action").

[142] See, for example, Violence Against Women Act of 1993, S 11, 103d Cong, 1st Sess (Jan 21, 1993).

post–Civil War Constitution, which has as one of its purposes the use of federal authority to prevent the disproportionate subjection of certain groups to public and private violence. It seems clear, too, that sexual violence is not only an inadequately enforced crime; it is also an inadequately addressed tort. There should be a range of civil actions against people, including pornographers, who have abused children and women in the home or in the production of their work. An important advantage of this route is that the "reasonable doubt" standard of criminal law need not be met, and recovery can occur under the civil law's more lenient "preponderance of the evidence" standard. Here the First Amendment issues are trivial. Well-publicized tort actions might also deter criminal activity and spur new statutory initiatives.

Moreover, content-neutral laws might be invoked to prevent hate speech, hate crimes, and injuries that result from pornography. For example, the law of trespass can and should be used against cross-burning. Universities can use general requirements of civility and decent behavior to stop hate speech—not as part of specialized speech codes, but as part of a less selective ban on conduct on campus inconsistent with educational requirements. Prosecutors can pay special attention to criminal acts that reflect racial hatred or misogyny. We should encourage greater enforcement efforts to protect against child pornography. Current obscenity law offers considerable opportunity to proceed against materials that involve violence or coercion in their production and use. When allocating scarce resources, prosecutors should proceed against such materials, not against materials that are offensive because of their sexual explicitness.

We should also encourage much more experimentation with a wide range of different kinds of legal approaches to the problem of pornography. There is no reason for localities to believe themselves bound to take the judicially-invalidated Dworkin/MacKinnon ordinance as the universal model for regulation of pornography. A constitutional banality is pertinent here: One of the principal advantages of a federal system is that it offers enormous scope for experimentation. *R.A.V.* and *Hudnut*, taken together, mean that courts will quickly strike down many imaginable regulations of pornography. In these circumstances it makes sense to have a broad range of proposals, in order to escape the problems of selectivity, vagueness, and overbreadth.[143] Some localities might try, for

[143] Kagan, 60 U Chi L Rev at 883-901 (cited in note 31).

example, to regulate a subcategory of speech that is already regulable under *Miller*. Other localities might combine the obscenity and pornography approaches and exempt from control all speech with serious social value. These are simply some of a large number of possible experiments designed to do some good while increasing the chances of judicial validation.

Finally, private or public pressure might be brought to bear against material that sexualizes violence, especially when the material appears on television or in movies. A promising model is provided by an innovative measure enacted through the initiative of Senator Paul Simon in 1990.[144] Senator Simon's statute exempts from the antitrust laws any effort by the television networks to reduce violence on television. This measure does not require any agreement among the networks. It does not censor any speech.[145] But it does say that an agreed-upon set of principles will not violate the antitrust laws. In this way, it encourages networks to reach agreements that would otherwise be unlawful.

The Simon initiative is especially valuable insofar as it recognizes that competition for viewers can lead to an undesirable state of affairs, one in which there is an increasing incidence of violence. In late 1992, the networks did indeed reach a shared set of principles.[146] The agreement should significantly affect programming in 1993 and after. Among other things, the new principles say that programs should not depict violence as glamorous or as an acceptable solution to human conflict; should avoid gratuitous violence; and should avoid mixtures of sex and violence. Perhaps it will be possible to build on this idea to counteract some of the problems of the broadcasting media, without resorting to government regulation at all.

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[144] Television Program Improvement Act of 1990, Pub L No 101-650, Title V, §501, 104 Stat 5127 (Dec 1, 1990), codified at 47 USC § 303(c) (Supp 1992).

[145] There is, however, a possible First Amendment issue under the *R.A.V.* decision. It would clearly be unlawful to exempt from the antitrust laws any agreement to limit criticism of the President. The question then becomes whether a subject matter exemption, limited to violence, is unacceptably selective in the same sense as the law invalidated by the *R.A.V.* Court. I do not believe that there is unacceptable selectivity in the light of the absence of viewpoint discrimination, the plausibility of the claim of harm, and the lack of reason for suspicion about viewpoint discrimination.

[146] Matt Marshall and John Lippman, *Big 3 Networks Agree to "Limit" Violence on TV*, LA Times A1 (Dec 12, 1992).

Conclusion

I have made three claims in this Essay. First, certain narrowly defined categories of pornography and hate speech can be regulated consistently with the First Amendment. They count as "low value" speech, and they cause sufficient harms to be regulable under existing standards. Broadly speaking, the argument for regulating pornography is stronger than the corresponding argument for regulating hate speech, on both the value and the harm sides; but some well-defined categories of hate speech might be subject to legal controls. Second, the prominent objections from neutrality are misplaced. Some regulations of pornography and hate speech can be neutrally justified, even if they appear discriminatory on the basis of content, subject matter, or even viewpoint. They can be neutrally justified in large part because of the anticaste principle. Third, we should jettison the "speech-conduct" distinction in favor of an approach that explores whether the symbols at issue are intended and received as a contribution to the exchange of ideas about some issue.

Under this approach, flag-burning, cross-burning, and much else will qualify as speech, though it may be bannable because of sufficiently neutral justifications. Under this approach, moreover, some "words" do not qualify as speech, because they amount to a way of committing an independently unlawful act. These claims raise many questions and leave a number of ambiguities. But they will resolve the vast majority of issues raised by government regulation of pornography and hate speech and help orient treatment of the rest.

I have also outlined a number of possible approaches for those who seek to prevent the harms produced by pornography, hate speech, and hate crimes. A particular priority is to attack those harms through measures that (a) do not implicate speech at all and (b) are content-neutral if they do implicate speech. Strategies of this kind cannot counteract all of the harms produced by hate speech and pornography. But they can do a great deal of good, and so long as *Hudnut* and *R.A.V.* stand as the law, they are, I suggest, among the best routes for the future.

A more general lesson follows from these claims. The concerns about pornography and hate speech are in one sense new, but in another sense very old; they recall the original goal of the Civil War Amendments: the elimination of caste systems. As I have emphasized, the caste-like features of current practices are not as severe as those of traditional caste systems, but they are nonetheless

conspicuous. An important element of those practices consists of the disproportionate subjection of women and blacks to public and private violence and to frequent intrusions on their self-respect—the time-honored constitutional notion of stigma.[147] Many imaginable limits on sexually explicit materials and on racist speech would indeed violate the First Amendment. But, I suggest that narrow and well-defined legal controls on pornography and hate speech are simply a part of the attack on systems of racial and gender caste. If they are understood in this light, and if they are appropriately narrow and clear, they can operate without making significant intrusions into a well-functioning system of free expression.

[147] *Brown v Board of Education of Topeka*, 347 US 483, 493-95 (1954).