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WEAPONIZING THE FIRST AMENDMENT: AN EQUALITY READING

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*This Article traces how and why the First Amendment has gone from a shield of the powerless to a sword of the powerful in the past hundred years. The central doctrinal role of “content neutrality” and “viewpoint neutrality” in this development is analyzed; the crucial tipping points of anti-Semitism, in *Collin v. Smith*, and pornography, in *Hudnut v. American Booksellers*, are identified. The potential for substantive equality to promote freedom of speech is glimpsed.*

Once a defense of the powerless, the First Amendment¹ over the last hundred years has mainly become a weapon of the powerful. Starting toward the beginning of the twentieth century, a protection that was once persuasively conceived by dissenters as a shield for radicals, artists and

* The insightful assistance of Lori Watson and Lisa Cardyn, of Max Waltman (especially in helping to wrestle the vast empirical materials on the harms of pornography below the line), and of Lori Interlicchio for her tremendous help with footnote form and accuracy, is gratefully acknowledged. The essential University of Michigan Law Library and the Cook Fund supported my work beyond measure, always being there. Deliveries of the core ideas at the First Amendment conference at Columbia University sponsored by Vince Blasi in November, 2019, and at The McCorkle Lecture at the University of Virginia, February 6, 2020, produced clarifying discussions. A preliminary sketch appears in *The Free Speech Century* 140 (Lee Bollinger & Geoffrey Stone eds., 2019). Lee and Geoff practice freedom of expression, contrasting with goose-steppers to First Amendment fundamentalism. Overcoming the best efforts of the latter, this Article is finally being published in full. The *Virginia Law Review* has my gratitude for courage, principle, and independent thinking, as well as for precision, persistence, and undaunted hard work at a time of challenge. This Article is dedicated to the memory of my teacher and dear friend, Thomas I. Emerson.

¹ U.S. Const. amend. I.

activists, socialists and pacifists, the excluded and the dispossessed, has become a sword for authoritarians, racists and misogynists, Nazis and Klansmen, pornographers, and corporations buying elections in the dark.² In public discourse, with which these legal developments are tightly connected, freedom of speech has at the same time gone from a rallying cry for protesters against dominant power to a claimed immunity of those who hold dominant power. Thus weaponized,³ the First Amendment has morphed from a vaunted entitlement of structurally unequal groups to have their say, to expose their inequality, and to seek equal rights, to a claim by dominant groups to impose and exploit their hegemony.

On the social level of the speech itself, dominant groups promoting ideologies of supremacy have solidified and enhanced their power through inaccurately but successfully positioning themselves as marginal powerless dissenters, or as debaters just expressing ideas. As much public speech has accordingly escalated in its abusiveness, markedly on social media, from racist dog whistles and worse through sexual objectification and worse, to some electoral and other political assaults and invitations to violence, a First Amendment appeal is often used to support dominant status and power, backing white supremacy and masculinist misogynistic attacks in particular. Voices challenging inequality on campuses and in media as well as on streets, in communities, in social media, and in courts are frequently effectively muted and exposed to further abuse and silenced through subordinating aggression, including verbal, physical, and legal threats, in the name of freedom of speech. And everyone wonders, how did we get here?

In law, the doctrinal pivot of this twisted development turns on a vicious irony. The very First Amendment doctrine that has supported intensifying hierarchies of power in its results is founded in a purported

² All the examples in this sentence are discussed in this Article except the last, which is exemplified by *Citizens United v. FEC*, 558 U.S. 310 (2010), and preceding cases, discussion of which is beyond the scope of this Article.

³ Justice Elena Kagan spoke of “weaponizing” the First Amendment in a dissenting opinion contending that fees assessed by statute by public employee unions on all who benefitted from their collective bargaining should have been permitted rather than invalidated under the First Amendment: “There is no sugarcoating today’s opinion. The majority . . . prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.” *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting). Although the power alignments in her recognition parallel those argued here, I am not claiming that Justice Kagan agrees with the analysis in this Article.

equality principle. Starting in the 1970s, the First Amendment began to build a doctrine of content neutrality, extended (where applicable) to viewpoint neutrality, said to be predicated on equality.⁴ Neutrality has become its principal tool, overwhelming even its few substantive recognitions. Content neutrality, like gender neutrality or racial neutrality (often termed colorblindness) under the Equal Protection Clause,⁵ is rooted in the abstract Aristotelian notion of formal equality, which can distinguish sameness from difference within a prescribed range, but lacks substantive comprehension or direction. Absent the injection of substance—considered non-neutral, hence non-principled and prohibited by this doctrine—this doctrine has proven to be an instrument of reproduction of the status quo, incapable of reliably distinguishing social dominance from subordination, thus maintaining that dominance. That is, it is incapable of seeing hierarchy, markedly the rank ordering of white over not white, of male and masculine over female and feminine, that (among many other inequalities) defines inequality in reality.⁶ So this law has proven unable to support opposition to the way things are, or to counter and change it.

An inadequate approach to power, resulting in an incapacity to identify substantive inequality when it animates First Amendment cases—including a failure to identify inequality in these cases at all—is a major part of the underlying story of the First Amendment’s transformation. Being unable to tell the difference between power and powerlessness relatively speaking—for instance, being unable to identify the deployment of racial and/or gender-based terrorism through historically

⁴ As traced in detail below, this trajectory went from *Schacht v. United States*, 398 U.S. 58 (1970), to *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), to Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975), as recounted in Geoffrey R. Stone, *Kenneth Karst’s Equality as a Central Principle in the First Amendment*, 75 U. Chi. L. Rev. 37 (2008). None identifies the “equality” being applied as formal equality, which it is.

⁵ U.S. Const. amend. XIV, § 1. For discussion, see Catharine A. MacKinnon, *Feminism Unmodified* 33–37, 55, 71–74, 164–67, 275 n.6 (1987), and Catharine A. MacKinnon, *Sex Equality* (3d ed. 2016).

⁶ See, e.g., Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 Minn. L. Rev. 1, 27 (2011); Catharine A. MacKinnon, *Substantive Equality Past and Future: The Canadian Charter Experience*, in *Canada in the World: Comparative Perspectives on the Canadian Constitution* 227, 227–44 (Richard Albert & David R. Cameron eds., 2018) [hereinafter *MacKinnon, Substantive Equality Past and Future*]; Catharine A. MacKinnon, *Substantive Equality Revisited: A Reply to Sandra Fredman*, 14 Int’l J. Const. L. 739 (2016); Catharine A. MacKinnon, *Substantive Equality Revisited: A Rejoinder to Sandra Fredman*, 15 Int’l J. Const. L. 1174 (2017).

unambiguous means, that is, a determined blindness to social reality—has become firmly entrenched in the First Amendment, and the social discourse invoking it, as the virtue termed “neutrality.” Inevitably, existing unequal social arrangements, namely structures and practices of inequality, sometimes in aggressive forms, are thereby protected.

The First Amendment, firmly ensconced within the liberal tradition, tends reflexively to see power as residing in the state, which it sees as power’s fountainhead.⁷ In liberalism, power, rendered “coercive power,” is seen as emanating nearly exclusively from government; society, absent intrusion by the state, is deemed free. Freedom—here, freedom of speech—thus becomes about protecting existing social arrangements, which includes inequalities of power in society, from the state. This includes protecting inequality when the state supports intervention to address that inequality by means of, for example, civil laws against discrimination that include an expressive element.⁸ As a result, statutes that aim (for example) to protect socially disempowered and discriminated-against social groups from inequality imposed through speech or expressive conduct, violent or otherwise, *because they are statutes*, are seen to turn those harmed by such conduct into actors with power, as if they *are* the state. The statutes are legally mispositioned this way instead of recognizing them as attempted legal interventions on behalf of subordinated social groups, passed in an attempt to shift or mitigate their relative powerlessness, or to shield them from its violent excesses. Social relations are overwhelmingly not grasped as a locus or source or wellspring of power, hence of its inequality. The blinkering or overtly prohibiting of any explicit statutory recognition of grounds of

⁷ This ground zero assumption is so fundamental it is virtually impossible to find articulated explicitly because it operates as unconscious ideology. It is most visible in the choice, when discussing power, only to argue for the legitimacy of state power, that is, the principal power seen to exist, as well as in the relative absence of analysis, for example, of male power (Locke analyzes it in the family only to justify it) or white privilege. See, e.g., John Rawls, *Political Liberalism* 136 (1996) (“[P]olitical power is always coercive power backed by the government’s use of sanctions, for government alone has the authority to use force in upholding its laws.”); Robert Nozick, *Anarchy, State, and Utopia* 23 (1974) (“A state claims a monopoly on deciding who may use force when; it says that only it may decide who may use force and under what conditions; it reserves to itself the sole right to pass on the legitimacy and permissibility of any use of force within its boundaries[.]”); Ronald Dworkin, *Law’s Empire* 188, 190–92 (1986). Given how much violence against women occurs that is no less effectively coercive for being extra-legal, this is all mythic.

⁸ This is not always the case. For examples of a lesser but nonetheless existing line of authority, see Part II’s discussion of *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

substantive equality such as race or sex—First Amendment rulings considering their realities instead to be “discussions of” those “topics” or “ideas about” those realities⁹—implements this assumption.¹⁰

The absence of an operative substantive theory of social equality is thus—in the guise of equality, no less—embedded in the First Amendment’s content neutrality. Few if any of its outcomes are neutral as to content, however, and its doctrine of viewpoint neutrality misses the many times dominant viewpoints are obscured while being protected. The upshot is that this doctrine, systematically implemented, protects “speech” that promotes substantive social inequality as it currently exists.¹¹ Claiming freedom of speech, practices of inequality are converted into expressions of ideas about inequality, transforming actionable discrimination into protectable “speech.”

Opposition to discriminatory practices becomes censorship of thoughts or ideas on one side of a discussion. In this light, because discrimination, including through expressive acts of the powerful and advantaged, silences the speech of disadvantaged and subordinated groups as well as promotes their disadvantage and actualizes their subordination, neutrality as a doctrinal approach supports the status quo distribution of social power under the First Amendment just as effectively as it largely does under the Equal Protection Clause, where neutrality became the mainstream doctrine during roughly the same time period.¹²

If substantive inequality is all but invisible in the text of First Amendment doctrine and commentary, it is vividly visible in the facts of many, even most, First Amendment cases, if read through a substantive inequality lens. In early First Amendment cases, asymmetrical harms of what amounts to inequalities, if not so called, were clearly recognized. Passing without notice or comment, over time the underlying alignments of power, seen in substantive terms, have been reversed. Originally, the

⁹ See *infra* text accompanying notes 91–104 (focusing on *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)); *infra* text accompanying notes 158–62 (focusing on *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986)).

¹⁰ *Infra* Part II discusses this, focusing on *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

¹¹ See *infra* Part II.

¹² As discussed in *infra* Part III, watershed public debates and judicial decisions in this respect revolved around two Seventh Circuit cases on which certiorari was denied concerning, substantively, anti-Semitism and commercialized misogyny: a permitting restriction applied to Nazis marching in Skokie, Illinois, see *Collin v. Smith*, 578 F.2d 1197, 1199 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978), and a civil statute recognizing harms of pornography as sex discrimination, see *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986).

statutes suppressing speech sided with state power; those they silenced were its critics. Increasingly, the statutes subjected to First Amendment attack have sided with the powerless and have been attacked by those with power, claiming to be powerless dissenters. Power's victims were those the statutes aimed to protect or those whose victimization the statutes aimed to remedy. But the statutes have been legally invalidated as First Amendment violations either as applied or on their face by representatives of social dominance, claiming the mantle of the powerless and dispossessed.

I.

In the First Amendment dissents of the early twentieth century—the North Star for its authoritative interpretation to the present—alignments of power and powerlessness were, substantively speaking, generally correctly identified. Those whom the Court's (usually) dissenters sought to protect did authentically need their speech protected, for the reasons it was said they needed it. The defendants were principally critics of the state, needing protection from the state; its primary agenda was to protect itself from their criticisms through statutory prohibitions on dissent. As came to be recognized, the state did not need the protection the Supreme Court majorities of that era said it did; the people challenging the state did. This eventually resulted in the invalidation or vitiation of most of the statutes under which these defendants were prosecuted and the effective abrogation of the majority opinions and installation of their (by then) famous dissents as guiding precedent.

The vaunted tradition of speech-protective First Amendment case law, beginning in Justices Holmes's and Brandeis's dissents¹³ and growing through those by Justices Black and Douglas,¹⁴ arose to protect political advocacy critical of the government—expression of opinion on matters of public debate—from the power of the government to silence dissent through criminal law: censorship. The cases involved verbal opposition to governmental ideology or state policies under state or federal criminal statutes, such as opposing the draft or military enlistment or advocating a change in the form of government. The *Schenck* test, written by Holmes

¹³ *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes & Brandeis, JJ., dissenting); *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis & Holmes, JJ., concurring).

¹⁴ *Dennis v. United States*, 341 U.S. 494, 579 (1951) (Black, J., dissenting); *id.* at 581 (Douglas, J., dissenting).

for the Court,¹⁵ permitted criminalizing the “proximity and degree”¹⁶ of the dangerousness of the act prosecuted, which typically included speaking or circulating a newspaper or leaflet, or its intent, without waiting to see whether the outcome it advocated had succeeded. The principal concern of the statutes was “serious injury to the State.”¹⁷ Given the importance of this interest,¹⁸ serious risk was enough.

The vindicated dissents against the convictions of Abrams and Gitlow, for instance, turned largely on a comparison of the powerlessness of the defendants with the powerfulness of the state; the defendants’ advocacy should be protected, the dissents argued, largely because it so lacked traction that it was unlikely to succeed. The *Abrams* dissent would have allowed “the surreptitious publishing of a silly leaflet by an unknown man.”¹⁹ Defending the protection of Abrams’ “poor and puny anonymities” built in the idea that the speech should be protected because it was ineffectual.²⁰ Dennis and his colleagues were described in dissent as “miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful.”²¹ Communists “*as a political party . . . are of little consequence.*”²² The powerlessness of the speakers, hence of the speech, relative to the power of the State—the substantive inequality between the parties—became baked into the First Amendment paradigm as a strong rationale for protecting the less powerful, as well as cogent evidence that there could be no “clear and present danger that this advocacy will succeed.”²³ So it should be protected.

The Court’s dissenters in these cases, laying the foundation of modern First Amendment law, clearly saw who needed protection and why in who had power and who did not, measured in part by speech whose protection

¹⁵ *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”); see also *Whitney*, 274 U.S. at 376 (Brandeis & Holmes, JJ., concurring).

¹⁶ *Schenck*, 249 U.S. at 52.

¹⁷ *Whitney*, 274 U.S. at 378 (Brandeis & Holmes, JJ., concurring).

¹⁸ *Dennis*, 341 U.S. at 501 (“The obvious purpose of the statute is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism.”).

¹⁹ *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

²⁰ *Id.* at 629.

²¹ *Dennis*, 341 U.S. at 589 (Douglas, J., dissenting).

²² *Id.* at 588.

²³ *Id.*

could be afforded because it had been widely rejected and was not hegemonic. The relation between the parties was not expressed as an inequality, although it was one. The Supreme Court sustained this same substantive recognition of relative powerlessness as justifying protection on First Amendment grounds as late as 1982, when it invalidated a federal law compelling disclosure of campaign contributions as applied to the Socialist Workers Party on the grounds that such disclosure would likely devastate “a minor political party which historically has been the object of harassment by government officials and private parties.”²⁴ History and substance—context, i.e., the reality of relative power—counted. At the same time, a First Amendment that goes up against any real power other than the state, with ideas that purport to be rejected but actually are so accepted they are structural, is exactly *not* what was being built here.

Reality had also mattered when the Supreme Court allowed a group defamation statute that reflected an understanding of social inequality, although (as before) the term was not used. The opinion for the Court by Justice Frankfurter in *Beauharnais v. Illinois* upheld a statute that prohibited portrayals of “depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion” that “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.”²⁵ Finding the statute to be “specifically directed at a defined evil,”²⁶ the Court extended libel doctrine from individuals to groups,²⁷ recognizing the status, opportunity, resource, and dignitary differentials of substantive inequality:

It would . . . be arrant dogmatism . . . for us to deny that the Illinois legislature may warrantably believe that a man’s job and his educational opportunities and the dignity accorded him may depend as much on the

²⁴ *Brown v. Socialist Workers ’74 Campaign Comm. (Ohio)*, 459 U.S. 87, 88 (1982).

²⁵ 343 U.S. 250, 251 (1952) (quoting Ill. Rev. Stat. ch. 38, § 471 (1949)).

²⁶ *Id.* at 253.

²⁷ *Id.* at 258 (“But if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State.”). Note the reference to the state. The ruling was also based in part on the propensity of such statements to cause breaches of the peace and on the observation that they had little social value in seeking truth.

reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits.²⁸

This is equality thinking in substance. Really, the statute prohibited practices of discrimination well known to enact and promote substantive social inequalities on the concrete grounds the statute listed.²⁹

Ominously for the future, dissents by Black and Douglas condemned the Illinois law as censorship by transforming enactments and performances of bigotry into protected discussions of matters of public concern.³⁰ They also distinguished between *Chaplinsky*'s³¹ application of "fighting words" to individuals and to groups, not grasping that inequality is inherently collective even when visited on individuals, that all groups are made up of individuals, and that harm on group grounds exponentially expands its harm to individuals. The gravamen of substantive inequality was grasped by Frankfurter, not Black. The liberals abstracted away the speech interest from its statutory and real role in violent inequality, defended those with power—whiteness was supreme—against their targets, those who the conservatives, with the state legislature, seeing the substance, aimed to protect.³² Justice Douglas's dissent in *Beauharnais* did glimpse inequality's substance fleetingly:

²⁸ Id. at 251, 263.

²⁹ Excellent scholarship on this point can be found in Kimberlé Williams Crenshaw, Richard Delgado, Charles R. Lawrence III, and Mari J. Matsuda in *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*. See Mari J. Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press 1993).

³⁰ *Beauharnais*, 343 U.S. at 272 (Black & Douglas, JJ., dissenting) ("Every expansion of the law of criminal libel so as to punish discussions of matters of public concern means a corresponding invasion of the area dedicated to free expression by the First Amendment."). Reed and Jackson also dissented. Id. at 277 (Reed, J., dissenting); id. at 287 (Jackson, J., dissenting).

³¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

³² These conservatives were not yet the libertarians that many are today, on and off courts, who enthusiastically embrace the Black/Douglas line from the right. On this obvious embrace, see, e.g., Mark Tushnet, *Can You Watch Unenumerated Rights Drift?*, 9 U. Pa. J. Const. L. 209, 210 (2006) ("From the 1920s to the 1970s or so, liberals typically supported challenges to speech regulations . . . Since then, though, free speech has become *conservatives'* darling. They have used it in the culture wars to challenge hate speech regulation and antidiscrimination laws."); Wayne Batchis, *The Right's First Amendment: The Politics of Free Speech & The Return of Conservative Libertarianism*, at x (2016) ("Today, a critical mass of conservatives both on and off the Supreme Court are much more willing than they have been in the past to agree with their liberal counterparts that speech is deserving of First Amendment protection. . . . [T]he First Amendment has become an affirmative tool for advancing mainstream conservative policy objectives."); Adam Liptak, *How Conservatives Weaponized*

Hitler and his Nazis showed how evil a conspiracy could be which was aimed at destroying a race by exposing it to contempt, derision, and obloquy. I would be willing to concede that such conduct directed at a race or group in this country could be made an indictable offense. For such a project would be more than the exercise of free speech.³³

Missed by him was the fact that this statute addressed precisely such conduct, along with seeing the prohibited behavior for what it was: an imposition of inequality.

A crucial ruling in which the liberals' abstract speech template prevailed, as it has to this day, was *New York Times Co. v. Sullivan*, constitutionalizing the law of libel in 1964.³⁴ Tacitly cloaked in a vindication of the speech rights of equality-seekers against racist officials without saying so, this decision further empowered the media, already a powerful social institution, to publish inaccuracies, and undermined law against false publication. The *Times* had run a civil rights fundraising ad for Black leaders that described racist misbehavior by Southern white police officers. Based on minor inaccuracies in the ad, the *Times* was successfully sued for libel by the police commissioner under state libel law. In the Supreme Court, the newspaper successfully argued that more than small inaccuracies should be required to sue for speech, establishing First Amendment hegemony over the law of libel, requiring for the first time that not mere falsity, but "reckless disregard of whether it was false or not[,]” was necessary to establish libel of public officials.³⁵ Thereafter, a libel claimant had to show that the publisher of defamation of a public figure knew the truth but ignored it.

The submerged substantive alignment pitted the civil rights movement against the police, but the case played out through its formal legal parties: the supposedly vulnerable mainstream media against the all-powerful state common law of libel. The civil rights speech—the anti-white-racist speech—at the case's factual foundation was ignored in substance. The

the First Amendment, N.Y. Times (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html> [https://perma.cc/7AFR-LG E3] (“Conservative groups, borrowing and building on arguments developed by liberals, have used the First Amendment to justify unlimited campaign spending, discrimination against gay couples and attacks on the regulation of tobacco, pharmaceuticals and guns.”).

³³ *Beauharnais*, 343 U.S. at 284 (Douglas, J., dissenting).

³⁴ 376 U.S. 254 (1964). The phrase typically used for this standard is “reckless disregard of the truth,” which appears in the Syllabus. *Id.* at 255.

³⁵ *Id.* at 280.

Court instead proceeded as if the underlying substantive inequality between assertion of civil rights and official Southern police suppression of their pursuit—the equality-seeking content of the speech and the speakers—was irrelevant, although they were aligned with the speech interests at stake by the newspaper. Instead, the Court placed a mainstream media outlet, a colossus actually, in the victimized position of the powerless speaker in need of protection against the powerful state, there represented by the law of libel found in need of constitutional restriction.

The actual content of the speech at issue in *New York Times* may have been the last interest of the *Times*'s lawyer in the case, Herbert Wechsler, who had created the general concept of “neutral principles of constitutional law”³⁶ in opposition to the result in *Brown v. Board of Education*.³⁷ That case's decision combined explicit formal equality logic with an implicit substantive shift that assumed the inherent equality of Black and white schoolchildren—a shift greatly protested by Wechsler in his critique of *Brown* and defense as “neutral,” hence principled, of the prior case law that upheld official racial segregation.³⁸

Ignoring the equality content of the speech protected in the *New York Times* case made it unnecessary for the law, or the public debate surrounding it, to consider whether the mighty power to publish defamatory falsehoods that publishers—which today can include most Internet service providers—gained in the case might as or more often find the inequality shoe on the other foot: publishers hiding behind the First Amendment to publish lies that harm socially subordinated groups, including their members. In other words, in *New York Times*, the outcome was aligned with the equality interests, but it is not always so. Ignoring the implicit inequality driver in the facts there made a later doctrinal recognition of the inequality interest all the more difficult.

Making matters worse, *New York Times* has been widely cited not only as eliminating the categorical exemption of group libel from First Amendment protection, which it did not expressly do, but as calling

³⁶ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

³⁷ 347 U.S. 483 (1954).

³⁸ Wechsler, *supra* note 36, at 33 (“I find it hard to think the judgment really turned upon the facts. Rather, it seems to me, it must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved.”). Note the defense of dominance in the guise of neutrality. *Id.*

redress for or regulation of group libel as in *Beauharnais* into question under the First Amendment under any rubric, so that “no one thinks the First Amendment would today be interpreted to allow group defamation to be prohibited.”³⁹ Although this conclusion is exaggerated and could be revisited, given that *Beauharnais* has never been overruled and has even been cited as authority by the Court,⁴⁰ nonetheless “its continued vitality has been questioned[,]”⁴¹ beginning with *New York Times*, an individual—not a group—libel case. Thus was recognition of the harms of the speech of inequality sidelined as the law against libel, including racist libel, was weakened as a tool against published lies against groups as well as public individuals.⁴²

A similar elision of the content of substantive inequality occurred in *Brandenburg v. Ohio*,⁴³ another landmark speech case in which racial inequality drove the facts but was entirely ignored in the decision. There, a leader of a Ku Klux Klan group was convicted under a criminal syndicalism statute that was struck down, creating the new “incitement” test for measuring the relation between speech and the harm it caused.⁴⁴ The First Amendment’s free speech guarantee, *Brandenburg* held, does “not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁴⁵ The substance of the Klan’s white supremacist advocacy—

³⁹ Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 672 (7th Cir. 2008); accord *Dworkin v. Hustler Mag. Inc.*, 867 F.2d 1188, 1200 (9th Cir. 1989); *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 331 n.3 (7th Cir. 1985), aff’d mem., 475 U.S. 1001 (1986) (stating cases beginning with *New York Times* have “so washed away the foundations of *Beauharnais* that it could not be considered authoritative”); *Collin v. Smith*, 578 F.2d 1197, 1204–05 (7th Cir. 1978); *Tollett v. United States*, 485 F.2d 1087, 1094 n.14 (8th Cir. 1973); *Anti-Defamation League of B’nai B’rith, Pac. Sw. Reg’l Off. v. FCC*, 403 F.2d 169, 174 n.5 (D.C. Cir. 1968) (Skelly Wright, J., concurring) (noting “far from spawning progeny, *Beauharnais* has been left more and more barren by subsequent First Amendment decisions, to the point where it is now doubtful that the decision still represents the views of the Court”).

⁴⁰ See, e.g., *United States v. Stevens*, 559 U.S. 460, 468 (2010); *New York v. Ferber*, 458 U.S. 747, 763 (1982).

⁴¹ *Sambo’s Rests., Inc. v. City of Ann Arbor*, 663 F.2d 686, 694 n.7 (6th Cir. 1981). A cogent summary of this view can be found in *Draego v. City of Charlottesville*, No. 3:16-cv-00057, 2016 WL 6834025, at *8–9 (W.D. Va. Nov. 18, 2016), noting, inter alia, Supreme Court references undermining *Beauharnais*.

⁴² As to public figures, see generally Frederick Schauer, *Public Figures*, 25 Wm. & Mary L. Rev. 905 (1984).

⁴³ 395 U.S. 444 (1969).

⁴⁴ *Id.* at 448–49, 449 n.4.

⁴⁵ *Id.* at 447.

“derogatory of Negroes and, in one instance, of Jews[,]”⁴⁶ including the threat of violence in a speech on a film (that was shown) stating that if the existing government “continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken”⁴⁷—not to mention the Klan’s well-known history of acting on such threats⁴⁸—was ignored. A second speech omitted this statement but contained the virulent “Personally, I believe the n---er should be returned to Africa, the Jew returned to Israel[,]”⁴⁹ quoted by the Court without noting the role of mass deportations in genocide, the ultimate substantive inequality. Legally protecting the white supremacist point of view, as this decision did, was not seen as state action on one side—the hierarchically dominant side—of a political issue or debate of public concern that has another side: the subordinated substantive inequality side. Conforming to the prior First Amendment template, injury to subordinated peoples was reconfigured as injury to the state, such that advocating violent means to political and economic change “involves such danger to the security of the State that the State may outlaw it.”⁵⁰

Thus was the stage set for the ruling, and abdication of ruling, in a situation a step closer to genocide. In *Collin v. Smith* in 1978, the Seventh Circuit, certiorari denied, invalidated a local ordinance against dissemination of materials that promoted hatred toward persons on the basis of their race, national origin, or religion, and permitted the Nazis to march in brown uniforms with swastikas flying in a town whose 70,000 inhabitants numbered 40,000 Jews.⁵¹ Upholding the ordinance was seen as “[i]deological tyranny;”⁵² the Nazis and their beliefs were not seen as ideologically tyrannical, nor was officially permitting their expression.

⁴⁶ Id. at 446.

⁴⁷ Id. (quoting film of a Klan rally). The pithy “Jews will not replace us!” is today’s version from the Charlottesville rally of August 11–12, 2017. See *Torch-Wielding White Nationalists Clash with Counterprotesters at UVA*, Daily Beast (Aug. 12, 2017, 9:57 AM), <https://www.thedailybeast.com/torch-wielding-white-nationalists-clash-with-counter-protestors-at-uva> [<https://perma.cc/W972-4WH4>]. In my opinion, the accurate descriptive term is white supremacists, not white nationalists.

⁴⁸ On Klan violence during the Reconstruction era, see Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* (1971); Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 *Mich. L. Rev.* 675 (2002).

⁴⁹ *Brandenburg*, 395 U.S. at 447 (quoting film of a Klan rally) (dashes added).

⁵⁰ Id.

⁵¹ 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978).

⁵² Id. at 1200.

Authoritatively allowing their bigoted expression (they decided to march in Chicago instead) was thus rendered neutral. The court asserted that permitting unpopular views “distinguishes life in this country from life under the Third Reich,”⁵³ eliding the fact that the substantive views it was officially permitting were those that characterized—i.e., were authoritatively articulated while being actualized in—the Third Reich, including through extermination of Jews by the millions.

“Content control” was regarded by the Seventh Circuit as an intrinsically “slippery and precarious path,” exemplifying “the essence of . . . forbidden censorship.”⁵⁴ The cherished truism was re-paraded that “[u]nder the First Amendment there is no such thing as a false idea.”⁵⁵ The decision distinguished facts from what were rendered Nazi beliefs, for instance, “that black persons are biologically inferior to white persons . . . [and] that American Jews have ‘inordinate . . . political and financial power’ in the world and are ‘in the forefront of the international Communist revolution.’”⁵⁶ Actually, these statements are philosophically factual in form. Apart from the assessment of “inordinate,” which is a judgment not a fact, they are factually false. The idea that they are true is a false idea, which leaves “under the First Amendment” as a stand-alone ipse dixit.

So no idea in factual form, however false, can attract legal action?⁵⁷ False facts that form the basis for prejudice, stereotypes, and other practices of discrimination include that gay men are pedophiles who are coming for your children, that Muslims are terrorists, that Black men are lazy and violent and oversexed, that Black women are promiscuous, that women are men’s biological inferiors who lie about rape, which they

⁵³ Id. at 1201.

⁵⁴ Id. at 1202 (quoting *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972)). The prohibited materials were precluded from being considered “fighting words,” despite a state narrowing construction, because the town had promised to prevent responsive violence. Id. at 1203.

⁵⁵ Id. (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)).

⁵⁶ Id. at 1199.

⁵⁷ This cannot be right, of course, since libel law itself, for example, largely exempts opinion but allows statements of fact to be more readily actionable. It could be that this truism is meant to apply to opinions, but these statements are not in the form of opinions. See *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 18 (1990) (observing that “the fair meaning of the [*Gertz*] passage is to equate the word ‘opinion’ . . . with the word ‘idea’” suggesting that ideas should be corrected by other ideas, but there is no blanket exception from libel law for “opinion”). Likely the answer is thought to be that “some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.” *United States v. Alvarez*, 567 U.S. 709, 718 (2012).

secretly desire, and so on. Belief in such lies is a real engine of substantive inequality, giving credibility and clout to practices based on them from shunning, to unequal pay, to impunity for rape, to police brutality, racially disproportionate incarceration and capital sentencing, to exclusion from the country. In the Skokie case, the consequences of the march, termed “symbol[ic],”⁵⁸ were reduced to psychological “offensiveness”⁵⁹ and “trauma”⁶⁰ in the heads of the target population, its connections with inequality to the point of genocide by perpetrators ignored, as if only the sensitivities of the hearers and not the willingness to kill conveyed by the speakers were relevant to its legally cognizable effects. The Nazis were falsely termed “dissidents,”⁶¹ unjustifiably conflating them with the dissidents of the past free speech tradition, the well-documented role of anti-Semitism in American life,⁶² not to mention the world, ignored.

Justice Blackmun, one of the Court’s most substantive thinkers, dissented from the denial of certiorari, joined by Justice White, perhaps its sharpest legal mind in his time, together refusing to forget who Nazis, in reality, were.⁶³ The majority’s refusal to review the decision, they noted in understatement, was in “some tension with *Beauharnais*.”⁶⁴ They considered that the question whether “there is no limit whatsoever to the exercise of free speech” should be examined in circumstances in which the proposed demonstration “just might fall into the same category as one’s ‘right’ to cry ‘fire’ in a crowded theater.”⁶⁵ At least someone did not confine the ability to address the harm created by speech to that speech that was impotent in producing effects. At least someone imagined that if speech could present a clear and present danger to the state, it might, in some circumstances, realistically endanger a historically subordinated group. Their dissent grasped that the Nazis were moving to impose on Jews on U.S. soil the very substantive inequality that this country fought

⁵⁸ *Smith*, 578 F.2d at 1206.

⁵⁹ *Id.* at 1207.

⁶⁰ *Id.* at 1205.

⁶¹ *Id.* at 1206 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

⁶² See, e.g., Leonard Dinnerstein, *Antisemitism in America* (1994); Eric L. Goldstein, *The Price of Whiteness: Jews, Race, and American Identity* (2006); From Antisemitism to Anti-Zionism: The Past & Present of a Lethal Ideology (Eunice G. Pollack ed., 2017).

⁶³ “[W]e are presented with evidence of a potentially explosive and dangerous situation, enflamed by unforgettable recollections of traumatic experiences in the second world conflict.” *Smith v. Collin*, 439 U.S. 916, 918 (1978) (Blackmun, J., dissenting from the denial of certiorari).

⁶⁴ *Id.* at 919.

⁶⁵ *Id.*

to stop in a war in Europe. Yet equality as an interest effectively protected by the ordinance—challenged by the Nazis, in effect defended by Skokie on behalf of its Jewish citizens, and violated by the Seventh Circuit and the Supreme Court majority in the result—was, as such, unstated.

These milestone free speech cases thus achieved their “speech” protections by submerging powerful evidence of substantive inequality, frequently protecting and furthering it. The cases were predicated on facts in which bigoted expression was sought to be protected or racist acts were prohibited by law, yet were resolved without even legally noticing these realities, as if it was crucial to the legal posture of principle to ignore on what side of an inequality line the free speech decision came down. Well past when it was justified by the facts of the cases, the decisions continued to act as if the power alignments of the sides in the litigation were what they had been in the (by then established) tradition of the syndicalism and communism dissents: the state, embodied in a statute or ordinance representing the powerful suppression of speech on one side, powerless dissenters subject to prosecution or state restraint—now the Klan or the Nazis, their allegedly unpopular and powerless speech being suppressed—on the other.

Thus was the abstract model constructed as if the state held a monopoly on power and those whose “speech” it was restricting had less or little or none—regardless of whether the state was no longer protecting itself, but was seeking to protect some people in society from others, whose biases represented, and actions derived their potency and permission from, structural social dominance. Restricting arguable expression was reflexively rendered an expression of the dominant power of the state over powerless others, rather than what it was: an attempt by the state to promote equality in civil society in the interest of disadvantaged groups. In other words, the state was not seeking to protect itself or its own power in *Beauharnais*, *Brandenburg*, or *Collin v. Smith*, nor was the state the target of the potential violence. The target of the “speech” was African Americans, formerly legally enslaved and still structurally subordinated across American society, and Jews, including many who had survived the Nazis when six million within living memory had not.

In this light, substantively speaking, the speech-protective tradition of the First Amendment was hijacked as a protection for powerful media and organized terrorist groups who stood in for, represented, *were* dominant interests. This could happen not because these entities were powerless, but because they were not: the decisions track the substantive status quo

distribution of power. Both the mainstream media and these racist groups had established forms of social hegemony. And despite the racism in the facts, nothing in these cases, legally speaking, was seen to be about equality. Through this lens, the early dissents represent an unrecognized First Amendment equality tradition all but demolished, certainly dishonored, by the doctrine of tacit inequality that inverted and replaced it.

II.

Equality entered the First Amendment canon in *Schacht v. United States*, in which the U.S. Supreme Court held that a statute that prohibited the unauthorized wearing of an American military uniform, there in a “theatrical production,” would have been facially constitutional. However, “leav[ing] Americans free to praise the war in Vietnam but [sending] persons . . . to prison for opposing it, cannot survive in a country which has the First Amendment.”⁶⁶ The notion that prohibiting all speech of a certain content—content here being wearing a uniform for artistic purposes—is acceptable to the First Amendment, but selecting a preferred side in an argument that could be taken while prohibiting the other side was not, was subsequently construed in equality terms as permitting a neutral regulation but not (what was actually) a viewpoint-based one. The notion that all unauthorized wearing of American military uniforms could constitutionally be prohibited was regarded as “neutral.”⁶⁷ This notion aspires to value neutral contentlessness. Actually, the United States military uniform conveys a message replete with content;⁶⁸ there is no world in which it is content neutral. Uniforms exist to convey a message in life and on stage. In plays, only prohibiting costumes of any kind would be closer to neutral, resulting in a public nudity that also sends a message. Every attire or lack of it has social meaning.

The subsequent Supreme Court decision in *Police Department of Chicago v. Mosley*⁶⁹ in 1972 first made what it called an equality consideration explicit in a First Amendment context, invalidating a

⁶⁶ 398 U.S. 58, 63 (1970); see also Stone, *supra* note 4, at 38 (terming *Schacht* “[t]he first clear intimation of the equality conception of the First Amendment”).

⁶⁷ Stone, *supra* note 4, at 39.

⁶⁸ For merely one illustration, see Dave Philipps, *To Stand Out, the Army Picks a New Uniform with a World War II Look*, N.Y. Times (May 5, 2019), <https://www.nytimes.com/2019/05/05/us/new-army-greens-uniform.html> [<https://perma.cc/SH8Z-AD3V>].

⁶⁹ 408 U.S. 92 (1972).

Chicago ordinance prohibiting picketing within 150 feet of a school while school was in session except for peaceful picketing “involved in a labor dispute.”⁷⁰ The Court assumed all peaceful picketing could be prohibited but found unconstitutionally unequal “under the Equal Protection Clause, not to mention the First Amendment”⁷¹ allowing some peaceful pickets but not others. Labor was the content. This case, analytically speaking, applied the putative neutrality of formal equality: treating likes alike, unlikes unlike, “affect[ing] alike all persons similarly situated.”⁷² Considering equality within the First Amendment thus became the formal equality distinction between some First Amendment restrictions and others.⁷³ So as equal protection (with exceptions) under the Fourteenth Amendment has been confined to the formal equality straightjacket of the mainstream approach of gender neutrality for sex and colorblindness for race,⁷⁴ the First Amendment has increasingly been restricted to content and viewpoint neutrality. The extended results of viewpoint neutrality have become a doctrinal obsession across First Amendment adjudication, reinforcing inequality of power and effective caste status as they exist,

⁷⁰ *Id.* at 94 n.2 (quoting Chi., Ill., Municipal Code ch. 193-1(i) (1968)).

⁷¹ *Id.* at 96.

⁷² *Barbier v. Connolly*, 113 U.S. 27, 32 (1885).

⁷³ The classic articulation of this principle was Karst, *supra* note 4, at 37. Although he had some intimations of substantive equality, most were shoveled under “de facto” or disparate impact inequality. His approach was to think substance and speak abstraction, producing the inaccuracy of his hopeful predictions. Stone vividly illustrates the abstract method. See Stone, *supra* note 4, at 40–42. For the doctrine as developed early, see, for example, *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 536 (1980) (“[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited ‘merely because public officials disapprove the speaker’s views.’” (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring))).

⁷⁴ Catharine A. MacKinnon, *Sex Equality* (3d ed. 2016), is essentially a treatise on this point in the form of a casebook. Even the doctrinal labels used to distinguish the most important Fourteenth Amendment cases from the less important ones have immigrated into First Amendment law, i.e., the Equal Protection concept of strict versus intermediate scrutiny. Under the First Amendment, strict scrutiny is applied to content-based regulations, which survive only when necessary to serve a legitimate and compelling governmental interest, together with least restrictive narrow tailoring that serves it. Hence, seldom. See *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 813 (2000). Protecting listeners from offensive content is not a legitimate governmental interest. *Cohen v. California*, 403 U.S. 15, 24–25 (1971). What is now termed “intermediate scrutiny” under the First Amendment means that a “content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

just as the implementation of formal equality largely has done under the Equal Protection Clause.⁷⁵

The First Amendment notion of content neutrality, justified in equality terms, was termed “protection against governmental discrimination on the basis of speech content.”⁷⁶ This abstract prohibition against distinguishing between some speech and other speech without strong reasons is centrally aimed against the government prohibiting the expression of some points of view, or at granting the content of some views a forum because it finds them acceptable, while denying a forum to others “to express less favored or more controversial views.”⁷⁷ Given merit to this sensitivity, entirely missed is that fact that neither governmental favor nor acceptability as such has anything to do with the ways in which the substance of inequality is largely promoted through verbal and other expressive conduct. Karst perceptively noted, “[t]he formal equality of ‘content-neutral’ procedural rules . . . may conceal a hidden inequality,”⁷⁸ but he did not disclose the substantive inequality concealed. His influential article thinks substantively but speaks abstractly.

On this reading of the tradition, courts have spent much of the intervening decades since *Mosley* trying to justify, or rejecting the attempted justification of, distinctions between some restrictions and other restrictions, explaining why restricting some expressive materials is acceptable and others not, in terms of neutrality. In fact, all the materials have content, and most convey points of view that often go unrecognized. For instance, the Supreme Court permitted to stand the conviction of David Paul O’Brien for burning his draft card, which he did to protest the draft, under a statute that prohibited destroying draft cards.⁷⁹ The case

⁷⁵ See Catherine A. MacKinnon, *Difference and Dominance: On Sex Discrimination* (1984), in *Feminism Unmodified*, supra note 5, at 32–45, and, to illustrate the contrast between a formal and substantive equality approach in the U.S. constitutional context, see Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 *Yale L.J.F.* 343 (2019).

⁷⁶ Karst, supra note 4, at 35; see also *Mosley*, 408 U.S. at 95–96 (describing how the First Amendment prevents the government from restricting expression based on its content); Stone, supra note 4, at 41 (discussing Karst’s observation that the central concern in *Mosley* “would turn out to be inequality based on the content of the message”).

⁷⁷ *Mosley*, 408 U.S. at 96.

⁷⁸ Karst, supra note 4, at 39.

⁷⁹ *United States v. O’Brien*, 391 U.S. 367 (1968). For a further example of viewpoint non-neutrality never recognized as such, the gravamen of defamation is falsely making someone

became the standard for permitting prohibitions of expressive acts as “action.” Destroying one’s draft card may have a number of meanings, all with content, however, and it is virtually impossible to express a point of view favorable to the selective service system by burning its registration vehicle. The underlying act may have been prohibited for reasons other than its expressive content, but its prohibition is far from viewpoint neutral.

The absence of a substantive equality approach has been as damaging to equality interests in the First Amendment area as it has been under the Equal Protection Clause.⁸⁰ In *Boy Scouts of America v. Dale*,⁸¹ for just one example, the Supreme Court used formal equality logic to entrench a substantive inequality when it disallowed a New Jersey public accommodation statute that prohibited discrimination based on sexual orientation as applied to the Boy Scouts because it could “significantly burden the Boy Scouts’ desire to not ‘promote homosexual conduct as a legitimate form of behavior.’”⁸² Purporting to be neutral as to the Boy Scouts’ (then expressed) homophobia,⁸³ the Court failed to see what the statute saw: substantively, guaranteeing gay rights is guaranteeing equality rights, while permitting homophobia as a basis for a public policy under the guise of protecting its free expression, there expressive association, is putting state power behind inequality. First Amendment content neutrality permitted substantive inequality to be official policy. In other words, substantive equality guarantees are not neutral as between equality and inequality, as formal ones can be. Under the First Amendment, the expressive dimension of being gay also lost under formal equality’s content neutrality, which (again) was not neutral at all. A substantive equality approach would have protected it, recognizing the hierarchy of straight over gay as the substantive inequality it is.

look bad. There is a point of view in that. Falsely making someone look good is not defamatory, it is successful PR.

⁸⁰ For discussion under the Equal Protection Clause, see, for example, Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 Ohio St. L.J. 1081 (2004).

⁸¹ 530 U.S. 640 (2000).

⁸² *Id.* at 653 (quoting Reply Brief for Petitioners at 5, *Boy Scouts of Am.*, 530 U.S. 640 (No. 99–699), 2000 WL 432367, at *5). The prior First Amendment case, *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, had similarly authorized the exclusion from a march of gay groups, rendered expressive content. 515 U.S. 557 (1995).

⁸³ *Boy Scouts of Am.*, 530 U.S. at 653 (“As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression.”).

Formal equality, seeking neutrality in the sense of outcomes on no one's side, is actually not possible in real inequality situations. It tilts toward power winning because neutrality favors non-intervention, meaning not disrupting the arrangement that power has established. At best, it can go either way. Indifferent between substantive equality and inequality, it is not an equality rule at all. First Amendment neutrality has thus become a shibboleth for fairness in the guise of equal treatment while overwhelmingly siding with inequality in substance, as well as the form in which the ever-elusive holy grail of high groundlessness is sought, when what is actually needed is an injection of context, substance, history: inequality's reality. What happens under the First Amendment now that gay and lesbian rights have some more constitutional dimension⁸⁴ is an open question. The neutrality fixation provides no confidence as to the answer, since not disturbing what power has established almost always looks more neutral than equalizing it does.

Both before and after *Mosley*, a more substantive equality recognition has sometimes overcome neutrality, prevailing if rarely over the claimed First Amendment interest. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,⁸⁵ for example, held that the state interest in preventing sex discrimination at work outweighed the First Amendment commercial speech interest in publishing sex-segregated ads, a holding Karst found "unfortunate."⁸⁶ In similar vein from a substantive equality standpoint, the Supreme Court in *Roberts v. United States Jaycees*⁸⁷ held that states have a "compelling interest in eradicating discrimination against . . . female citizens"⁸⁸ on the basis of sex, as embodied in a Minnesota human rights statute, that outweighed any First Amendment right of expressive association that would have kept the Jaycees an organization confined to "young men."⁸⁹ Crucially, the Court

⁸⁴ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (protecting same-sex sexual acts from criminalization under Fourteenth Amendment Due Process liberty); *United States v. Windsor*, 570 U.S. 744, 775 (2013) (invalidating Section 3 of the Defense of Marriage Act (DOMA), which defined marriage as the union between one man and one woman, under the Fifth Amendment's equal protection component); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (holding that marriage, and its recognition by the State, is a fundamental right guaranteed to same-sex couples under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment).

⁸⁵ 413 U.S. 376, 391 (1973).

⁸⁶ Karst, *supra* note 4, at 33.

⁸⁷ 468 U.S. 609 (1984).

⁸⁸ *Id.* at 623.

⁸⁹ *Id.* at 613.

recognized that “acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly . . . such practices are entitled to no constitutional protection.”⁹⁰ Recognition that acts of discrimination, “wholly apart from the point of view such conduct may transmit,” are *not* constitutionally protected is a principle that, despite the occasional hat tip, has largely remained confined to the facts of this case.

Using abstract equality formalism to sideline concrete unequal historical reality came to a head in *R.A.V. v. City of St. Paul*,⁹¹ in which a young man was accused of burning a cross on the fenced yard of an African American family’s home, under a statute that prohibited such acts when the actor reasonably knew it would “arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender[.]”⁹² Interpreted by the State as a subcategory of “fighting words,”⁹³ the inequality grounds were rendered “specified disfavored topics”⁹⁴ by the Supreme Court majority. The Court contended that the law “goes even beyond mere content discrimination, to actual viewpoint discrimination[.]”⁹⁵ opining that, under the statute, those arguing in favor of equality were permitted to use statements that “insult, or provoke violence,” but those arguing against equality could not.⁹⁶ This approach obscured the fact that these grounds list some of the substance of substantive equality: permitting discrimination on those grounds violates equality rights, prohibiting discrimination on those same grounds is what equality law does. Precisely what the Supreme Court found violated the First Amendment was what a substantive equality analysis, in content, would support: opposition to “bias-motivated” hatred and fighting words “based on virulent notions of racial supremacy.”⁹⁷ The majority’s

⁹⁰ Id. at 628.

⁹¹ 505 U.S. 377 (1992).

⁹² Id. at 379–80 (quoting St. Paul, Minn., Legis. Code § 292.02 (1990)).

⁹³ Id. at 381.

⁹⁴ Id. at 391.

⁹⁵ Id.

⁹⁶ Id. Actually, contrary to the Court’s strained reaching for a hypothetical to illustrate its abstract point, it seems to me that “a sign saying . . . that all ‘anti-Catholic bigots’ are misbegotten” would not be allowed under the statute, as it is “on the basis of religion.” Id. at 391–92.

⁹⁷ Id. at 392 (quoting *In re Welfare of R.A.V.*, 464 N.W.2d 507, 508, 511 (Minn. 1991), rev’d, *R.A.V.*, 505 U.S. 377).

objection in the name of governmental neutrality that the city was “seeking to handicap the expression of particular ideas”⁹⁸ amounts to objecting to the city’s prohibition of historically bigoted acts of terrorism—in the Minnesota Supreme Court’s rendition of *Chaplinsky*, “conduct that itself inflicts injury or tends to incite immediate violence.”⁹⁹ Burning a cross is not part of an argument over ideas but a well-understood act of white supremacy.

Under neutrality doctrine, the inequality substance on each side has been turned upside down in the last century. When a viewpoint is seen, and when a law based on it is found to violate the First Amendment, is when substantive inequality is exposed, named, and explicitly opposed by public policy. But a ground of inequality is not a viewpoint; it is a cultural artifact that is a basis for assigned systemic advantage and disadvantage, a category of social stratification. Discrimination is not a viewpoint either, although not being random it contains and enforces a point of view as most acts do; it is the imposition or enactment of an inferior or endangered status on a socially systematic, damaging, and arbitrary ground. Where equality is social policy, discrimination is an illegal practice of inequality. Cross-burning is not a discussion any more than rape or segregation are, although all three are communicative as well as actively subordinating and obviously discriminatory. The hostility of the *R.A.V.* majority to equality as a basis for social policy is itself a viewpoint, one contrary to any serious legal prohibition on inequality, indeed contrary to the history of the Fourteenth Amendment, which opposed discrimination on the basis of race in substance in its origins, even if its jurisprudence today often does not. The *R.A.V.* list of “disfavored topics” is actually the well-recognized list of grounds of substantive inequality in this country.¹⁰⁰

⁹⁸ *Id.* at 394.

⁹⁹ *Id.* at 380 (quoting *R.A.V.*, 464 N.W.2d at 510).

¹⁰⁰ The exception for some inequality that the *R.A.V.* majority made for Title VII, while welcome, was incoherent: “sexually derogatory ‘fighting words,’ among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices” because the government is not targeting conduct “on the basis of its expressive content,” so “acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” *Id.* at 389–90. For an informative analysis, see Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn’t Bark*, 1994 *Sup. Ct. Rev.* 1. As the concurrence acutely notes, the federal Title VII hostile work environment regulation “does not prohibit workplace harassment generally; it focuses on what the majority would characterize as the ‘disfavored topi[c]’ of sexual harassment.” *R.A.V.*, 505 U.S. at 409 (White, J., concurring in the judgment) (alteration in original). “[B]ecause a general ban on harassment in the workplace would cover the problem of sexual

Just eleven years after *R.A.V., Virginia v. Black*¹⁰¹ upheld an anti-cross-burning statute, providing an exceptional substantive, if tacit, First Amendment equality ruling in the result. Contextualizing Virginia's prohibition on cross-burning "with intent to intimidate"¹⁰² in the history of the reality of cross-burning—being Ku Klux Klan terrorism, heralding lynching and other torture and murder¹⁰³—the practice was described as a virulent and unambiguous "symbol of hate."¹⁰⁴ "Symbol" minimized; "hate" psychologized and moralized. In any event, allowing the prohibition on cross-burning was seemingly acceptable to a majority of the Court under the First Amendment because the concrete ground for the inequality that the cross-burning effectuated was not mentioned in the statute. That is, the law did not say "race;" it only said "cross-burning."¹⁰⁵ Apparently, if the Skokie ordinance had only prohibited all swastika-flying and brown shirt marching, it would have been constitutional too.

Not permitted, in other words, in prohibiting the imposition of an inequality by putatively expressive means, is overt recognition of, or restriction to, the substantive grounds on which that inequality is imposed, thence prohibited. The grounds are censored. Opposing a named inequality is unequal, a neutrality violation. Allowing it to be imposed is not, nor is prohibiting its material imposition, so long as the grounds of inequality on which it is imposed are elided. Cross-burning can be prohibited as in *Virginia v. Black* because anyone can say anything on any side of anything about anyone by burning one, according to the statute. Never mind that, in reality, cross-burning only expresses one side by some people over and against certain others, only spreads terror in certain communities. Prohibiting the racist inequality cross-burning constitutes, promotes, and threatens was thus able to be treated not as prohibited viewpoint discrimination by the sleight of hand of prohibiting cross-burning the act, although the only viewpoint cross-burning the act expresses is virulent white supremacy, a race-based (and dominant) point

harassment, any attempt to proscribe the subcategory of sexually harassing expression would violate the First Amendment." *Id.* at 410. It is nonetheless true that sexual harassment "itself inflicts injury[.]" *id.* at 380 (majority opinion), so is within Minnesota's construction of the statute's fighting words. But then so was cross-burning. *R.A.V.*, 464 N.W.2d at 510–11.

¹⁰¹ 538 U.S. 343 (2003).

¹⁰² *Id.* at 362.

¹⁰³ *Id.* at 352–57.

¹⁰⁴ *Id.* at 357 (quoting *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 771 (1995) (Thomas, J., concurring)).

¹⁰⁵ *Id.* at 362.

of view. A substantive equality principle, by contrast, stands squarely against white supremacy and favors opposing it, as, in one rare substantive moment, has the Equal Protection Clause.¹⁰⁶ What is invalid in the *R.A.V.* statute is permitted in *Virginia v. Black* because the prohibited word “race” is not uttered.

Suspicion that the dynamic driving domestic white supremacist terrorism simply is not real to Supreme Court majorities, in prejudice or portent or lived reality, grows upon reading the 2010 decision in *Holder v. Humanitarian Law Project*.¹⁰⁷ There, a federal statute prohibiting core political speech, including support for groups on the congressional terrorism watch list that includes counseling these groups in nonviolent resolution of conflict, survived First Amendment strict scrutiny for the first time since the beginning of the last century.¹⁰⁸ This terrorism, apparently, is real.¹⁰⁹

III.

Over the same time period as these developments, an obligato of the First Amendment’s law on pornography can be discerned beneath them. Beginning with obscenity—a doctrine under which more writers and artists than pornographers were early prosecuted¹¹⁰—this field morphed

¹⁰⁶ *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that a prohibition on interracial marriages involving exclusively white persons shows they are unconstitutional “measures designed to maintain White Supremacy”). The *Loving* Court also held that even if all races were even-handedly prohibited from intermarrying, the anti-miscegenation law would still violate the Equal Protection Clause because it is race-based. *Id.* at 11–12 n.11. Apparently, marriage isn’t expressive.

¹⁰⁷ 561 U.S. 1 (2010).

¹⁰⁸ *Id.* at 39–40.

¹⁰⁹ Viewpoint neutrality, far from being in retreat, is metastasizing. Ignoring the substantive racial dimensions of a case challenging refusal to trademark “The Slants” under a statute that prohibited racially disparaging trademarks, the Supreme Court extended the viewpoint discrimination prohibition to commercial speech, opining “[g]iving offense is a viewpoint.” *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017). Offense is not racism’s issue; discrimination is. The Court’s statement is confused. Something gives offense only to someone who is offended by it, which can be because of its viewpoint or some viewpoint-neutral attribute. A photo of a steaming mound of excrement can be found offensive without conveying any viewpoint whatever, certainly none about inequalities. Reducing discrimination to its offensiveness is a tool for trivializing its consequences.

¹¹⁰ For documents illustrating this point, see Edward de Grazia, *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius* (1992); analysis of illustrative cases may be found in Charles Rembar, *The End of Obscenity: The Trials of Lady Chatterley, Tropic of Cancer and Fanny Hill* (1968).

into rulings on indecency, child pornography, animal cruelty videos, and violent video games. Obscenity law has exhibited no more awareness of the inequalities in its facts than have other First Amendment areas. *Roth v. United States*,¹¹¹ permitting a federal statute prohibiting mail of “obscene, lewd, lascivious, or filthy . . . or other publication[s] of an indecent character”¹¹² in 1957, defined obscenity as a category outside constitutionally protected speech that appealed to the “prurient interest” in sex and was “utterly without redeeming social importance.”¹¹³ Nothing on the inequalities required to produce the materials or the harms imposed and promoted through its use. The watershed decision in *Redrup v. New York* in 1967,¹¹⁴ under which scores of obscenity decisions were reversed, largely spelled the end of First Amendment restrictions on written sexually explicit materials and established the basic framework of what, refined, became the *Miller* test for obscenity in 1973.¹¹⁵ *Miller*, recognizing no harms or the inequalities based on gender, age, race, and wealth on which the exploitative sex industry of which pornography is an

¹¹¹ 354 U.S. 476 (1957).

¹¹² *Id.* at 491 (quoting 18 U.S.C. § 1461 (1952)).

¹¹³ *Id.* at 484, 487, 503 (upholding the defendant’s conviction).

¹¹⁴ 386 U.S. 767 (1967).

¹¹⁵ *Miller v. California*, 413 U.S. 15, 24 (1973) (“The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

integral part depends,¹¹⁶ has also proven essentially unenforceable¹¹⁷ as the pornography industry has, among its other effects, habituated massive

¹¹⁶ Empirical evidence and analysis pertaining to each factor may be found in the following sources: (gender) 2 Special Comm'n on Pornography & Prostitution in Canada, Report of the Special Committee on Pornography and Prostitution 371 (Government of Canada 1985); John Lowman, Canada, *in* Prostitution: An International Handbook on Trends, Problems, and Policies 56, 69–70 (Nanette J. Davis ed., 1993); Kristiina Kangaspunta, Mapping the Inhuman Trade: Preliminary Findings of the Database on Trafficking in Human Beings, 3 *F. on Crime & Soc'y* 81, 95–97 (2003); (age) Debra Boyer, Lynn Chapman & Brent K. Marshall, Survival Sex in King County: Helping Women Out 3 (1993); Comm. on Sexual Offences Against Children & Youths, Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths 229, 991 (1984); Jennifer James, Entrance into Juvenile Prostitution: Final Report 17 (1980); Melissa Farley et al., Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder, 2 *J. Trauma Prac.* 33, 39–41 (2003) [hereinafter Farley, et al., Prostitution in Nine Countries]; Susan M. Nadon, Catherine Koverola & Eduard H. Schludermann, Antecedents to Prostitution: Childhood Victimization, 13 *J. Interpersonal Violence* 206, 213 (1998); Mimi H. Silbert & Ayala M. Pines, Entrance into Prostitution, 13 *Youth & Soc'y* 471, 483 (1982); (race/ethnicity: African Americans) James, Entrance into Juvenile Prostitution, *supra*, at 19; Barbara Goldsmith, Women on the Edge, *New Yorker*, Apr. 26, 1993, at 65; Carol Leigh, Black Women and Prostitution, 1 *Gauntlet*, 1994, at 114; Vednita Nelson, Prostitution: Where Racism and Sexism Intersect, 1 *Mich. J. Gender & L.* 81, 83 (1993); (race/ethnicity: First Nations) Special Comm'n on Pornography & Prostitution in Canada, *supra*, at 347; Melissa Farley, Jacqueline Lynne & Ann J. Cotton, Prostitution in Vancouver: Violence and the Colonization of First Nations Women, 42 *Transcultural Psychiatry* 242, 249 (2005); (race/ethnicity: Native Americans) Sarah Deer, Relocation Revisited: Sex Trafficking of Native Women in the United States, 36 *Wm. Mitchell L. Rev.* 621, 624 (2010); Suzanne Koeplinger, Sex Trafficking of American Indian Women and Girls in Minnesota, 6 *U. Saint Thomas L.J.* 129 (2008); (socioeconomic status) Mike Dottridge, Kids as Commodities? Child Trafficking and What To Do About It 28 (2004); Chandré Gould & Nicolé Fick, *Inst. for Sec. Stud.*, Report to the South African Law Reform Commission: Preliminary Research Findings of Relevance to the Draft Legislation To Combat Trafficking in Persons and Legislation Pertaining to Adult Prostitution 12 (2007); South African Law Reform Comm'n, Sexual Offences: Adult Prostitution 27 (2009); Special Comm'n on Pornography & Prostitution in Canada, *supra*, at 376–77; Farley et al., Prostitution in Nine Countries, *supra*, at 34, 56, 65; Amber Hollibaugh, *On the Street Where We Live*, *Women's Rev. Books*, Jan. 1988, at 1.

¹¹⁷ The few successful prosecutions in the vast sea of pornography can be readily named. See, e.g., *United States v. Isaacs*, 565 F. App'x 637 (9th Cir. 2014) (affirming conviction of violent pornography producer/distributor to four years imprisonment). For details, see Press Release, U.S. Dep't of Just., Ira Isaacs Sentenced in Adult Obscenity Case (Jan. 16, 2013), <https://archives.fbi.gov/archives/losangeles/press-releases/2013/ira-isaacs-sentenced-in-adult-obsenity-case> [https://perma.cc/789W-WU9C]; Victoria Kim, Mistrial Declared in L.A. Fetish Film Producer's Obscenity Case, *L.A. Times: L.A. NOW* (Mar. 6, 2012, 2:55 PM), <http://latimesblogs.latimes.com/lanow/2012/03/mistrial-declared-in-la-fetish-film-producers-obsenity-case.html> [https://perma.cc/2795-3ASJ]. Paul F. Little, a.k.a. "Max Hardcore," was sentenced to 46 months' imprisonment on October 3, 2008, before the 11th Circuit Court of Appeals reduced his sentence. See *United States v. Little*, 365 F. App'x 159 (11th Cir. 2010) (affirming convictions for obscenity charges in the Middle District of Florida, but vacating sentence enhancement for pecuniary gain); see also Press Release, U.S. Dep't of

populations to abuse of women, creating the “community standards” of obscenity law that validate rape culture,¹¹⁸ under which aegis the prevalence of pornography has exploded exponentially.¹¹⁹ Obscenity law contains no prohibition on violence in depiction—“speech about violence is not obscene”¹²⁰—or in its production. The one recognition of harm in the obscenity tradition occurred in 1968 in upholding a statute that restricted children’s access to obscenity that was “harmful to minors.”¹²¹ The Court neither required evidence of that harm nor said what it was.

In sharp contrast with the law of pornography of adults, the law against child pornography prohibits sexual material made of children on the express observation that it requires and constitutes child abuse, a harm sentimentally presumed rather than specified or required to be shown.¹²² This, despite being a content prohibition and a viewpoint restriction, for materials that are as much “speech” as any pornography is. Child pornography is criminalized based on its content—content that is sex with children, which promotes the view that sex between adults and children

Just., Adult Entertainment Producer Sentenced to 46 Months in Prison on Obscenity Charges (Oct. 3, 2008), <https://www.justice.gov/archive/opa/pr/2008/October/08-crm-894.html> [<https://perma.cc/W4WM-ML8V>]. In *United States v. Extreme Associates, Inc.*, 431 F.3d 150, 161 (3d Cir. 2005), cert. denied, 547 U.S. 1143 (2006), the couple behind the entity was convicted after a plea bargain on July 1, 2009. See Ryan Smith, “Extreme” Porn Couple Gets Prison Time for Violent Videos, CBS News (July 1, 2009, 2:30 PM), <https://www.cbsnews.com/news/extreme-porn-couple-gets-prison-time-for-violent-videos/> [<https://perma.cc/N8LC-ERNS>].

¹¹⁸ For contextual discussions of the meaning of the term “rape culture,” see Emilie Buchwald, Pamela R. Fletcher & Martha Roth, *Transforming a Rape Culture* (Milkweed Editions, rev. ed. 2005); Kate Harding, *Asking for It: The Alarming Rise of Rape Culture—And What We Can Do About It* (2015); Nickie D. Phillips, *Beyond Blurred Lines: Rape Culture in Popular Media* (2017).

¹¹⁹ The largely criminal and partly clandestine nature of pornography has made it “difficult if not impossible to put an exact figure on the financial magnitude of the pornography industry. . . . [T]he United States saw [its] revenues grow from a conservatively estimated \$4 billion a year in 1978 . . . to a low estimate of \$15 to \$20 billion a year in 1998. . . . Pornography is beyond cavil massively lucrative, netting many times that figure each year, exploding exponentially into the twenty-first century.” MacKinnon, *Sex Equality*, supra note 5, at 1688–89 (listing sources). Recent research shows that “[t]he global pornography industry is expected to reach US\$100 billion in the near future.” Melinda Tankard Reist & Abigail Bray, *Introduction to Big Porn Inc: Exposing the Harms of the Global Pornography Industry*, at xiv (2011).

¹²⁰ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 793 (2011); see also *id.* at 792.

¹²¹ *Ginsberg v. New York*, 390 U.S. 629, 632 (1968) (quoting *People v. Ginsburg*, 290 N.Y.S.2d 239, 240 (N.Y. Crim. Ct. 1966)).

¹²² See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256, 258 (2002) (holding that statutory prohibitions on virtual child pornography and on the production or distribution of material presented as child pornography are overbroad and unconstitutional).

is desirable for, and desired by, both. If “[a]dult speech refers not merely to sexually explicit content, but to speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts,”¹²³ the same is no less true of pornography of children, considered child abuse per se. The child pornography prohibition was nonetheless extended to buyers and collectors on the accurate analysis that its purchase and possession creates and stimulates the market that requires abuse to make it.¹²⁴

Although the distinction between child and adult is not termed an inequality in this doctrine, it is one. Age provides a hierarchy of adults over children: in physical, economic, political (e.g., no vote), and social status, in psychological development, access to speech and its credibility. The child pornography prohibition is tacitly based on the substance of this inequality: the powerlessness of children relative to the adults who pimp, manipulate, and sexually use the children to make pornography for adult sexual and financial (and sometimes exchanged) profit. In practical effect, these decisions were significantly undercut by the ruling in *Ashcroft v. Free Speech Coalition* in 2002, which permitted virtual child pornography and computer-generated images of children engaged in sexual activity, invalidating their federal prohibition.¹²⁵ Justice Rehnquist’s dissent there realistically noted that, with emerging technology, it would become increasingly hard to tell the difference between real and virtual children, making many prosecutions for child pornography difficult to impossible.¹²⁶

What may have been the tipping point of adult pornography regulation, foreshadowing the ascendancy of viewpoint discrimination in *R.A.V.*, was the Seventh Circuit’s *Hudnut* decision in 1986. This facial case challenged square legislative recognition of the substantive inequality between the sexes in and of pornography, defined as “sexually explicit subordination of women, whether in pictures or in words,” including anyone used in the place of women, that also included a range of sexually objectifying, abusive, and violent presentations. The ordinance provided civil causes of action for four acts of sex discrimination that could be

¹²³ *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 457 (2002) (Souter, J., dissenting).

¹²⁴ *Osborne v. Ohio*, 495 U.S. 103, 109–10 (1990).

¹²⁵ 535 U.S. at 256, 258.

¹²⁶ *Id.* at 267 (Rehnquist, C.J., dissenting).

proven connected to the challenged pornography's making and use.¹²⁷ The Seventh Circuit invalidated the ordinance as viewpoint discrimination under *Mosley*, citing *Brandenburg* for "[t]he ideas of the Klan may be propagated"¹²⁸ and *Collin v. Smith* for the permissibility of Nazis marching through a Jewish community.¹²⁹ Despite accepting the premises of the ordinance that, as that court put it, "[p]ornography is an aspect of dominance. It does not persuade people so much as change them[,] is "not an idea[,] and perpetuates subordination which "leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets[,]""¹³⁰ the panel concluded that "this simply demonstrates the power of pornography as speech" as well as, and hence, its value thus protection as speech.¹³¹ The more damage, the more protection. In defining pornography as sex discriminatory subordination, the court found Indianapolis "has created an approved point of view[;]" no successful rationale for the law could "be limited to sex discrimination."¹³² Why sex discrimination must always be an inadequate rationale, and why equality is a point of view rather than a social policy or compelling state interest, was neither explained nor authoritatively supported. The ordinance's actionable civil injuries of discrimination—coercion, force, assault, and trafficking—were not points of view but acts, discriminatory when proven sex-based. The definition made materials that constitute inequalities, there that actively subordinate, actionable through these four causes of action only. Yet these same harms, rendered unconstitutionally non-neutral by the panel's opinion, provided a protective First Amendment mantle for pornography. The Supreme Court summarily affirmed,¹³³ ducking the issues raised.

The conventional wisdom running beneath the lines of many pornography cases, including *Hudnut*, was pithily expressed by Justices Souter and Ginsburg, dissenting in 2008, that "as a general matter pornography lacks the harm to justify prohibiting it."¹³⁴ To the contrary,

¹²⁷ *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985) (quoting Indianapolis, Ind., Code § 16-3(q) (1984)), *aff'd mem.*, 475 U.S. 1001 (1986).

¹²⁸ *Id.* at 328 (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

¹²⁹ *Id.* (citing *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978)).

¹³⁰ *Id.* at 328, 329 (footnote omitted).

¹³¹ *Id.* at 329, 331.

¹³² *Id.* at 332.

¹³³ *Hudnut v. Am. Booksellers Ass'n*, 475 U.S. 1001 (1986) (mem.). Chief Justice Burger, Justice Rehnquist, and Justice O'Connor dissented.

¹³⁴ *United States v. Williams*, 553 U.S. 285, 310 (2008) (Souter, J., dissenting).

evidence of such harm has long been well-documented and has become increasingly overwhelming over the past several decades, with study after study using diverse methodologies providing further data proving the point. The exploitation of vulnerable and abused populations acquired to make pornography of sex acts using them is well-established. Pornographers, as pimps, take advantage of the severe poverty, childhood sexual abuse and neglect, homelessness, and discrimination on account of sex, race, ethnicity, sexuality, gender identity, and similar and intersected substantive inequalities that generally characterize prostituted persons.¹³⁵ Studies suggest that about half of all prostituted persons have been sexually used for pornography while in prostitution; many of those used in pornography are also prostituted off-camera.¹³⁶ Pornography, in reality,

¹³⁵ One exemplary study compared 134 female performers contacted via American databases or internet websites advertising jobs in the pornography industry with 1773 demographically matched controls, finding that 21% of performers (4% of controls) reported being forcibly removed to foster care before age eighteen; 37% of performers (13% of controls) reported being subjected to “forced sex” before age eighteen; 24% of performers (12% of controls) reported living on welfare before age eighteen; 34% of performers (6% of controls) reported experiencing domestic violence during the past twelve months; 27% of performers (9% of controls) reported subjection to “forced sex” as adults; and performers reported “significantly worse” mental health and higher rates of depression than controls ($p < .01$). Corita R. Grudzen et al., *Comparison of the Mental Health of Female Adult Film Performers and Other Young Women in California*, 62 *Psychiatric Servs.* 639, 641–42 (2011). Additionally, 50% of performers reported living in poverty in the preceding twelve months. *Id.* at 641 tbl.1. These preconditions and characteristics are similar to those of persons exploited in prostitution. See, e.g., Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 *Harv. C.R.-C.L. L. Rev.* 271, 276–80 (2011) (referring to multiple studies). In 1986, the Attorney General’s Commission on Pornography found that the preconditions of pornography performers resembled those exploited in prostitution documented by other researchers. *Attorney Gen.’s Comm’n on Pornography, Final Report of the Attorney General’s Commission on Pornography* 231 n.983 (Michael J. McManus ed., 1986). Moreover, “performers” were often found to be young, poor, and prior victims of childhood abuse. *Id.* at 242. Further, “with striking regularity” those used to make pornography spoke of “money and dire financial need as critical factors” that caused them to enter the industry. *Id.* at 231.

¹³⁶ See, e.g., Marjan Javanbakht, M. Claire Dillavou, Robert W. Rigg, Jr., Peter R. Kerndt & Pamina M. Gorbach, *Transmission Behaviors and Prevalence of Chlamydia and Gonorrhea Among Adult Film Performers*, 44 *Sexually Transmitted Diseases* 181, 182–83 (2017) (reporting that 28% of 225 female performers in Los Angeles recruited at clinics serving persons used in the pornography industry reported off-camera prostitution including “sex work, such as escorting in the past 3 months”); Farley et al., *Prostitution in Nine Countries*, *supra* note 116, at 44, 46 tbl.4 (finding 49% of 854 prostituted persons in nine countries reported pornography being made of them in prostitution); Melissa Farley, *Prostitution and Trafficking in Nevada: Making the Connections* 31 (2007) (finding twenty-one of forty-five persons prostituted in legal brothels reported use to make pornography); Corita R. Grudzen, Gery Ryan, William Margold, Jacqueline Torres & Lillian Gelberg, *Pathways to Health Risk Exposure in Adult Film Performers*, 86 *J. Urb. Health* 67, 68–69 (2008) (interviewing eighteen

is an arm of prostitution in which third parties profit from the selling of others for the sexual use of regular consumers which, population surveys now document, constitute around half of all men (and many times fewer women) in the United States.¹³⁷

The abusive treatment of women in pornography is frequently clearly visible on the face of the materials. Pornographers increasingly capitalize on overtly degrading and humiliating women.¹³⁸ Consumer demand for

female and ten male performers, directors, producers, and agents in the Los Angeles pornography industry, and finding that persons used to make pornography also “worked as escorts” and had sex “off-camera in exchange for money or other favors[.]” though the frequency was “unclear”). These works reference additional research arriving at similar and related conclusions.

¹³⁷ A self-administered anonymous computer survey conducted in the United States in 2014 with a weighted probability sample of 5165 non-institutionalized adults, age 18–39, estimated that 46% of the men and 16% of the women used pornography during any given week, and 56% of men and 26% of women during any given month. See Mark Regnerus, David Gordon & Joseph Price, Documenting Pornography Use in America: A Comparative Analysis of Methodological Approaches, 53 *J. Sex Rsch.* 873, 875–76, 878 tbl. 4 (2016). When Americans age 18–60 ($n = 15,738$) were studied, 43% of men and 9% of women reported “watching pornography in the past week,” and 34% of men and 72% of women reported no pornography use in at least the last year (if at all). David Gordon, Austin Porter, Mark Regnerus, Jane Ryngeart & Larissa Sarangaya, *The Austin Inst. for the Study of Fam. & Culture, Relationships in America Survey 27* (proportions), 53 (methodology) (2014), <http://relationshipsinamerica.com/> [<https://perma.cc/VXQ2-MNSB>]. Individual studies with young men indicate a substantial minority consumes daily, or three or more days per week. A twelve year old study of 500 female and 313 male diverse U.S. college students age 18–26 found that 21.3% of the men (only 1% of women) reported using pornography either “every day or almost every day” or “3 to 5 days a week”; 27.1% of the men (only 2.2% of women) reported using pornography one or two days a week; 21% of the men (only 7.1% of women) reporting using it two or three days a month; 16.8% of men (20.7% of women) reporting using it once a month or less; and 13.9% of men (69% of all women) reporting no pornography use. Jason S. Carroll et al., *Generation XXX: Pornography Acceptance and Use Among Emerging Adults*, 23 *J. Adolescent Rsch.* 6, 18 tbl.1 (2008). Roughly similar consumption frequencies are reported in some other countries. For a relatively recent study, see *Folkhälsomyndigheten [Public Health Agency of Sweden], Sexuell och reproduktiv hälsa och rättigheter i Sverige 2017: Resultat från befolkningsundersökningen SRHR2017 [Sexual and Reproductive Health and Rights in Sweden 2017: Results from a 2017 Population Study]*, at 164–65 fig.2, fig.3 (2019) (estimating that 41% of men and 3% of women age 16–29 consumed pornography three times or more per week), available at <https://www.folkhalsomyndigheten.se/> [<https://perma.cc/L5CV-RMHN>]; cf. id. at 20 (English summary). Differences in consumption between men and women include men viewing pornography significantly more often alone and while masturbating compared with women, who more often reported viewing with a “dating partner.” Elizabeth M. Morgan, *Associations Between Young Adults’ Use of Sexually Explicit Materials and Their Sexual Preferences, Behaviors, and Satisfaction*, 48 *J. Sex Rsch.* 520, 525–26, 526 tbl. 3 (2011).

¹³⁸ Consistent with many prior studies, one content analysis of 110 of the roughly 250 “most popular, best-selling, critically acclaimed, and influential hardcore [heterosexual]

more intense and extreme violent, denigrating, and subordinating materials, escalating in severity with use, has been demonstrated in psychological experiments and documented in naturalistic surveys.¹³⁹ The

pornographic movies” over forty years, published in 2012, found that there were “arguably violent, abusive, and/or coercive encounters in nearly all” movies. Natalie Purcell, *Violence and the Pornographic Imaginary: The Politics of Sex, Gender, and Aggression in Hardcore Pornography* 179–81 (2012). Since the 2000s, “nearly every” popular pornographic movie exhibited “ass-to-mouth” (a woman performing oral sex on a man immediately after his anal penetration of her or another woman) and “throat sex” (many “filled with gagging, retching, choking, gasping, and—less often—vomiting”). *Id.* at 110, 118, 135. A common scenario in popular pornographic movies includes thirty to forty minutes of literally tearing down a woman, where, in rougher movies, she is bruised while being “choked and throttled,” mascara streaking down her face, nose dripping with mucus, and eyes irritated and red, while the end includes spraying semen in her face, often accompanied by mocking comments. *Id.* at 145–46. A systematic quantitative content analysis of a random sample of fifty of the 275 bestselling/most rented U.S. pornography movies during December 2004–June 2005 corroborates Purcell’s study. For example, 88.2% of all scenes presented physical aggression that, *inter alia*, included “gagging” in 53.9% of all scenes (defined as “an object or body part, e.g., penis, hand, or sex toy, is inserted into a character’s mouth, visibly obstructing breathing”), “ass-to-mouth” in 41.1%, open hand slapping in 41.1%, hair pulling in 37.2%, and choking in 27.6%. Ana J. Bridges, Robert Wosnitzer, Erica Scharrer, Chyng Sun & Rachael Liberman, *Aggression and Sexual Behavior in Best-Selling Pornography Videos: A Content Analysis Update*, 16 *Violence Against Women* 1065, 1070–72, 1074–75 tbl.1, 1080 (2010). Verbal aggression was manifest in 48.7% of all scenes, of which 97.2% included dehumanizing name-calling, such as “bitch” and “slut.” The targets of physical and verbal aggression were women in 94.4% of scenes. *Id.* at 1075–76.

¹³⁹ See, e.g., Dolf Zillmann & Jennings Bryant, *Shifting Preferences in Pornography Consumption*, 13 *Comm’n Rsch.* 560, 560–78 (1986) (reporting dramatic shifts in preferences for violent materials after being exposed to nonviolent commercial pornography for one hour per week for six weeks); Aline Wéry & J. Billieux, *Online Sexual Activities: An Exploratory Study of Problematic and Non-Problematic Usage Patterns in a Sample of Men*, 56 *Computs. in Hum. Behav.* 257, 259–60, 262 tbl.2 (2016); Jodie L. Baer, Taylor Kohut & William A. Fisher, *Is Pornography Use Associated with Anti-Woman Sexual Aggression? Re-examining the Confluence Model with Third Variable Considerations*, 24 *Can. J. Hum. Sexuality* 160, 163–64 (2015) (finding a significant correlation among 183 adult males between higher self-reported frequency of pornography consumption and a larger proportion of explicitly violent pornography consumed ($r = .20, p < .01$)). Purcell, *supra* note 138, at 118, notes that name-calling such as “bitch” or “cunt” was typically only used in scenes presenting rapes in the 1970s, but became “more universally deployed in the 2000s.” Similarly, heterosexual anal sex, reportedly a “rarity” in the 1970s, became the “primary event” by 2010, its “depth, speed, duration, and intensity” having increased considerably. *Id.* at 118–19. In early 2005, as many as 55.9% of the scenes in the random sample of bestselling/most rented movies studied by Bridges and her colleagues included anal sex, while 86.2% included vaginal sex. See Bridges et al., *supra* note 138, at 1074. Purcell reported in 2012 that anal sex commonly occurred “without vaginal sex at all or with just a minute or two of vaginal sex followed by twenty minutes of anal penetration.” Purcell, *supra* note 138, at 118. Sometimes a woman’s anus is stretched “to the point of ‘gaping,’” which ventures “toward disfigurement

acts presented in the most prevalent materials have to be done to *someone* in order for them to be shown being done to the real people to whom the consumers demand to see these acts done. The empirical record of the harm done in the making of pornography is increasingly decisive and large,¹⁴⁰ although given the severity of the harms reported, even one harmed person is one too many.

The harm done to others as a result of the use of pornography by consumers has generated by far the most scholarly interest, hence evidence. The conclusions of this large and diverse body of literature are robust and statistically significant, showing that consumption of pornography contributes to gender-based violence through attitudes that minimize, trivialize, or normalize those acts. Experimental studies of general population samples,¹⁴¹ longitudinal studies corroborating the

or mutilation”—all while the camera zooms in and exclamations of “infantile glee” are heard. *Id.* at 146, 213 n.103. Much corroborating research has been conducted over time.

¹⁴⁰ One revealing study found that 49% of 854 prostituted persons surveyed in nine countries who also reported being used for pornography while in prostitution exhibited “significantly more severe” PTSD symptoms than the other 51% exhibited. Melissa Farley, “Renting an Organ for Ten Minutes:” What Tricks Tell Us About Prostitution, Pornography, and Trafficking, *in* Pornography: Driving the Demand in International Sex Trafficking 144, 145–46 (David E. Guinn & Julie DiCaro eds., 2007) [hereinafter Farley, Renting an Organ]. In this study, 68% of all 854 persons, sampled under various laws and in differing forms of prostitution (e.g., brothels, strip clubs, streets), and who had not expressly sought help, satisfied clinical criteria for posttraumatic stress on average at the level of treatment-seeking Vietnam veterans, torture victims, battered women seeking shelter, and rape survivors. Farley et al., Prostitution in Nine Countries, *supra* note 116, at 44–49, 56. For sampling, see *id.* at 37–39. Controlling for other relevant factors (e.g., prior child sexual abuse, rape, or physical assault), a statistical “ceiling effect” was evidenced in which the only distinguishable PTSD predictor was having been used in pornography, suggesting that prostitution that takes place in making pornography is especially harmful. See Farley, Renting an Organ, *supra*, at 146.

Insiders reveal that pornographers permit more physical abuse of vulnerable women on the set when it may increase profits. See, e.g., Grudzen, Ryan, Margold, Torres & Gelberg, *supra* note 136, at 69, 72–75 (interviewing eighteen female and ten male performers in Los Angeles, of which six reported being harmed during the shoot, a further six reported symptoms such as anal tears, some being forced into sex with violent persons, many having to have sex without condoms); Final Report of the Attorney General’s Commission on Pornography, *supra* note 135, at 200, 200 n.765 (citing male Los Angeles performer who professed having participated in over 100 movies, testifying how producers, distributors, and photographers regularly forced women into anal sex despite resistance); *id.* at 205–06, 206 n.799 (referring to witnesses describing how pornographers used violence on performers, one torturing women and young girls and inflicting permanent physical injuries to meet publisher’s demand for sadomasochistic photographs with higher value, materials from Washington, D.C.).

¹⁴¹ Meta-analyses of nearly fifty psychological experiments show exposure to both violent and nonviolent pornography cause men in the normal population (not convicted, not institutionalized, not high hostile, etc.) to be significantly more aggressive towards women

direction of causality in social reality and demonstrating substantial significant negative effects,¹⁴² together with cross-sectional surveys

and more prone to adopt attitudes shown to promote and trivialize sexual aggression than otherwise. See Mike Allen, Tara Emmers, Lisa Gebhardt & Mary A. Giery, *Exposure to Pornography and Acceptance of Rape Myths*, 45 *J. Commc'n* 5, 18–19 (1995); Mike Allen, Dave D'Alessio & Keri Brezgel, *A Meta-Analysis Summarizing the Effects of Pornography II: Aggression After Exposure*, 22 *Hum. Commc'n Rsch.* 258, 267–69, 271, 274 (1995). Psychologists have identified some crucial underlying mechanisms: nonviolent pornography that objectifies, degrades, or dehumanizes (which commercial pornography does) contributes to men categorizing women as either “whores” or “Madonnas,” “wild” or “virtuous,” and so on, where perceptions of promiscuity promote aggression. See Dolf Zillmann & James B. Weaver, *Pornography and Men's Sexual Callousness Toward Women*, in *Pornography: Research Advances and Policy Considerations* 95, 109–21 (Dolf Zillmann & Jennings Bryant eds., 1989) (summarizing studies and reporting an original experiment). Pornography objectifies women for the consumer, thus reducing their human value and in turn legitimizing abuse.

¹⁴² One longitudinal study found that when various relevant “baseline” predictors are controlled, including perpetration of sexual harassment among twelve- to fourteen-year old boys, more general pornography consumption predicted significantly more sexual harassment perpetration after two years. See Jane D. Brown & Kelly L. L'Engle, *X-Rated: Sexual Attitudes and Behaviors Associated with U.S. Early Adolescents' Exposure to Sexually Explicit Media*, 36 *Commc'n Rsch.* 129, 139, 140 tbl.1, 142–43 (2009). Another longitudinal study using six data waves from 2006–2012 with males and females age 10–21 found, after adjusting for other relevant predictors including previous sexual harassment perpetration, that those reporting previous violent pornography exposure (likely the more frequent pornography consumers, see *supra* note 139 and accompanying text) ran a significantly increased adjusted odds for later having for the first time “kissed, touched, or done anything sexual with another person when that person *did not want*” it, compared to those not consuming any pornography. Michele L. Ybarra & Richard E. Thompson, *Predicting the Emergence of Sexual Violence in Adolescence*, 19 *Prevention Sci.* 403, 406, 409, 410 tbl.2 (2018). The study added more outcome measures during 2010–2012, finding significantly increased adjusted odds for those who had consumed violent pornography of later committing their first “rape,” “coercive sex,” and “sexual harassment,” compared with non-consumers. *Id.* at 409, 411 tbl.3. Even when both male and female survey respondents are included, violent pornography exposure significantly predicted “a fourfold increased odds or higher” of committing any of the four types of sexually aggressive acts, after adjusting for other relevant predictors. *Id.* at 409. The confidence intervals were wide for some measures of sexual violence, suggesting a lack of precision due to the small perpetrator sample size, cf. *id.* at 411–12, but fifty years of research supports the inference that these odds reflected substantial causal effects. Moreover, another longitudinal study found similar significant conclusions on a related measure, where more general pornography consumption at wave one led to stronger “notions of women as sex objects” at wave three, mediated at wave two by the extent that respondents “lik[ed]” pornography. See Jochen Peter & Patti M. Valkenburg, *Adolescents' Exposure to Sexually Explicit Internet Material and Notions of Women as Sex Objects: Assessing Causality and Underlying Processes*, 59 *J. Commc'n* 407, 422 (2009). Note that Peter and Valkenburg's mediation analysis seems superfluous (if consumers did not “like” pornography, they would presumably not consume it on their own initiative). This may cause a statistical “post-treatment bias,” underestimating effects of pornography exposure. See *infra* note 147.

further corroborating the ecological validity of other studies¹⁴³ together support and confirm each other's findings. Studies of general populations of women find many being asked to imitate unwanted sex acts from pornography.¹⁴⁴ Inquiries into intensively at-risk populations—

¹⁴³ For meta-analysis of both cross-sectional and longitudinal studies, see, e.g., Paul J. Wright, Robert S. Tokunaga & Ashley Kraus, A Meta-Analysis of Pornography Consumption and Actual Acts of Sexual Aggression in General Population Studies, 66 *J. Comm'n* 183, 201 (2016) (finding “little doubt” that more pornography consumption “on the average” predicts more “actual acts of sexual aggression” among individuals than less consumption does, with no moderation based on consumers’ sex, age, country, time of study (before/after Internet), and whether study was cross-sectional, longitudinal, or published); Gert Martin Hald, Neil M. Malamuth & Carlin Yuen, Pornography and Attitudes Supporting Violence Against Women: Revisiting the Relationship in Nonexperimental Studies, 36 *Aggressive Behav.* 14, 18 (2010) (finding, in meta-analysis, that pornography consumption significantly predicts stronger attitudes supporting violence against women).

¹⁴⁴ Walter S. DeKeseredy & Martin D. Schwartz, *Woman Abuse on Campus: Results from the Canadian National Survey 110* (1998) (finding in 1992 that 8.4% of 1638 women that were dating reported being “upset” by dating partners attempting to make them imitate pornography, and that 22.3% of the women reporting sexual abuse also reported being upset by attempts to make them imitate pornography; yet only 5.8% of the women not reporting sexual abuse reported being upset by attempts at pornography imitation); Diana E.H. Russell, *Sexual Exploitation: Rape, Child Sexual Abuse, and Workplace Harassment* 124–26 (1984) (finding eighty-nine (9.6%) out of 930 representative women sampled in San Francisco reported being upset by someone attempting to get them do something that they knew came from pornography).

prostituted women¹⁴⁵ and battered women,¹⁴⁶ whose abuses display striking similarities—find compelling harms among more vulnerable

¹⁴⁵ See, e.g., Farley et al., *Prostitution in Nine Countries*, supra note 116, at 44, 46 (finding that 47% of 802 persons, of 854 total sampled in a variety of prostitution forms (brothels, streets, escorting, strip clubs, etc.), reported being upset by attempts at making them imitate pornography); Mimi H. Silbert & Ayala M. Pines, *Pornography and Sexual Abuse of Women*, 10 *Sex Roles* 857, 862–65 (1984) (finding among 200 prostituted persons sampled in San Francisco, 73% reported specific information about being raped, of which 24% spontaneously reported rapists consistently referring to pornography, suggesting the prostituted woman or girl enjoyed it). Corroborating this finding, a majority of johns studied have been documented to want to imitate pornography, including 52% of 101 johns in Boston. See Melissa Farley et al., *Comparing Sex Buyers with Men Who Don't Buy Sex: "You Can Have a Good Time with the Servitude" vs. "You're Supporting a System of Degradation"* 4, 30–31 (paper presented at the Annual Conference of Psychologists for Social Responsibility, Boston, MA, July 15, 2011), <http://www.prostitutionresearch.com/pdfs/Farleyetal2011ComparingSexBuyers.pdf> [<http://perma.cc/LX9L-2VK2>]. As many as 48% of 113 johns in one study in Chicago acknowledged that they buy the sex they are uncomfortable asking for from their partners, or which their partner refuses (e.g., oral and anal sex, sadism, and masochism). Rachel Durchslag & Samir Goswami, *Chi. All. Against Sexual Exploitation, Deconstructing the Demand for Prostitution: Preliminary Insights from Interviews with Chicago Men Who Purchase Sex* 11–12 (2008), <https://humantraffickinghotline.org/sites/default/files/Deconstructing-the-Demand-for-Prostitution%20-%20CAASE.pdf> [<https://perma.cc/5V4Q-PH32>]; see also Melissa Farley et al., *Attitudes and Social Characteristics of Men Who Buy Sex in Scotland*, 3 *Psychol. Trauma* 369, 376 (2011) (reporting 79% of 110 johns acknowledging the same).

¹⁴⁶ See, e.g., Catherine Moreau, Sophie Boucher, Martine Hebert & Jacinthe Lemelin, *Capturing Sexual Violence Experiences Among Battered Women Using the Revised Sexual Experiences Survey and the Revised Conflict Tactics Scales*, 44 *Archives Sexual Behav.* 223, 225, 227–28, tbl.3 (2015) (finding among 138 battered women age 20–76 that 26.1% ($n = 36$) reported at least one abusive incident related to pornography and their abusive partner, of which 80.5% reported being forced to reenact specific pornography, 75% reported being forced to view pornography, and 27.8% reported being forcibly filmed or photographed by their partners; and that depending on measurement scales, the 26.1% women reporting pornography-related incidents were about twelve to twenty times significantly more likely to be subjected to “severe sexual violence,” and about ten times significantly more likely to be subjected to “moderate sexual violence”). Similar significant findings have been reported in numerous studies, although measurements vary. See, e.g., Catherine A. Simmons, Peter Lehmann & Shannon Collier-Tenison, *Linking Male Use of the Sex Industry to Controlling Behaviors in Violent Relationships: An Exploratory Analysis*, 14 *Violence Against Women* 406, 410–12 (2008); Janet Hinson Shope, *When Words Are Not Enough: The Search for the Effect of Pornography on Abused Women*, 10 *Violence Against Women* 56, 61–66 (2004); Raquel Kennedy Bergen & Kathleen A. Bogle, *Exploring the Connection Between Pornography and Sexual Violence*, 15 *Violence & Victims* 227, 230–31 (2000); Elizabeth Cramer et al., *Violent Pornography and Abuse of Women: Theory to Practice*, 13 *Violence & Victims* 319, 326–27 (1998); Elizabeth Cramer & Judith McFarlane, *Pornography and Abuse of Women*, 11 *Pub. Health Nursing* 268, 270 (1994); see also Walter S. DeKeseredy & Amanda Hall-Sanchez, *Adult Pornography and Violence Against Women in the Heartland: Results From a Rural Southeast Ohio Study*, 23 *Violence Against Women* 830, 834–43 (2017) (conducting qualitative interviews in 2003–2004 with forty-three separating/separated rural southeast Ohio battered women, complemented by “back-talk[s]” with twelve respondents in

targets, including reports of consumers coercing women into imitating pornography. Analyzed with statistical sophistication, the experimental and non-experimental naturalistic data suggest that many more men appear to be at risk of becoming more sexually aggressive when consuming more pornography than even the many studies that find substantial such risk have demonstrated.¹⁴⁷ Other general population studies also reveal that men who report consuming more pornography are significantly more likely to report imitating popular aggressive and degrading pornography with their women sex partners.¹⁴⁸ Studies using

2013, finding that twenty-four of the interviewees reported pornography being involved in their “estranged” partner’s sexual assaults, which could include imitation of pornography, including with violence, and comparing respondents with women in pornography, forcibly introducing other sexual partners, and filming sexual acts without permission).

¹⁴⁷ Appealing attempts try to link aggression as a result of pornography use to individual predispositions, implying that pornography consumption only risks making a significant minority of men more sexually aggressive based on various predisposing factors. See, e.g., Neil M. Malamuth, Tamara Addison & Mary Koss, *Pornography and Sexual Aggression: Are There Reliable Effects and Can We Understand Them?*, 11 *Ann. Rev. Sex Rsch.* 26, 79 (2000) (concluding that men “classified as being at relatively low risk for sexual aggression” exhibited “only a relatively minor difference (though statistically significant) in sexual aggression between those who report different levels of pornography use”); Baer, Kohut & Fisher, *supra* note 139, at 170; cf. Neil M. Malamuth, Gert Martin Hald & Mary Koss, *Pornography, Individual Differences in Risk and Men’s Acceptance of Violence Against Women in a Representative Sample*, 66 *Sex Roles* 427, 435–36 (2012) (finding that “the association between pornography use and attitudes supporting violence varied as a function of men’s risk level for sexual aggression”). But different levels of various predispositions to sexual aggression are themselves actually shown significantly caused by pornography consumption itself, controlling for which can result in a serious underestimation of its effects. Max Waltman, *The Politics of Legal Challenges to Pornography: Canada, Sweden, and the United States* 89 (2014) (unpublished manuscript) (on file with author), scrutinizes studies of the effects of pornography consumption that ignore the way in which some of their chosen moderators are actually partial consequences of pornography consumption, thus dependent rather than moderating variables. This statistical error is termed post-treatment bias. See, e.g., Jacob M. Montgomery, Brendan Nyhan & Michelle Torres, *How Conditioning on Posttreatment Variables Can Ruin Your Experiment and What To Do About It*, 62 *Am. J. Pol. Sci.* 760 (2018); Gary King & Langche Zeng, *When Can History Be Our Guide? The Pitfalls of Counterfactual Inference*, 51 *Int’l Stud. Q.* 183, 201 (2007). In other words, pornography consumption increases the very variables sometimes controlled for, hence counted out, in measuring the effects of its consumption.

¹⁴⁸ A survey with a convenience sample of 1606 heterosexual women and men, most fairly religious white college/university students living in a U.S. city or suburb, having an average age of 22.55 (*sd* = 7.95), found that those men (and some fewer women) reporting consuming more pornography for masturbation were also significantly more likely to report imitating aggressive pornography (e.g., choking or hair-pulling), more degrading/uncommon pornography (e.g., ass-to-mouth or facial ejaculation), and more target pornography (e.g., being choked or having hair pulled). See Ana J. Bridges, Chyng F. Sun, Matthew B. Ezzell & Jennifer Johnson, *Sexual Scripts and the Sexual Behavior of Men and Women Who Use*

Pornography, 2 Sexualization, Media, & Soc’y 1, 4, 7 tbl.4 (2016). Women were more likely to engage in target behaviors than men were. *Id.* at 10–11. Moreover, although a large proportion reported having imitated some pornography, far more men than women wished to do so. See *id.* at 5 tbl.2, 8 tbl.5 (finding the same proportion (28.2%) of men and women reported having tried anal sex, but that many more men (45.3%) than women (8.1%) wished to try it ($p < .001$); finding that ejaculation on a woman’s face or in her mouth was reported by 66.7% of men and 62.1% of women ($p = .064$), yet 59.6% of men but only 12.5% of women wanted to try it ($p < .001$); finding that 26.9% of men and 19.7% of women reported name-calling their partners during sex (e.g., “slut,” “whore”) ($p = .001$), but that men were significantly more likely to want to try it than women were (13.1% vs. 5.4%; $p < .001$); and finding that 15.9% of men reported choking their partner with hands during sex while only 3.8% of women reported so, and 5.7% of the men wanted to try it compared to 2.0% of women ($p < .001$)). A study found similar results with 384 German heterosexual men, average age 32.12 ($sd = 9.12$), and of whom 66.31% were in a “romantic relationship.” See Paul J. Wright, Chyng Sun, Nicola J. Steffen & Robert S. Tokunaga, Pornography, Alcohol, and Male Sexual Dominance, 82 *Comm’n Monographs* 252, 258, 260 tbl.1, 261 tbl.2 (2015) (finding that those men reporting consuming more pornography were significantly more likely to report imitating it, and finding that 66.1% of all reported having “tried” and 17.9% “would like to try” ejaculation in a woman’s face; 12.1% reported having “tried” and 12.4% “would like to try” ass-to-mouth sex; 24.2% report having “tried” and 11.8% “would like to try” penile gagging; 18.1% report having “tried” and 6.1% “would like to try” choking; and 4.5% reported having “tried” and 34.9% “would like to try” double-penetration, i.e., penetrating a partner’s anus or vagina simultaneously with another man). A recent American study with a weighted probability sample of 2227 persons aged 18–60 corroborates the prior studies regarding imitation, including also among the subpopulation of men who have sex with men. See Debby Herbenick et al., *Diverse Sexual Behaviors and Pornography Use: Findings From a Nationally Representative Probability Survey of Americans Aged 18 to 60 Years*, 17 *J. Sexual Medicine* 623, 627–30 & tbl.2 (2020) (finding that more frequent pornography consumption during the past year together with a greater range of pornography accessed during one’s lifetime significantly predicted engaging in various “dominant and target” sexual behaviors, such as trying anal sex without asking, ejaculating on another person’s face, choking someone during sex, and pressuring someone into doing something sexually unwanted). Revealing men’s knowledge about women’s distaste for some pornographic practices, a qualitative U.S. study interviewing sixteen young male pornography consumers found that by and large, the men saw ejaculation in the face or mouth as expressing women’s subordination to men, and realized that women did not appreciate it. See Chyng Sun, Matthew B. Ezzell & Olivia Kendall, *Naked Aggression: The Meaning and Practice of Ejaculation on a Woman’s Face*, 23 *Violence Against Women* 1710, 1715, 1717–19 (2017); see also C. Marston & R. Lewis, *Anal Heterosex Among Young People and Implications for Health Promotion: A Qualitative Study in the UK*, *BMJ Open*, May 23, 2014, at 2 (finding among 130 respondents aged 16–18 that a quarter reported anal heterosexual experiences and that “[w]omen reported painful anal sex”), <https://bmjopen.bmj.com/content/4/8/e004996> [<https://perma.cc/6B92-HE9K>]; *id.* at 4 (finding that “few of the men and only one woman . . . referred to physical pleasure”); *id.* at 3 (finding that the “main reasons given for young people having anal sex were that men wanted to copy what they saw in pornography, and that ‘it’s tighter’” in the sense of being “better for men,” and in “seemingly communicative and caring partnerships, some men seemed to push to have anal sex with their reluctant partner despite believing it likely to hurt her”); cf. Breanne Fahs & Jax Gonzalez, *The Front Lines of the “Back Door”: Navigating (Dis)engagement, Coercion, and Pleasure in Women’s Anal Sex Experiences*, 24 *Feminism & Psychol.* 500, 507,

aggregated data from whole societies, such as crime reports, purporting to question the effect of pornography on sexual aggression, have been exposed as containing misleading methodological flaws.¹⁴⁹ From an equality perspective, given this powerful evidence of harm, obscenity law, followed by indecency legislation and adjudication—neither of which has been required to show proof of harm—provide a major exercise in missing the point.

The extent to which existing First Amendment doctrine denies the harms of pornography to adults through conceptually precluding its legal relevance can be focused by asking: would a prosecution for a “snuff” film, in which a person—say, for this purpose, an adult woman—is

510–12 (2014) (finding in qualitative interviews with twenty adult U.S. women, average age 34 ($sd = 13.35$) and demographically diverse, that six out of twelve women reportedly tried anal sex “willingly (though often reluctantly) only to discover their lack of enjoyment or too much pain[.]” and a quarter of the sample had “overtly violent encounters with anal sex,” many being pressured into anal sex by partners who had discussed it with male friends or wanted to imitate pornography).

¹⁴⁹ See Max Waltman, *Appraising the Impact of Toward a Feminist Theory of the State: Consciousness-Raising, Hierarchy Theory, and Substantive Equality Laws*, 35 *Law & Ineq.* 353, 372–73 n.82 (2017). Waltman notes that two aggregated cross-sectional U.S. interstate comparisons of reported rapes during 1980–1982 support the conclusions of the meta-analyses, longitudinal, and cross-sectional studies, while the longitudinal aggregated study in the Czech Republic from 1971–2007 claims a contrary conclusion. Compare Larry Baron & Murray A. Straus, *Four Theories of Rape: A Macrosociological Analysis*, 34 *Soc. Probs.* 467, 467 (1987) (finding that when analyzing “1980–1982 data on rapes known to the police in” the U.S. that, among other factors, “circulation of pornography” had an increasing “direct effect[] on the incidence of rape”), and Joseph E. Scott & Loretta A. Schwalm, *Rape Rates and the Circulation Rates of Adult Magazines*, 24 *J. Sex Rsch.* 241, 243, 246 (1988) (finding “a statistically significant [positive] relationship between rape rates and adult magazine circulation rates by state” using data from 1982), with Milton Diamond, Eva Jozifkova & Petr Weiss, *Pornography and Sex Crimes in the Czech Republic*, 40 *Archives Sexual Behav.* 1037, 1037 (2011) (finding that “rape and other sex crimes did not increase” after Czech Republic enacted a law that allowed pornography for the first time). Official crime reports are influenced by many factors, especially by all the reasons for the underreporting of sex crimes generally. The “aggregate” method is therefore regarded as highly unreliable. See Drew A. Kingston & Neil M. Malamuth, *Problems with Aggregate Data and the Importance of Individual Differences in the Study of Pornography and Sexual Aggression: Comment on Diamond, Jozifkova, and Weiss* (2010), 40 *Archives Sexual Behav.* 1045, 1045–46 (2011) (identifying methodological criticisms of the Czech study); Neil M. Malamuth & Eileen V. Pitpitan, *The Effects of Pornography Are Moderated by Men’s Sexual Aggression Risk*, *in Pornography: Driving the Demand in International Sex Trafficking*, *supra* note 140, at 125, 137–42 (discussing problems with aggregated methodology generally). For further critical analysis of longitudinal aggregated studies of pornography and sexual crimes, see Waltman, *supra* note 147, at 134–38.

murdered to make a sex film,¹⁵⁰ be constitutionally protected? Is snuff protected speech? Much would depend on the law under which it was prosecuted, although the absence of a law designed to face this most brutal reality of the pornography industry makes a point in itself. Snuff is likely not obscene because a jury is unlikely to concede that it “appeals to the prurient interest” in sex under *Miller*,¹⁵¹ although it obviously does, or no such market would exist. Such films are overwhelmingly sexually violent, which (again) obscenity law is not designed to cover.¹⁵² “[I]ncitement to imminent lawless action”¹⁵³ is not likely provable here, because while a snuff film may stimulate desire for the acts it presents and inspire copying, acquisition and use are typically clandestine, such acts are likely not imminent, and the violence of most immediate concern—that required to make it—has already occurred. Unless someone fights back, snuff is not “fighting words[.]”¹⁵⁴ Snuff is not child pornography if the murdered person reached the age of majority, or looks as if they could have.¹⁵⁵

Would a film of a murder committed so the killing could be filmed as sex be judicially rendered “about” the “topic of” sexual murder, per the

¹⁵⁰ The existence of these hypothetical facts is substantiated by my forensic research. For a few illustrations of the hundreds of readily available press reports documenting its reality, including some prosecutions, see Police To Move on Snuff Film, *Liverpool Echo*, May 12, 2014, at 5; Snuff Films Are Real on the Internet, *GroundReport* (Jan. 30, 2015), <https://www.groundreport.com/snuff-films-are-real-on-the-internet/> [<https://perma.cc/F3XY-TJ4M>]; Mack Lamoureux, Head of Gore Website Pleads Guilty in Canadian Snuff Film Trial, *VICE News* (Jan. 25, 2016, 2:55 PM), https://www.vice.com/en_us/article/mbn983/head-of-gore-website-pleads-guilty-in-canadian-snuff-film-trial [<https://perma.cc/L5AF-4JG7>] (“‘It has death, it has horror, it has cruelty, it has violence, it has dismemberment, and it has sex,’ Justice Sterling Sanderman said of the video that Marek hosted.”); Julie Bindel, I’ve Seen the Type of Violent Snuff Porn Peter Madsen Viewed Before He Murdered Kim Wall—Anyone Who Denies a Connection is Deluded, *Independent* (Apr. 25, 2018, 4:00 PM), <https://www.independent.co.uk/voices/kim-wall-peter-madsen-snuff-porn-submarine-inventor-submarine-swedish-journalist-a8322076.html> [<https://perma.cc/26N3-44JY>]; Geraldine McKelvie, I Was Sold as a Sex Slave at 19 and Forced To Watch a Girl Be Murdered, *Irish Mirror Online* (Jan. 5, 2019), <https://www.irishmirror.ie/news/i-sold-sex-slave-19-13817660> [<https://perma.cc/3CBC-G6V2>]; José Luis Durán King, The World of the “Snuff” Films, *NoticiasFinancieras*, June 8, 2019.

¹⁵¹ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁵² For analysis, see Catharine A. MacKinnon, Not a Moral Issue, 2 *Yale L. & Pol’y Rev.* 321, 321–45 (1984).

¹⁵³ *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

¹⁵⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (quoting *State v. Chaplinsky*, 18 A.2d 754, 762 (N.H. 1941)).

¹⁵⁵ This likely application of the scienter requirement in *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994), substantially gutted the child pornography prohibition in my view.

R.A.V. approach, “a distinctive idea, conveyed by a distinctive message”?¹⁵⁶ A generally prohibited act like killing a person is not insulated from prosecution as “speech” when done for expressive purposes,¹⁵⁷ but what about its visual product? Snuff is definitely “sexually explicit subordination”¹⁵⁸ that typically includes women being dismembered or tortured to death in a sexualized context, but restricting such material was deemed “thought control,”¹⁵⁹ despite the obscenity of torture (when sadomasochism) being constitutionally criminal.¹⁶⁰ Snuff is not likely terrorism as defined,¹⁶¹ although members of the same group as the person sexually murdered for the film might well be especially intimidated or coerced, indeed terrorized, upon encountering it.¹⁶²

A snuff film should fall within the 1949 standard in *Giboney v. Empire Storage & Ice Co.*,¹⁶³ a labor speech case that holds that the First Amendment is not violated by making illegal speech that is “an integral part of conduct in violation of a valid criminal statute.”¹⁶⁴ The First Amendment does not protect “a course of conduct . . . merely because the conduct was in part initiated, evidenced, or carried out by means of

¹⁵⁶ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393 (1992).

¹⁵⁷ *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (rejecting First Amendment challenge to conviction for burning draft card, although it was done as protest: “We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea”). This is not to say that snuff films are made for expressive purposes.

¹⁵⁸ *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986).

¹⁵⁹ *Id.* at 328–29.

¹⁶⁰ *Mishkin v. New York*, 383 U.S. 502, 505 (1966) (describing covers of books as presenting “scantily clad women being whipped, beaten, tortured, or abused”).

¹⁶¹ Per the USA Patriot Act definition, as “material support to terrorists,” 18 U.S.C. § 2339A(b) (2006), upheld as applied by *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8 (2010). It is said that snuff films of prostituted and trafficked women who resisted are used to coerce other such women into submission and cooperation.

¹⁶² The Code of Federal Regulations defines terrorism as “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.” 28 C.F.R. § 0.85(l) (2019). Would this be considered a definition of a viewpoint, given the acts are legal unless aiming to accomplish a particular political or social objective, typically ideologically defined? If offensiveness is a viewpoint, intimidation certainly is, both actually being the response of someone being subjected to the actions involved.

¹⁶³ 336 U.S. 490 (1949) (sustaining injunction against picketing to enforce a secondary boycott in light of state statute banning them).

¹⁶⁴ *Id.* at 498. “It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.” *Id.*

language, either spoken, written, or printed.”¹⁶⁵ When speech is “an essential and inseparable part of a grave offense against an important public law,”¹⁶⁶ that speech “cannot immunize that unlawful conduct from state control.”¹⁶⁷ The acts required for the “speech” here are murder, or conspiracy to murder, a federal crime,¹⁶⁸ given that making such a film is typically planned and usually cooperative. All the way back to his dissent in *Roth*, no less an opponent of obscenity restrictions than Justice Douglas cited *Giboney* as the standard that should be applied to pornography.¹⁶⁹ *Giboney* was also cited to support the federal criminal prohibition on advertising and selling child pornography, because those activities provide an economic motive for producing sex materials using children, which is validly criminal,¹⁷⁰ a ruling that, further citing *Giboney*, has been extended to possession and viewing of child pornography, because those activities increase the demand for it.¹⁷¹

By extension, the creation of much adult pornography is equally “‘intrinsically related’ to the sexual abuse” of those who are used to make it,¹⁷² giving the speech at issue “a proximate link to the crime from which

¹⁶⁵ *Id.* at 502.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*; see also *id.*, as cited in *Cox v. Louisiana*, 379 U.S. 559, 563 (1965), and in *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972).

¹⁶⁸ 18 U.S.C. § 1117 (2012).

¹⁶⁹ *Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting).

¹⁷⁰ *New York v. Ferber*, 458 U.S. 747, 761–62 (1982) (quoting *Giboney*, 336 U.S. at 498). *United States v. Stevens*, 559 U.S. 460, 471 (2010), in declining to find animal snuff films outside the protection of the First Amendment, distinguished those facts from the ones in *Ferber*, noting the latter ruling, predicated on *Giboney*, was “grounded . . . in a previously recognized, long-established category of unprotected speech[.]” It further supported the use of *Giboney* in this setting by noting that the distribution and sale of child pornography “‘were intrinsically related to the sexual abuse of children,’ giving the speech at issue ‘a proximate link to the crime from which it came.’” See *id.* (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002) (upholding the PROTECT Act)).

¹⁷¹ *Osborne v. Ohio*, 495 U.S. 103, 109–11 (1990) (quoting *Ferber*, 458 U.S. at 761–62); see also *United States v. Williams*, 553 U.S. 285, 297 (2008) (citing *Giboney* among other cases to support upholding federal law criminalizing pandering or solicitation of child pornography as not overbroad under the First Amendment). Frequently, *Ferber* is cited quoting the *Giboney* language.

¹⁷² *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002) (quoting *Ferber*, 458 U.S. at 759); see *supra* note 140 for the harms imposed during production, and *supra* notes 135–36 for how pornographers exploit substantive inequalities such as poverty, childhood abuse and neglect, and mental challenges of performers to acquire them for use, including recruiting persons who are also prostituted off-camera. For abuse that is clearly visible in the materials themselves in more recent pornography, see *supra* notes 138–39. On the abusiveness of prostitution, see sources documented in MacKinnon, *supra* note 135, at 282–88.

it came.”¹⁷³ Why is child pornography (unless virtual) axiomatically seen as predicated on acts against children, but no acts against adults are ever seen as requisite to its production? If ever speech was “brigaded with action,”¹⁷⁴ snuff is. Indeed, most pornography violates valid laws against prostitution and often rape, without that having been noticed—and, when noticed, having been incoherently repudiated.¹⁷⁵ Going back in the First Amendment tradition, Holmes’s dissent in *Abrams* is suggestive:

I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.¹⁷⁶

“Fraught with death”¹⁷⁷ indeed. If persuasion to murder as an act post “speech” can be constitutionally criminalized, might a sex film of murder that required committing it as an act ante the “speech”—and is contained therein—be as well? If so, what about rape?

The Court’s decision on animal snuff in *United States v. Stevens* offers close parallels but little encouragement.¹⁷⁸ Animal crush and human snuff

¹⁷³ *Ashcroft*, 535 U.S. at 250.

¹⁷⁴ *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring).

¹⁷⁵ See *People v. Freeman*, 758 P.2d 1128 (Cal. 1988); *People v. Fixler*, 128 Cal. Rptr. 363 (Cal. Ct. App. 1976). This critique is not to support criminalizing people used in prostitution or pornography. Laws that criminalize prostitution are, in my opinion, valid only as to pimps and johns, the victimizers, not as to people bought and sold.

¹⁷⁶ *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting).

¹⁷⁷ This phrase, of course, was used to opposite effect in Holmes’ dissent in *Abrams*:

I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Id. at 630.

¹⁷⁸ The congressional attempt to criminalize films of the torture and murder of animals failed strict scrutiny as an overly broad content-based regulation. Robert J. Stevens was prosecuted for compiling and selling videos of dogfighting under a federal statute that also prohibited “crush videos,” animal snuff, sex films that present the torture and killing of animals as a sexual fetish and lack serious value. In the Court’s cost/benefit balance, the statute would cover depictions of “humane” slaughter of food animals and hunting. *United States v. Stevens*, 559 U.S. 460, 476 (2010) (“[T]here is an enormous national market for hunting-related depictions in which a living animal is intentionally killed.”). Justice Alito thought the statute had a “substantial core of constitutionally permissible applications.” *Id.* at 491 (Alito, J., dissenting).

are both clandestine and highly profitable. Too, as Justice Alito noted in dissent, before Congress passed the law against the animal crush and cruelty films that the *Stevens* decision invalidated, the underlying conduct in the videos could be prosecuted, but without an inside witness, such prosecutions had proven nearly impossible; the videos provided both a prosecutable crime and evidence for the underlying conduct.¹⁷⁹ As the market in child pornography had been recognized to stimulate the abusive acts if possession and viewing were permitted,¹⁸⁰ the *Stevens* decision put crush videos back online.¹⁸¹ Justice Alito observed that “[c]rush videos present a highly unusual free speech issue because they are so closely linked with violent criminal conduct.”¹⁸² Actually, it is not at all unusual for pornography of adult women to be linked with violent criminal conduct. Women in pornography are often coerced, someone (usually someone else) is paid for the sex acts depicted,¹⁸³ making it prostitution, which is criminal conduct. Pimps are known for their violence.¹⁸⁴ Rape or torture, which are acts of violence, is not uncommon in pornography,¹⁸⁵

¹⁷⁹ *Id.*

¹⁸⁰ *Osborne v. Ohio*, 495 U.S. 103 (1990).

¹⁸¹ *Stevens*, 559 U.S. at 492–93 (Alito, J., dissenting).

¹⁸² *Id.* at 493.

¹⁸³ For coercion in pornography production and its links to prostitution, see *supra* notes 135–38 and 140. Most women in prostitution, of which pornography is an arm, are pimped, further crimes. A synthesis averaging the estimates from eighteen sources, including research studies, government reports, and non-governmental agencies in the United States, Ireland, Spain, Germany, the Netherlands, Italy, Poland, Bulgaria, India, Nepal, and Cambodia estimated that 84% of prostituted women were under the control of third parties or subjected to pimping or human trafficking. No national or regional differences appeared. See Melissa Farley, Kenneth Franzblau & M. Alexis Kennedy, *Online Prostitution and Trafficking*, 77 *Alb. L. Rev.* 1039, 1041–42, 1042 n.14 (2014).

¹⁸⁴ See, e.g., Brynn N.H. Jacobson, *Comment, Addressing the Tension Between the Dual Identities of the American Prostitute: Criminal and Victim; How Problem-Solving Courts Can Help*, 37 *Seattle U. L. Rev.* 1023, 1026–28 (2014) (“Many women and girls experience violence at the hands of a ‘customer,’ and roughly 66% reported that a pimp had battered them. The promises of love and a better life turn into threats, violence, and continued isolation from former sources of support. Pimps resort to slapping, punching, and forced sex, with the amount of violence increasing over time. Pimps use fists and objects such as wire hangers, broomsticks, baseball bats, telephone cords, hammers, screwdrivers, and brass knuckles. Many women also report not being allowed to keep any of the money they earn. Pimps do not need a reason to physically abuse the women they prostitute; the abuse is a method of establishing and maintaining dominance and control. Women also report the number of customers they ‘served’ as increasing the longer they were in the sex trade, with an average of ten per day.”) (footnotes omitted); Michael J. Frank & G. Zachary Terwilliger, *Gang-Controlled Sex Trafficking*, 3 *Va. J. Crim. L.* 342, 393–96 (2015).

¹⁸⁵ See *supra* note 140 for the harms imposed during production, and see *supra* notes 138–39 for examples of abuse clearly visible in the materials themselves.

and pornography is an industry of organized crime,¹⁸⁶ a violent industry. What is unusual is recognizing the link between the “speech” and the violent criminal conduct. Justice Alito saw that the materials in *Stevens* were like those in *New York v. Ferber*¹⁸⁷ in containing “speech that itself is the record of sexual abuse,”¹⁸⁸ so should not be constitutionally protected for the same reasons. His dissent gets at much of the substance of the inequality between humans and non-humans—the social hierarchy—without recognizing it as such. Human snuff raises the question whether adult women would be treated any better than animals by the Court, were a statute against similar atrocities enacted for their protection.

Given the Court’s determined protection of sexually abusive materials, hope that the harm done by speech recognized as violent—snuff often showing violence—was further dimmed by the 2011 *Brown v. Entertainment Merchants Ass’n* decision, declining to permit California to restrict the sale of violent video games to adults. The interactive training effects of the video games, in which users perform the motions of maiming, killing, torture, and rape, like pilots learn to fly planes in flight simulators (termed “target practice” by Justice Breyer in dissent),¹⁸⁹ were dismissed by the majority as the same as reading a book or watching a movie.¹⁹⁰ Which is not to say that a book or a movie is by definition harmless either. The sexual content of the violent video games was distinguished from its (presumptively nonsexual) violence, although the California law was limited to “killing, maiming, dismembering, or sexually assaulting an image of a human being[.]”¹⁹¹ A snuff film differs only in presenting these same acts actually being done as sex to a real

¹⁸⁶ See Final Report of the Attorney General’s Commission on Pornography, *supra* note 135, at 29–30, 291–302 (presenting condensed report documenting links between pornography industry and organized crime). For a more detailed account, including appendices on specific criminal investigations, see the original edition of the report: Attorney Gen.’s Comm’n on Pornography, U.S. Dep’t of Just., Attorney General’s Commission on Pornography: Final Report, vol. 1: 291–97, vol. 2: 1037–1238 (1986) [hereinafter Attorney General’s Commission on Pornography: Final Report].

¹⁸⁷ 458 U.S. 747 (1982).

¹⁸⁸ *United States v. Stevens*, 559 U.S. 460, 494 (2010) (Alito, J., dissenting) (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002)).

¹⁸⁹ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 841 (2011) (Breyer, J., dissenting).

¹⁹⁰ *Id.* at 798 (majority opinion). Justice Breyer disagreed. He also compiled the research. See *id.* at 849, 851–52 (Breyer, J., dissenting). Justice Alito, concurring, was especially brilliant in not buying this either. See *id.* at 820 (Alito, J., concurring).

¹⁹¹ *Id.* at 789 (majority opinion) (quoting Cal. Civ. Code § 1746(d)(1) (West 2009)).

human being, who begins alive and ends dead. Although violence against a person is an ultimate act of inequality, no glimpse of any “‘actual problem’ in need of solving”¹⁹² was discerned in *Brown*.¹⁹³

A video game may be closer to being “about” its contents than a snuff film is. Still, the tendency of this Supreme Court majority to make anything that contains words or images or symbolism or meaning (and what doesn’t) into “speech” containing an “idea about” whatever is done in it was apparent in its description of the danger posed by the California law, which was described much as cross-burning in *R.A.V.* had been: “the *ideas* expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription.”¹⁹⁴ One would think what the law does would be at least as important as what the Court imagines the law was passed to do. One also wonders about this Court’s response to direct feed webcam prostitution, in which the consumer orders up what he wants from a prostituted person, adult or child, following his orders live on the other end of a video camera, typically run by a pimp, for masturbation in real time on his end while viewing the responses to his orders on his computer screen.¹⁹⁵ Does putting prostitution into this artifact form, conveyed and consumed digitally on a screen while being performed live simultaneously, render it “speech” too? Who is speaking? Is this “ideas about” prostitution? As Andrea Dworkin put the point:

[W]e are told all the time that pornography is really about ideas. Well, a rectum doesn’t have an idea, and a vagina doesn’t have an idea, and

¹⁹² Id. at 799 (quoting *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 822 (2000)).

¹⁹³ The decision did, finally, make it definitively clear that the obscenity test has nothing whatever to do with violence: (as previously noted) “speech about violence is not obscene.” Id. at 793; see also id. at 793, 793 n.2 (glossing *Ginsberg* as approving “a prohibition on the sale to minors of *sexual* material that would be obscene from the perspective of a child” that is “harmful to minors”) (emphasis in original). The materials described—“‘nudity, sexual conduct, sexual excitement, or sado-masochistic abuse’ that were ‘harmful to minors’”—were assumed rather than shown harmful, and similarly were assumed to appeal to “‘the prurient, shameful or morbid interest of minors[.]’” Id. at 793–94 n.2 (quoting *Ginsberg v. New York*, 390 U.S. 629, 646 (1968)).

¹⁹⁴ Id. at 799.

¹⁹⁵ This form of prostitution increased during the COVID-19 pandemic and associated lockdowns. See Melissa Farley, *Prostitution, the Sex Trade, and the COVID-19 Pandemic*, *Logos: J. Mod. Soc’y & Culture* (2020), <http://logosjournal.com/2020/prostitution-the-sex-trade-and-the-covid-19-pandemic/> (pages 6–8 in online version, section titled “Pimps and Sexwork Unions Have Strongly Promoted Online Prostitution/Pornography and Webcamming During the COVID-19 Pandemic”) [<https://perma.cc/3RKF-TJN7>].

the mouths of women in pornography do not express ideas; and when a woman has a penis thrust down to the bottom of her throat, as in the film *Deep Throat*, that throat is not part of a human being who is involved in discussing ideas.¹⁹⁶

The urgency to reconfigure acts as “speech,” and bigotry as neutrality, is arguably driven by the felt need to protect sellers and buyers of sexual violation and exploitation in the form of pornography, which requires a foundation of sex, racial, and class inequality, with sexual acts against women and children accordingly, to make it. Once neutrality rules, discrimination and opposition to it are alike rendered points of view, equated and invisible and nonactionable in this form. Any ground given in restricting anything considered “speech” simultaneously risks restricting pornography as an underlying desiderata of protection, precluding pursuit of substantive equality in the expressive field.

Consider that pornography, the most mass of media, is the original fake news: it is lies, pure and simple, about women’s sexuality in particular, children’s sexuality as well, presenting both as desiring to be violated by acts the consumer is aroused by imposing, hence seeing being imposed. The original alternative facts were then invented and circulated by public relations firms hired by pornographers¹⁹⁷ to persuade a credulous and desensitized public to the conventional wisdom that exposure to pornography, which vast numbers were and are using,¹⁹⁸ does no harm, in the sense of no damage to those affected by the consumers who are affected by the pornography. No such methodologically valid facts

¹⁹⁶ Andrea Dworkin, *Pornography Happens to Women*, in *The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography* 181, 181–90 (Laura J. Lederer & Richard Delgado eds., 1995).

¹⁹⁷ A key instance is Letter from Steve Johnson, Senior Vice President, Gray & Co., to John M. Harrington, Executive Vice-President of the Council for Periodical Distributors Associations, 1, 2 (June 5, 1986) (on file with the Harvard University Schlesinger Library, Catharine A. MacKinnon Archive, Box 221.10). The Council for Periodical Distributors Associations was one member of the Media Coalition, *id.* at 1, which contained pornographers and not, and brought the *Hudnut* litigation against the Indianapolis civil rights ordinance discussed above. At the time, in any event, many magazine distribution networks were known to be owned by pornographers.

¹⁹⁸ For more updated evidence of the frequency and prevalence of pornography consumption in the normal (non-institutionalized) population, see *supra* note 137. See also Samuel L. Perry & Cyrus Schleifer, *Till Porn Do Us Part?: A Longitudinal Examination of Pornography Use and Divorce*, 55 *J. Sex Rsch.* 284 (2018); Sarah Blais-Lecours et al., *Cyberpornography: Time Use, Perceived Addiction, Sexual Functioning, and Sexual Satisfaction*, 19 *Cyberpsychology, Behav., & Soc. Networking* 649 (2016).

exist.¹⁹⁹ Social discourse has become accustomed to hearing only what supports an abusive unequal sexuality and status for over half the population, this industry having successfully conditioned the sexual pleasure of vast numbers to it. The authoritarian sexuality purveyed by pornography, on which ejaculatory entertainment vast swaths of the

¹⁹⁹ For substantive evidence of harm, which already existed at that time, see, e.g., Final Report of the Attorney General's Commission on Pornography, *supra* note 135, *passim*; Attorney General's Commission on Pornography: Final Report, *supra* note 186, at 299–352; In Harm's Way: The Pornography Civil Rights Hearings *passim* (Catharine A. MacKinnon & Andrea Dworkin eds., 1997). The evidence has been considerably strengthened since then. See *supra* notes 135–36, 138–40, and accompanying text for more updated studies on the abusive and exploitative conditions of production. See *supra* notes 141–49 for more updated studies on the abuse and injuries that the resulting materials promote among consumers.

Most scholars of this topic simply demonstrate harm, refuting the “no harm” canard. A few take on the shoddy work on the other side directly. See, for example, Neil M. Malamuth, Tamara Addison & Mary Koss, Pornography and Sexual Aggression: Are There Reliable Effects and Can We Understand Them?, 11 *Ann. Rev. Sex Rsch.* 26, 29–41 (2000), which criticizes researchers who misrepresent prior studies as showing no contribution to sexual aggression from pornography consumption when, in fact, the prior studies found such a contribution, and analyze flaws in experimental psychology that fail to create unbiased conditions where the influence of pornography on aggression can be reliably studied. Drew A. Kingston & Neil M. Malamuth, Problems with Aggregate Data and the Importance of Individual Differences in the Study of Pornography and Sexual Aggression: Comment on Diamond, Jozifkova, and Weiss (2010), 40 *Archives Sexual Behav.* 1045, 1045–48 (2011) criticizes studies using aggregated longitudinal statistical crime data for coming to the erroneous conclusion that pornography consumption is harmless. Max Waltman, Appraising the Impact of *Toward a Feminist Theory of the State*: Consciousness-Raising, Hierarchy Theory, and Substantive Equality Laws, 35 *Law & Ineq.* 353, 372–73 n.82 (2017) criticizes studies that use longitudinal aggregated statistics of reported sexual crimes to purport that the positive association between pornography consumption and actual sexual crime prevalence is insignificant. Waltman also criticizes a study of pornography “performers” in Los Angeles purporting to show that they have better health and well-being than a nonperforming demographic control group, showing it to be biased, lacking methodological rigor, and exhibiting a conflict of interest. *Id.* at 378–79 & 378–79 nn.106–08. Rebecca Whisnant, “But What About *Feminist Porn*?”: Examining the Work of Tristan Taormino, 2 *Sexualization, Media, & Soc’y* 1, 2–4, 5–10 (2016) found no evidence to support a self-proclaimed “feminist” pornographer’s claims that those she used in her productions have complete autonomy in deciding sexual partners and sex acts, and found overwhelming evidence of violence and degradation. In a comprehensive analysis of the evidence, Waltman, *supra* note 147, at 48–49, 51–53 criticized some studies of content in mainstream pornography purporting to show less physical aggression as biased compared with other studies that showed such aggression. Waltman also criticized studies that claim to find that pornography production and prostitution is less harmful than other studies have shown it to be. *Id.* at 76–83. He also analyzed quantitative studies of pornography consumption effects critically and found instances of minimization or compartmentalization of the documented harmful effects, *id.* at 89–122, and criticized longitudinal aggregated crime report studies for their unreliability on this question. *Id.* at 129–38.

electorate are hooked,²⁰⁰ is not politically neutral in the sense of power, far less is it gender neutral.

It becomes difficult to avoid the suspicion that First Amendment law has been constructed over the past half century or so in the increasingly long shadow of pornography—that is, cut to the shape that will ensure that pornography is protected, or at least not to risk re-raising the contentious question of its protection. Understandings and evidence of harm, as well as harm’s place in potential restrictions, must be trivialized and suppressed, causation made exclusive and linear rather than ecological and recursive, and governmental intervention in “speech” framed as necessarily neutral when all this is orchestrated precisely to preserve these particular materials from accountability for the harms of inequality they require and do, so sexual use of the materials, hence the people in them, can continue. And although this conclusion is repudiated by the *R.A.V.* majority,²⁰¹ it seems increasingly clear that doing real harm is indeed protected speech (with a few categorical exceptions) so long as it is done in the guise of conveying a viewpoint favorable to the doing of that harm.

The *R.A.V.* formulation achieved its First Amendment exception for Title VII inequalities by considering discrimination “conduct” and “acts.”²⁰² It indisputably is, but, as with sexual harassment, for example, it is often an entirely verbal act. Sexual harassment that is verbal is only discriminatory because of its content, which is coextensive with its consequences. It is, quite precisely, a class of speech that “by [its] very utterance inflict[s] injury,”²⁰³ the overwhelmingly neglected dimension of *Chaplinsky*, while its “‘fighting’ words” and “breach of the peace”

²⁰⁰ See *supra* note 137 for information on the proportions of the population that consume pornography regularly (e.g., three or more days per week, one or two days per week, or a couple of times per month).

²⁰¹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992) (“Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.”).

²⁰² *Id.* at 389–90 (“[S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation’s defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory ‘fighting words,’ among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” (internal citations omitted)).

²⁰³ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

elements have received the comparative weight, including in *R.A.V.*²⁰⁴ The exception in *R.A.V.* for Title VII might be built upon. Otherwise, disallowing the actionability of discriminatory activity involving pornography such as coercion, force, assault, and trafficking in subordination, as in *Hudnut*,²⁰⁵ *discriminates against antidiscrimination law based on its content*. Examining the viewpoint contortions, with First Amendment doctrine framed so that none of the massive record of pornography's harm is even legally relevant, it is difficult to avoid the conclusion that the First Amendment is shaped as it is so men can have their pornography.

Both the public discussion and the arc of the law have gone from obscenity wars, which were mainly about real art and literature or birth control, not pornography at all, to affirmative protection of a burgeoning industry of abuse, as if the same interests were at stake. The pornography industry does not produce art or literature, nor are pornography pimps artists or literary writers; pornography is a technologically sophisticated form of trafficking in women and children with profits to match.²⁰⁶ The past place of relatively powerless legitimate literary and artistic actors subjected to the narrow-minded moralistic might of state censorship has been appropriated by powerful exploitative actors of international organized crime, more potent in the lives of the most vulnerable women and children than the state is in protecting them.

The normalization of this approach, producing a similar inability to see, or studied indifference to, inequalities of power in the facts of First Amendment cases became especially visible for media speech after *New York Times*, which did not grasp the power of media at all. Illustrating the substantive inequality shoe on the other foot—the media violating the substantive equality interest, the state supporting the victims through legislation—the Supreme Court found Florida's civil statute prohibiting printing or broadcasting the name of the victim of a sexual offense violated the First Amendment.²⁰⁷ Part of the inquiry involved whether the

²⁰⁴ This made sense in *Chaplinsky* itself given the state court's interpretation of the statute resting on those elements. *Id.* at 572–74. It does not make sense that this language has been so largely ignored going forward. See also *R.A.V.*, 505 U.S. at 383 (citing to and validating *Chaplinsky*).

²⁰⁵ See *supra* note 12.

²⁰⁶ See Catharine A. MacKinnon, *Pornography as Trafficking*, 26 *Mich. J. Int'l L.* 993, 993–1001 (2005).

²⁰⁷ *Fla. Star v. B.J.F.*, 491 U.S. 524, 526 (1989).

law served “a need to further a state interest of the highest order.”²⁰⁸ While encouraging victims to report rape without fear of exposure was regarded as a “highly significant interest[,]” and the possibility of civil sanctions for such publication was not absolutely ruled out, the Court was not convinced of this “need” in this case for a variety of reasons, none of which confronted the equality interests in rape and its reporting, rape not being seen as a gender crime giving rise to equality considerations.²⁰⁹ Incredibly, many members of the Court grasped the power of the media so little that it was likened to village gossip.²¹⁰ Neither was media grasped as a specific instrument of gender-based harm, eliding that fear of the media—at least until the #MeToo movement and the rise of social media—has been one of the best documented reasons victims did not report their sexual assaults.²¹¹ Rape survivors have resisted becoming pornographic spectacles.

The Supreme Court majority in *Florida Star v. B.J.F.* denied that it was embracing the principle that all truthful publication is constitutionally protected, although the dissent saw that principle in the holding.²¹² The principled bases for appellee’s interests were what the dissent termed “privacy and peace-of-mind”²¹³—constitutionally weak compared with equality, which was not mentioned. The dissenters, at least, recognized that no public interest was served in knowing B.J.F.’s name. They might have added that her individual identity was as immaterial to the public at large as it likely was to her perpetrator. Not being able to report one’s rape on pain of denigration, humiliation, sexualization, objectification, and harassment—or firing from employment, ejection from family, shunning at school resulting in effective exclusion, suicidal ideation—because of media exposure of one’s identity is a form of “silence coerced

²⁰⁸ *Id.* at 533 (quoting *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979)). This was prior to the “strict” vs. “intermediate” scrutiny business.

²⁰⁹ *Id.* at 537. For discussion of rape as an equality issue, see Catharine A. MacKinnon, *Unequal Sex: A Sex Equality Approach to Sexual Assault*, in *Women’s Lives, Men’s Laws* 240–48 (Belknap Press 2005); Catharine A. MacKinnon, *Rape Redefined*, 10 *Harv. L. & Pol’y Rev.* 431 (2016).

²¹⁰ *B.J.F.*, 491 U.S. at 542 (Scalia, J., concurring in part and concurring in the judgment).

²¹¹ This is increasingly well understood. See Joanne Belknap, *Rape: Too Hard to Report and Too Easy to Discredit Victims*, 16 *Violence Against Women* 1335 (2010); Patricia H. Grant & Paula I. Otto, *The Mass Media and Victims of Rape*, in *Controversies in Victimology* 49, 49–71 (Laura J. Moriarty ed., 2d ed. Routledge, 2015).

²¹² *B.J.F.*, 491 U.S. at 553 (White, J., dissenting).

²¹³ *Id.*

by law,” what Justices Brandeis and Holmes, concurring in *Whitney*, termed “the argument of force in its worst form.”²¹⁴

IV.

A First Amendment substantive equality standard predicated on proof of harm could begin from the understanding in *Schenck* that “[t]he most stringent protection of free speech would not protect a man . . . from an injunction against uttering words that may have all the effect of force.”²¹⁵ Further confining prohibited abuse and harassment by expressive means to specific hierarchical grounds of historic inequality, with the potential intersectional addition of socioeconomic class as an aggravating factor, provides a far more predictable and administrable test than the empty, generic, abstract sameness-and-difference formal equality test now applied to any distinction with content, which in reality is most distinctions. Equality, substantively, is a limiting principle, keeping the slippery slope from sliding beyond the protection of groups historically subordinated on concrete well-established grounds.

In a substantive equality framework, the *New York Times* decision would have restricted the use of state libel law when attempted to be applied to limit equality-seeking through speech. The speech at issue there promoted equality, a legitimate and compelling state interest. A constitutional right to publish equality advocacy that exposes racist officials suppressing civil rights activities, who then attempt to punish that expressive exposure through suit for non-material inaccuracies, provides a kind of retaliation claim. In the Skokie case, the expression at issue targeted the very group that those who sought the permits had slated for extinction in a genocide. When the Court stated in *Beauharnais* that “the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties”²¹⁶ may be punished, this largely palliative aside served mainly to convey the court’s willingness to wait until after subsequent violence by either side or other discrimination occurred before legal intervention would be allowed. The incitement there referred to aggression other than the march

²¹⁴ *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis & Holmes, JJ., concurring).

²¹⁵ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

²¹⁶ *Beauharnais v. Illinois*, 343 U.S. 250, 261 (1952).

itself, and the “coercive activities” did not mean the expressive action for which the permit was sought, as would the *Beauharnais* inequality insight that expressive acts need not produce violence, and may not be able to be traced to specific denials of civil liberties, to coercively discriminate. The weaponization of “speech” for unequal ends that defines the trend line traced here over the past century—prominently for white supremacist and male dominant sexual purposes—started with anti-Semitism, thought at the time a contentious and anguishing sidebar.²¹⁷ It turned out to be the template for the future, as it so often has been. Substantively grasped, building in part on *Beauharnais*, the historical treatment of Jews could become a principle for recognizing unequal expressive harm.

Until very recently, the closest to a harm test the Supreme Court has come in the First Amendment area, other than in some of its child pornography rulings and *R.A.V.*'s exception for Title VII,²¹⁸ is *Brandenburg*'s “incitement” test. And it is not very close. Had the inequality that animated the facts in that case been noticed, however, incitement would apply not only to advocacy of violence in linear causal relation, immediate and lawless, to subsequent acts, but to advocacy that mobilizes pre-existing established powerful social forces—attitudes and behaviors—against known unequal groups. Which is the way most of it works and happens. Instead, the prior First Amendment template of protecting the state from damaging speech was inaptly applied to vulnerable social groups, who obviously do not have the state's power. Even then, the state is treated better. The state was protected from clear and present danger on a sliding scale of credibility of danger contingent on perception and proof. The Klan's targets, who were not present, were protected only from “imminent lawless action[,]”²¹⁹ ignoring both the power of the state and the long arm of potent white supremacy.

²¹⁷ This is my experience from engaging in that debate at the time and beyond. Although major principles were understood to be at stake, anti-Semitism was not, in substance, seen by others as particularly relevant as an empirical driver of the reality under discussion. It was assimilated to the moralistic “speech we hate” that we must therefore protect, rather than confronted as a real-life force for violent inequality. See, e.g., Franklin S. Haiman, *Nazis in Skokie: Anatomy of the Heckler's Veto*, 17 *Free Speech Y.B.* 11, 16 (1978) (discussing how the country proves its values by “defend[ing] the right of free expression even for those whose beliefs and messages it most despises”); *Nazis, Skokie and the A.C.L.U.*, *N.Y. Times*, Jan. 1, 1978, at E10 (“[If] the rights of those whom civil libertarians have most cause to despise are slighted, then everyone's rights are placed in jeopardy.”).

²¹⁸ Of course, most of the standard First Amendment exceptions, such as for information on troop ships sailing, false advertising, true threats, etc., are all versions of harm tests.

²¹⁹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

In the harm denial department, if the tipping point on racist hate speech was *Collin v. Smith*, on pornography it was *Hudnut*—both Seventh Circuit decisions the Supreme Court let stand without briefing or argument.²²⁰ As to pornography’s unequal harms, if no existing First Amendment test yet fully recognizes them, the Court’s approach to child pornography in *Ferber* and *Osborne* at least begins with the harm done to those violated in the making, and grasps possession and use as creating a demand for that abuse. Child pornography, it seems, is not a discussion of ideas, despite conveying “a favorable view of the practices it depicts[.]”²²¹ Facing as an inequality the disparity of age that is exploited in the materials could support extending the basis of the prohibition—actualized overwhelmingly through acquiescence by the children in the acts in the materials—to those children on whom the materials are frequently used, including by targeting and grooming them for sexual abuse through the stimulation and conditioning tools thereby provided to user adults. Potentially, an action could be created that looked back from adults to the violated children they were when first exploited. The contortions over morphing²²²—in which a nonsexual photo of a real child is combined with a sexually explicit photo, typically of an adult²²³—and apparent children—adults in age who “look like” children, who have no rights at all over the materials made of them in this setting—could be avoided, the real damage done by virtual, morphed, and pandered materials encompassed. The equality approach taken by the ordinance litigated in *Hudnut*, subject only to summary affirmance in the Seventh Circuit hence accessible for passage elsewhere, addresses these and other relevant harms done through adult as well as child pornography in a civil rights instrument.²²⁴ Free expression appears to have survived the criminalization of child pornography, as the ACLU et al. in vociferously

²²⁰ See supra note 12. Both decisions seem to me gutless.

²²¹ *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 457 (2002) (Souter, J., dissenting), to use the language of the dissenters there on the topic of content regulation.

²²² *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256–58 (2002) (holding sections of the Child Pornography Protection Act banning depictions of real or apparent minor engaging in sexually explicit conduct (18 U.S.C. § 2256(8)(B)) and depictions of sexually explicit conduct conveying the impression that minor is visually represented (18 U.S.C. § 2256(8)(D)) are overbroad and unconstitutional).

²²³ For an informative discussion, see Stacey Steinberg, *Changing Faces: Morphed Child Pornography Images and the First Amendment*, 68 *Emory L.J.* 909 (2019).

²²⁴ See Indianapolis, Ind., Code § 16–3(q) (1984).

opposing the *Ferber* law darkly predicted it could not,²²⁵ through a de facto, partially substantive, equality approach.

Maybe the denial of the power of speech is shifting. As mentioned previously, in 2011, a harm too great—honestly, a harm real to the privileged, including the legacy media—was experienced in the United States: foreign terrorism. Despite the Court’s observation in *Brown*—“Last Term, in *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated”²²⁶—*Holder v. Humanitarian Law Project*²²⁷ did just that. Disallowing material support of specified foreign terrorist organizations under a federal statute, including funding rendered “speech” as well as political speech itself—such as training in peace, international remedies, and political advocacy, despite being part of no “long . . . tradition of proscription,”²²⁸—was upheld.²²⁹ No litany of speech platitudes, including neutrality. No waiting around for the violence to happen this time.

Meantime, Canada has adopted substantive equality in interpreting its constitutional freedom of expression provision. Building on its explicit rejection of formal equality and embrace of substantive equality,²³⁰ the Supreme Court of Canada upheld a hate propaganda prohibition largely on an equality rationale in a case involving teaching anti-Semitism to schoolchildren.²³¹ Parliament’s distinctive obscenity law pointing to harm rather than morality, which prohibits “undue exploitation of sex, or of sex and any one or more of . . . crime, horror, cruelty and violence,”²³² was also saved on equality grounds from attack as a violation of freedom of expression.²³³ Enforcement and interpretation in Canada could use a more

²²⁵ Brief for Am. Booksellers Ass’n. et al. as Amicus Curiae Supporting Respondent, *New York v. Ferber*, 458 U.S. 747 (1982) (No. 81-55), 1982 WL 608539, at *8–9.

²²⁶ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 791 (2011).

²²⁷ 561 U.S. 1 (2010). (And *Stevens* did not so hold).

²²⁸ *Brown*, 564 U.S. at 792.

²²⁹ *Humanitarian L. Project*, 561 U.S. at 39.

²³⁰ See *Andrews v. L. Soc’y of B.C.*, [1989] 1 S.C.R. 143 (Can.); *R. v. Kapp*, [2008] 2 S.C.R. 483 (Can.).

²³¹ *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can.).

²³² *Offences Tending to Corrupt Morals*, R.S.C. 1985, c C-46 § 163(8) (Can.).

²³³ See *Butler v. R.*, [1992] 1 S.C.R. 452 (Can.); see also *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 (Can.) (applying the *Butler* harm test to gay and lesbian materials).

robust anti-hierarchical substantive equality understanding, though.²³⁴ After ten years of litigation, one defendant was convicted of snuff-themed verbal and visual pornography sexualizing the torture and murder of women,²³⁵ a conviction upheld on appeal.²³⁶ But since 1994,²³⁷ no published Canadian obscenity case has been prosecuted for nonviolent adult pornography, suggesting that the equality principle of substantive hierarchy needs further constitutional backbone in this area. Or a civil approach of the kind litigated in *Hudnut*, which does not depend on police or prosecutorial action or result in criminal sanctions. In any case, free speech appears robust in Canada.²³⁸

Seemingly opposed to such equality re-conceptualizations is the timeworn aphorism from Brandeis's concurrence in *Whitney* that "[m]en feared witches and burnt women."²³⁹ Because men thought some women were witches, and witches—some women—were feared to have supernatural powers to harm, men burned women. Irrational fear of harm does more harm than the harm irrationally feared. However, the harm done by pornography is not irrationally feared. Its harm is not a fear but a fact, established by a massive body of converging empirical evidence encompassing experimental and field studies, attitude surveys, interviews with rapists, and testimony from survivors. What is *not* addressing such a harm, even doctrinally precluding it, called? Meantime, it is women who are being burned. The other tired canard, that truth will triumph in the marketplace, so nothing that can be considered expression should be restricted, was well addressed by John Stuart Mill in a less commonly quoted passage in *On Liberty*: "[i]t is a piece of idle sentimentality that truth, merely as truth, has any inherent power denied to error, of

²³⁴ For further discussion, see MacKinnon, Substantive Equality Past and Future, *in* *Canada in the World*, supra note 6, at 227.

²³⁵ See *R. v. Smith* (2005) 76 O.R. 3d 435 (Can. Ont. C.A.).

²³⁶ See *R. v. Smith*, 2002 CarswellOnt 6125 (Can. Super. Ct. J.), aff'd in part, (2005) 76 O.R. 3d 435 (Can. Ont. C.A.), aff'd with modifications, 2012 ONCA 892 (Can.), 2012 CarswellOnt 15792 (Can. Ont. C.A.). This decision tellingly did not discuss "community standards."

²³⁷ See *R. v. Erotica Video Exch. Ltd.* (1994), 163 A.R. 181, 184 (Can. Alta.).

²³⁸ For a contrasting view, see the American-congratulatory book by Floyd Abrams, which makes a big point of how much freer speech is in the United States than in all the democracies that take inequality by expressive means seriously. Floyd Abrams, *The Soul of the First Amendment* (Yale Univ. Press 2017). He does not discuss pornography, presumably on the view that ignoring the embarrassment it presents to his argument will make it (the embarrassment, not the pornography) go away.

²³⁹ *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis & Holmes, JJ., concurring).

prevailing against the dungeon and the stake.”²⁴⁰ Knowing that the dungeon and the stake are also sexual preferences and sexual practices of inequality, a reality clearly evidenced in pornography, drives deeper the literal accuracy of this already acute observation.

In the public debate over pornography in particular, the media aligned its interest with the pornographers, its speech with their speech, imagining that restricting pornography risked restricting journalism, despite major distinctions in content and known effects. The underlying position of the mass media has been that nothing it or anyone says is responsible for any events in the real world. Just as pornography cannot cause acts of violence or inequality, nothing spoken or written can throw an election or get anyone killed. The press panic over the conviction of Michelle Carter in the suicide of her depressed friend—she texted him to kill himself and he did—illustrates: “Carter may have been despicable for her damning encouragement, but we should be very clear: She didn’t kill anyone. Words do matter, but they’re not lethal.”²⁴¹ A jury found Carter’s text caused her friend’s death, but according to some media, cause-in-fact between text and killing cannot metaphysically exist. Hitting closer to home, President Trump’s press criticisms made some journalists feel vulnerable. One journalist responded with the party line:

If we argue that rhetoric is to blame for certain acts of violence, then shouldn’t the natural conclusion . . . be that certain types of speech ought to be banned or regulated so as to protect against possible future harm? Wouldn’t it be irresponsible *not* to regulate this type of speech if it is indeed responsible for violence caused to others? This is all rubbish, of course, as the speech-can-kill line requires that one subordinate personal responsibility to external factors not directly involved in specific actions. It frees the criminal from the crime. . . . Let’s . . . not attribut[e] the terrible actions of others to our freedom to speak freely.²⁴²

²⁴⁰ John Stuart Mill, *On Liberty* 53 (London, John W. Parker & Son 1859).

²⁴¹ Kathleen Parker, *Can Words Kill People?*, *Wash. Post* (June 20, 2017, 7:35 PM), https://www.washingtonpost.com/opinions/can-words-kill-people/2017/06/20/3e79f4ee-55f3-11e7-ba90-f5875b7d1876_story.html?utm_term=.adca66480d86 [https://perma.cc/9C-49-HT2L].

²⁴² Becket Adams, *You’re Not Helping Free Speech When You Suggest Trump Is Going To Get Journalists Hurt*, *Wash. Examiner* (June 29, 2017, 5:14 PM), <http://www.washingtonexaminer.com/youre-not-helping-free-speech-when-you-suggest-trump-is-going-to-get-journalists-hurt/article/2627501> [https://perma.cc/FH7U-WL5G]. This

It is odd that it is thought impossible to hold responsible both those who impel acts and those who perform them, both those who make them happen and those who execute them. Supporting lack of accountability for the downstream consequences of anything denominated “speech” because there can be no such consequences—exemplifying the well-known cognitive psychological phenomenon called “confirmation bias”²⁴³—minimizes the valuable power journalists hold in their hands, a power unleashed on behalf of violated people in the #MeToo movement with real consequences.

The same arc of powerlessness to power as seen in the rest of the First Amendment tradition can be traced by the trajectory of cases on academic freedom, a right of “special concern” to the First Amendment,²⁴⁴ with the same reversal in inequality’s substance at its factual core. Initially a liberatory shield against imposition of orthodoxy on dissenters following the McCarthy era’s suppression of the expression by teachers on the left, assertion of academic freedom has increasingly become a sword in the hands of sexual harassers and racists who assert it as a right against students who assert their equality rights based on race and sex in education.²⁴⁵ Libel cases are also being brought by accused perpetrators of sexual harassment against those who publicly claim victimization by them.²⁴⁶ Here, the press and victims of sexual assault are on the same side, as the press and the victims of white supremacy were, unremarked, in the

passage suggests how nervous some journalists are at questioning their pure unaccountability, even when they imagine possible acts against themselves. In contrast, see Jim Rutenberg, *Trump Takes Aim at the Press, with a Flamethrower* (Aug. 23, 2017) (reporting that some journalists consider Trump’s criticism of the press to be an incitement to violence against them), <https://www.nytimes.com/2017/08/23/business/media/trump-takes-aim-at-the-press-with-a-flamethrower.html?searchResultPosition=1> [<https://perma.cc/X2BC-8F67>].

²⁴³ See P.C. Wason, *On the Failure To Eliminate Hypotheses in a Conceptual Task*, 12 *Q.J. Experimental Psych.* 129 (1960) (original experiment on confirmation bias finding tendency to favor information that validates preconceptions and beliefs, regardless of factual basis).

²⁴⁴ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); see also *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality).

²⁴⁵ For a fuller discussion, see Catharine A. MacKinnon, *On Academic Freedom: From Powerlessness to Power*, in Catharine A. MacKinnon, *Butterfly Politics* 242–62 (2017).

²⁴⁶ See, e.g., Madison Pauly, *She Said, He Sued, He Sued*, *How Libel Law is Being Turned Against MeToo Accusers*, *Mother Jones* (Mar./Apr. 2020), <https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault/> [<https://perma.cc/VQ32-Y5SU>]; Julia Jacobs, *#MeToo Cases’ New Legal Battleground: Defamation Lawsuits*, *N.Y. Times* (Jan. 12, 2020), <https://www.nytimes.com/2020/01/12/arts/defamation-me-too.html> [<https://perma.cc/M359-KFYW>]; Sui-Lee Wee & Li Yuan, *They Said #MeToo: Now They Are Being Sued*, *N.Y. Times* (Dec. 27, 2019), <https://www.nytimes.com/2019/12/26/business/china-sexual-harassment-metoo.html> [<https://perma.cc/EQ9W-T5LR>].

New York Times case. Speaking substantively in inequality terms, the press and media can need protection from government, but members of disadvantaged groups can need protection from media, which government could provide. Libel law could be improved by a more explicit recognition of inequality done through defamatory falsehoods, given the power the press and media has over individuals, groups, and elections. The law on these tensions is unsettled, Supreme Court auguries pulling in several directions. Outcomes in cases involving public allegations of sexual abuse and racial bigotry in employment and abuse through “speech” in educational relationships and environments go both ways,²⁴⁷ although equality of environments based on race and sex is statutorily guaranteed.²⁴⁸ Vindication of equality interests in speaking out against abuse in the public space at large, including on social media, continues to depend largely upon doctrines created outside the equality context.

Reductive analysis of the power of “speech” is, however, giving way to understandings of its potency in the area of terrorism domestic and foreign: belief in, and expression of, certain views obviously motivates lethal actions that actualize and further those views, without in any way reducing the responsibility of those who commit the criminal acts. The attacks of September 11th—a democratized experience of harm that is real to people to whom little else appears to be—may have modified the liberal article of faith that “speech” can neither constitute nor produce real harm and only that speech that is demonstrably ineffectual can justifiably be restricted. Yet the cry of “censorship” from the left²⁴⁹ and “PC” and “cancel culture” from the right remain reflexive whenever “speech” and harm are observed to be causally linked. Justice Kagan’s dissenting

²⁴⁷ The strongest case to date for survivors in education is *Feminist Majority Found. v. Hurley*, 911 F.3d 674 (4th Cir. 2018) (holding University of Mary Washington responsible for deliberate indifference to “true threats” via social media on proprietary platform in violation of Title IX).

²⁴⁸ Title VI of the Civil Rights Acts of 1964, 42 U.S.C. § 2000d et seq. (2012); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (2012).

²⁴⁹ In the public debate over pornography, pointing out the industry’s discriminatory foundations, i.e., the inequality of prostitution, and its dramatically unequal effects in the form of harms done during its production and inflicted by its consumers, is routinely mislabeled “censorship” in social discourse, even before any pursuit of remedies takes legal form. The human rights law litigated in *Hudnut* was also termed censorship by its opponents, although only its proven concrete harms would be actionable by its victims against their perpetrators, and no criminal law, tools, or remedies were involved.

recognition of the weaponization of the First Amendment²⁵⁰ was apt, particularly if class is understood as the inequality it is, despite law's failure to recognize it as such. But the actual weaponization of the First Amendment, "turning the First Amendment into a sword,"²⁵¹ did not suddenly come out of nowhere in 2018. Nor is that weaponization counterbalanced by purported content and viewpoint neutrality,²⁵² rather includes it. *Collin v. Smith* and *Hudnut* began forging and honing this now canonical sword.

A First Amendment that, in contrast, sustained its original insights into dissent and powerlessness, building into them a modern understanding of substantive inequality, would open expression to the unequal instead of largely confining its protection to the powerful, especially those for whom speech is a principal form of power. Sometimes the speech is the weapon. Exposing rather than denying or obscuring the harms of inequality done by expressive means, permitting rather than prohibiting their careful restriction, and supporting rather than discouraging or punishing expression by subordinated groups against their inequality would actualize the First Amendment's role in substantive equality, and begin to realize equality's potential to promote speech that is both freeing and free.

²⁵⁰ *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

²⁵¹ *Id.*

²⁵² Justice Kagan does not question content neutrality in her *Janus* decision. See *id.* at 2477 n.23 (majority opinion).