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# Witch Hunts: Free Speech, #MeToo, and the Fear of Women’s Words

Mary Anne Franks<sup>†</sup>

“What would happen if one woman told the truth about her life? The world would split open.”

– Muriel Rukeyser, *Käthe Kollwitz* (1968)

## INTRODUCTION

Perhaps the most seductive truism of free speech jurisprudence is that the First Amendment protects, in Justice Oliver Wendell Holmes’s words, “the thought we hate.”<sup>1</sup> The sentiment dominates both the formal doctrine and informal public understanding of free speech. The concept of offensive speech in the United States was associated for some time with marginalized speakers, such as Communists, civil rights activists, and union workers. However, it has over the last few decades become increasingly identified with speakers more closely tied to power and privilege, such as white supremacists, corporations, and members of mainstream religions. Public discourse on free speech has been dominated in the last few years by far-right figures such as Milo Yiannopoulos and Richard Spencer, whose speech tend to denigrate women, racial minorities, and the LGBTQ community.<sup>2</sup> Some of the fiercest defenders of this speech are self-identified civil libertarians, who claim to hate what such speakers are saying but who will “defend to the death their right to say it.”<sup>3</sup> These defenders do not dismiss the idea that such speech causes harm but maintain that it is this very characteristic that compels its protection.

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<sup>1</sup> *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

<sup>2</sup> Talib Kwali Greene, *Free Speech or Die?*, MEDIUM (Feb. 26, 2018), <https://medium.com/s/story/free-speech-or-die-53a206027143> [<https://perma.cc/4YMH-2D8L>].

<sup>3</sup> A cliché frequently but erroneously attributed to Voltaire.

It is clear, then, that classification as “the speech we hate” confers a great deal of power within free speech jurisprudence. While the determination of what is offensive or injurious is often presented as neutral and objective, it is in reality anything but. This is most clearly illustrated by comparing the treatment of men’s speech versus women’s speech throughout American history. While the politics of the most favored speech has shifted over time, what has remained largely constant is that free speech theory and practice has focused on men’s speech. There is a great irony here, as it is *women’s* speech that has been most feared, and thus extensively regulated, criticized, and prohibited throughout American history.

One of the only acknowledgments of the widespread and longstanding legal, political, and cultural efforts to silence women appears in Justice Louis Brandeis’s concurring opinion in *Whitney v. California* (1927): “Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.”<sup>4</sup> Justice Brandeis’s invocation of witch hunts and the burning of women to underscore this point is more illuminating than he may have intended. It points towards the historical attempts to suppress women’s speech, exemplified not only by witch hunts, but also by a wide range of legal, political, and cultural deprivations.

If it were actually true that the animating principle of free speech theory and practice is that the most feared speech is that most deserving of protection, then it is women’s speech that should be valorized as free speech par excellence, and attempts to suppress it should be condemned as censorship. A mass movement of women speaking out about experiences and abuses that have long been suppressed, such as the #MeToo movement, should be praised as the quintessential exercise of free speech. And yet, nearly as soon as it began, the movement was condemned for being so offensive and injurious to men that demands were made to curtail it. It is debatable in the first instance whether the characterization of #MeToo as harmful to men is accurate, but the more relevant point here is that to the extent that it is harmful to men, this should mean that women’s #MeToo speech is *more*, not less, deserving of protection. The efforts to silence these women should be seen as modern-day witch hunts, carried out by men in “the bondage of irrational fears”<sup>5</sup> that the mere word of a woman has the power to destroy men’s lives.

Instead, the very term “witch hunt” has been energetically and ironically repurposed to convey the persecution and silencing *of men by*

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<sup>4</sup> *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

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

women. In this Orwellian inversion, women's speech about men's abuses is characterized as a dangerous form of censorship, while men's criticism of that speech is characterized as a brave refusal to be silenced. This development makes clear that despite Justice Brandeis's fine words, offensive and injurious speech seems to be far less valued as "free speech" when it is spoken by women about men. Whether women are cast as witches who must be burnt or witch hunters who must be stopped, their speech continues to be feared and repressed rather than celebrated and protected.

This article argues that this unbroken history of suppressing women's speech demonstrates that the supposed American commitment to free speech is a seductive fraud. What is truly valorized in American free speech doctrine and practice is not free speech as such, but speech that advances or at least does not directly challenge white men's monopoly on power. Part I examines the claim that offensive and injurious speech should receive the greatest degree of protection under the First Amendment. It reveals that this claim, which purports to be the product of a neutral commitment to the rights of the vulnerable, masks a preference for the speech of the powerful. Free speech doctrine blurs the line between the merely offensive and the truly injurious, at least with regard to *men's* offensive and injurious speech, and particularly when that speech advances white male supremacy. Part II demonstrates that if we are to take the insistence on protection for "offensive and injurious speech" by vulnerable groups seriously, then a quick survey of history makes clear that it is women's speech, particularly women's speech perceived as offensive or injurious to men, that should take pride of place. Part III describes how women's speech that inspires fear in men is not only under-protected, but is, in an Orwellian twist, increasingly denounced as censorship. The whiplash-inducing critique of the #MeToo movement as a "witch hunt" dramatically illustrates this point, revealing the hollowness of our supposed commitment to "freedom for the thought we hate."

### I. THE SPEECH WE HATE

The American commitment to free speech is often described in terms of "freedom for the thought we hate."<sup>6</sup> This phrase comes from Justice Holmes's dissenting opinion in the 1929 case *United States v. Schwimmer*:

[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of

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<sup>6</sup> See, e.g., Anthony Lewis's influential book on the First Amendment. ANTHONY LEWIS, FREEDOM FOR THE THOUGHT WE HATE (2007).

free thought—not free thought for those who agree with us but freedom for the thought that we hate.<sup>7</sup>

The case often cited as the clearest illustration of the radical American commitment to freedom of speech for even the most hateful ideas is *Collin v. Smith*, which involved a proposed Nazi march in Skokie, Illinois, in 1976. Members of the National Socialist Party of America (NSPA) announced their intention to march in Skokie, a Chicago suburb, wearing Nazi-style uniforms and displaying banners with swastikas on them. Members distributed flyers and made unsolicited phone calls to Skokie residents with Jewish-sounding names promoting the march. At the time, around half of Skokie's population was Jewish, including hundreds of Holocaust survivors. The town of Skokie passed a series of ordinances to prevent the march from happening, which the NSPA, represented by the ACLU, challenged in court. Eventually, the ordinances were found to violate the First Amendment, and the NSPA was given permission to march.

In striking down Skokie's efforts to prevent the march, the Illinois Supreme Court analogized the case to the 1971 Supreme Court case *Cohen v. California*.<sup>8</sup> In that case, the Court reversed the conviction of Robert Cohen, who had been charged with disturbing the peace for wearing a jacket displaying the words "Fuck the Draft" inside a courthouse.<sup>9</sup> The Court rejected the argument that speech could be restricted on the basis of its offensiveness.<sup>10</sup> The Illinois Supreme Court reasoned that if it is not permissible under the First Amendment to punish Cohen for a profane phrase on his jacket, then it is equally impermissible to prohibit neo-Nazis from displaying swastikas.<sup>11</sup> The court asked,

How is one to distinguish [the swastika] from any other offensive word (emblem)? . . . [W]hile the particular four-letter word (emblem) being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.<sup>12</sup>

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<sup>7</sup> *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting).

<sup>8</sup> *Vill. of Skokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21, 23 (Ill. 1978).

<sup>9</sup> *Cohen v. California*, 403 U.S. 15 (1971).

<sup>10</sup> *Id.* at 23.

<sup>11</sup> *Skokie*, 373 N.E.2d at 24 (decided on remand from the Supreme Court).

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

Though the court described itself as simply following the insights of *Cohen*, the speech at issue in the two cases differed in several substantive ways. Cohen wore on his clothing a profane phrase expressing an undeniably political statement against the war while in a courthouse. Defendant Collin and his neo-Nazi confederates, however, intended to wave the most immediately recognizable symbol of the Holocaust in the faces of people who had escaped genocide, while marching through their streets dressed in SS uniforms. Cohen's speech was addressed to no one in particular at the courthouse, and the term he used, while crude, did not suggest violence. Collin, on the other hand, chose Skokie precisely because of its Jewish population, and the swastika conveys a far more specific and ominous meaning than a general profanity. As one expert involved in the Skokie case testified,

[T]he words of any Nazi to any Jew have, by definition, lost the usual intent and limitation of words: they are symbolic continuations of the Holocaust, literal perpetuations of the climate of the Holocaust, and preparations for a new Holocaust. No matter what words their placards bear, when Nazis march in Skokie, their presence and their regalia says to Jews: "You thought you escaped. You did not. We know where you are. When our strength is sufficient and when the time is ripe, we will come and get you."<sup>13</sup>

An expression of profanity with political import and a deliberate attempt to terrorize a particular group were both, according to the court, simply "matters of taste and style." In essence, the court found that "offense" and "injury" were the same for the purposes of the First Amendment. This elision of offense and injury is a profoundly depoliticizing move. In *Cohen*, the speaker was a lone citizen criticizing an official governmental policy; his speech could accurately be described as "speaking truth to power." The greatest harm his act could inflict was inspiring offended reactions in those around him. In *Collin*, a group of speakers of a privileged race and gender sought to terrorize a vulnerable minority—the very antithesis of speaking truth to power. The harm that this act was likely to inflict was not of causing potential offense but of inspiring terror and trauma in people who had escaped mass extermination. The obfuscation of the power dynamics in the two cases has contributed greatly to the modern-day understanding of "freedom for the thought we hate."

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<sup>13</sup> Mark A. Rabinowitz, *Nazis in Skokie: Fighting Words or Heckler's Veto?*, 28 DEPAUL L. REV. 259, 281 n.143 (1979).

The ACLU has become perhaps the most visible and vocal advocate for the principle of freedom of speech for the thought we hate, and it has fully embraced the depoliticizing approach of *Collin*. The ACLU calls itself the “largest and oldest civil liberties organization” in the U.S. It was the ACLU that won the NSPA’s right to march in Skokie in 1978, and it was the ACLU that secured the right for the extremist organizers to hold their white supremacist rally in Emancipation Park in Charlottesville, Virginia in 2017. Aryeh Neier, who was the ACLU’s executive director at the time of *Collin*, stated that the lesson to be learned from the case is that “[i]n a country where free speech generally prevails, it is best to take hate speech in stride. Ignoring it sometimes works, as does overwhelming it with the peaceful expression of contrary views.”<sup>14</sup>

This casual attitude to injurious speech is much easier to maintain when the event in question never takes place. Frank Collin never held his march in Skokie, having secured the right to rally in Marquette Park.<sup>15</sup> But, in contrast to Neier’s assertion, there is good reason to conclude that Collin’s decision not to march in Skokie was as likely due to concerns of violent counter-demonstrations by members of the Jewish community as by the “peaceful expression of contrary views.” The bloodless outcome of Skokie stands in sharp contrast to the white supremacist rally in Charlottesville, Virginia, where multiple violent confrontations broke out. One of the far-right demonstrators drove his car into a crowd of unarmed counter-protesters, injuring thirty-five people and killing a thirty-two-year-old woman named Heather Heyer. Two state troopers died when their helicopter crashed while monitoring the demonstration from the air. Among the other violent incidents were a man firing a gun into a crowd of people and six men beating a young black man in a parking garage.

The Skokie and Charlottesville incidents are only two of the many controversial cases the ACLU has taken on throughout its history, helping to cement its reputation as an organization willing to do the right thing even at great cost. In explaining its solicitude toward hateful speech and why it so often defends “controversial and unpopular entities” such as neo-Nazis and the KKK, the organization has stated,

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<sup>14</sup> Aryeh Neier, *Lessons in Free Speech 40 Years after Nazis Planned Skokie March*, CHI. SUN TIMES (Apr. 15, 2017), <https://chicago.suntimes.com/columnists/lessons-in-free-speech-40-years-after-nazis-planned-skokie-march/> [<https://perma.cc/Y7NU-EEGT>].

<sup>15</sup> Douglas E. Kneeland, *Nazis Backed on Rally in Chicago; Move Could Avert Skokie March*, NEW YORK TIMES (June 21, 1978), <https://www.nytimes.com/1978/06/21/archives/new-jersey-pages-nazis-backed-on-rally-in-chicago-move-could-avert.html> [<https://perma.cc/UD4Q-5FYS>].

We do not defend them because we agree with them; rather, we defend their right to free expression and free assembly. Historically, the people whose opinions are the most controversial or extreme are the people whose rights are most often threatened. Once the government has the power to violate one person's rights, it can use that power against everyone. [W]e subscribe to the principle that if the rights of society's most vulnerable members are denied, everybody's rights are imperiled.<sup>16</sup>

The principle described in this passage, that the rights of the vulnerable should be protected not only for their sake but for the sake of the general welfare, is admirable. It echoes the social justice insights of Kimberlé Crenshaw's intersectional scholarship<sup>17</sup> and Mari Matsuda's concept of "looking to the bottom."<sup>18</sup> Indeed, for some time, civil liberties groups did devote considerable effort to securing the free speech rights of vulnerable populations.<sup>19</sup> Much of the ACLU's early free speech advocacy was devoted to protecting political dissidents and advocates for gender and racial equality. But contemporary First Amendment theory and practice has shifted to further shoring up powerful white men's freedom of speech. As Lincoln Caplan observed in 2015, free speech advocates today "are not standing up for mistrusted outliers . . . or for the dispossessed and powerless," but instead advocate on behalf of "the super-rich and the ultra-powerful, the airline, drug, petroleum, and tobacco industries, all the winners in America's winner-take-all society."<sup>20</sup> John Coates notes that "corporations have increasingly displaced individuals as direct beneficiaries of First Amendment rights," as almost "half of First Amendment legal challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals."<sup>21</sup>

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<sup>16</sup> ACLU History, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/about/aclu-history> [<https://perma.cc/GP9R-5E33>] (last visited Mar. 2, 2019).

<sup>17</sup> Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989).

<sup>18</sup> Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

<sup>19</sup> Mary E. Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 1020 (1993) ("Initially, free speech claims were brought by draft resisters, labor organizers, civil rights activists, pacifists, communists, and similar progressive or left groups with less than their share of power and all too easily silenced by a hostile majority.")

<sup>20</sup> Lincoln Caplan, *The Embattled First Amendment*, THE AMERICAN SCHOLAR (Mar. 4, 2015), <https://theamericanscholar.org/the-embattled-first-amendment/#.V7toqI5eyVp> [<https://perma.cc/WBB2-6PXP>].

<sup>21</sup> John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 223–24 (2015).

Like the court's decision in *Collin*, the ACLU's defense of its choice of the cases and clients it represents deliberately obscures the power dynamics at work. The ACLU makes the empirical claim that "[h]istorically, the people whose opinions are the most controversial or extreme are the people whose rights are most often threatened."<sup>22</sup> But as the passage does not define the vague terms "controversial" or "extreme," it is all but impossible to verify the claim that people with such views are more vulnerable than others. What is more, there is simply no evidence to support the claim that "unpopular entities" like neo-Nazis, KKK members, and pornographers are the "most vulnerable members" of society. While these groups may be disliked by some, they are clearly neither universally disliked nor singled out for official discrimination. Indeed, what these groups tend to have in common is that they target truly vulnerable groups, such as women and minorities.

This can be stated even more strongly: many of the groups that the ACLU spends enormous amounts of resources to protect promote white male supremacy. One of the lesser-known details about the neo-Nazis' planned march in Skokie is that they planned to carry placards stating "Free Speech for the White Man."<sup>23</sup> The sign was probably intended as a crude provocation, but it is also an inadvertently apt description of the state of free speech in the United States, before and after 1976.<sup>24</sup>

I use the term "white male supremacy" here to refer not only to the:

ideology of violent extremists who openly call for the exclusion or elimination of women and nonwhite men, but also to that of groups and individuals who express "softer" forms of racial and gender superiority, including members of the so-called alt-right as well as more mainstream conservatives. It also includes the ideology of many self-described liberals who espouse commitment to racial and gender equality in theory but reinforce existing hierarchies of power in practice. White male supremacy can be subtle and even seemingly benevolent as well as overt and violent. And because white male supremacy is an ideology, not an identity, its adherents are not limited to people who are white or male.

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<sup>22</sup> ACLU History, *supra* note 16.

<sup>23</sup> *Vill. of Skokie v. Nat'l Socialist Party of Am.*, 366 N.E.2d 347, 352 (Ill. 1977), *aff'd in part, rev'd in part*, 373 N.E.2d 21 (Ill. 1978)

<sup>24</sup> See Mary Anne Franks, *Beyond 'Free Speech for the White Man': Feminism and the First Amendment*, RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 366 (Robin West & Cynthia Grant Bowman eds., 2019).

White male supremacy demands, in essence, that the interests of white men *take priority* over those of all others.<sup>25</sup>

So defined, white male supremacy is essentially America's founding ideology, not some marginal and repressed viewpoint. The First Amendment, like the rest of the Constitution, was written and enacted by a group of white men, who deliberately excluded all women and people of color from participation in the political process. White male supremacy has been defended throughout America's history, through slavery, lynching, segregation, police brutality, domestic violence, rape, and sexual harassment. Members of the Ku Klux Klan have served in law enforcement<sup>26</sup> and on the Supreme Court;<sup>27</sup> wife beaters and sexual abusers have sat in the Oval Office.<sup>28</sup> Donald Trump was elected President on a platform of misogyny,<sup>29</sup> racism,<sup>30</sup> and xenophobia;<sup>31</sup> the KKK and the extreme right<sup>32</sup> consider him a champion of their world view.<sup>33</sup> A 2017 poll found that nearly one-third of respondents "strongly or somewhat agreed that the country needs to 'protect and preserve its White European heritage,'" and nearly 40% agreed or somewhat agreed with the statement that "white people are currently under attack in this

<sup>25</sup> MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION: OUR DEADLY DEVOTION TO GUNS AND FREE SPEECH* 6 (2019).

<sup>26</sup> *The Ku Klux Klan and the End of Reconstruction*, HISTORY CHANNEL (Apr. 15, 2019), <https://www.history.com/topics/reconstruction/ku-klux-klan> [<https://perma.cc/V7EY-Y4T2>].

<sup>27</sup> Thad Morgan, *How an Ex-KKK Member Made His Way Onto the U.S. Supreme Court*, HISTORY CHANNEL (Oct. 28, 2018), <https://www.history.com/news/kkk-supreme-court-hugo-black-fdr> [<https://perma.cc/7BF6-PK8W>].

<sup>28</sup> Jack Bernhardt, *Why Lyndon Johnson, a Truly Awful man, Is My Political Hero*, GUARDIAN (Jan. 22, 2018), <https://www.theguardian.com/commentisfree/2018/jan/22/lyndon-johnson-anniversary-death-awful-man-my-political-hero> [<https://perma.cc/E3XG-3DHN>]; Becky Little, *Richard Nixon's Wife Alleged That He Hit Her, Says Memoir*, HISTORY CHANNEL (Aug. 31, 2018), <https://www.history.com/news/pat-nixon-abuse-allegations-richard-nixon-seymour-hersh-memoir> [<https://perma.cc/YB3G-3HD8>].

<sup>29</sup> Nadia Khomani, *Donald's Misogyny Problem: How Trump Has Repeatedly Targeted Women*, GUARDIAN, (Oct. 8, 2016), <https://www.theguardian.com/us-news/2016/oct/08/trumps-misogyny-problem-how-donald-has-repeatedly-targeted-women> [<https://perma.cc/446L-C4FE>].

<sup>30</sup> Paul Waldman, *Donald Trump Is Running the Most Explicitly Racist Campaign since 1968*, THE WEEK (Nov. 25, 2015), <https://theweek.com/articles/590711/donald-trump-running-most-explicitly-racist-campaign-since-1968> [<https://perma.cc/K4EN-2F6F>].

<sup>31</sup> Greg Sargent, *Trump Returns to His Old Standbys: Xenophobia, Hate, Lies, and Yes, Mass Deportations*, WASH. POST (Sept. 1, 2016), [https://www.washingtonpost.com/blogs/plum-line/wp/2016/09/01/trump-returns-to-his-old-standbys-xenophobia-hate-lies-and-yes-mass-deportations/?utm\\_term=.301d1bac2a09](https://www.washingtonpost.com/blogs/plum-line/wp/2016/09/01/trump-returns-to-his-old-standbys-xenophobia-hate-lies-and-yes-mass-deportations/?utm_term=.301d1bac2a09) [<https://perma.cc/NG6Q-GYUD>].

<sup>32</sup> "The term extreme right is used to describe right-wing political, social and religious movements that exist outside of and are more radical than mainstream conservatism." *Extreme Right / Radical Right / Far Right*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/glossary-terms/extreme-right-radical-right-far-right> [<https://perma.cc/5CAF-ALZL>] (last visited Aug. 7, 2019) (internal quotation marks omitted).

<sup>33</sup> Tom Jacobs, *Research Finds That Racism, Sexism, and Status Fears Drove Trump Voters*, PACIFIC STANDARD (Apr. 24, 2018), <https://psmag.com/news/research-finds-that-racism-sexism-and-status-fears-drove-trump-voters> [<https://perma.cc/55LJ-VHV3>].

country.”<sup>34</sup> One-in-ten Americans believe that the country has “gone too far” to bring about gender equality;<sup>35</sup> nearly 40% believe that women should be forced to carry pregnancies to term against their will in at least some cases.<sup>36</sup> Less than half of Americans believe that having committed sexual assault should disqualify a person from becoming a Supreme Court Justice.<sup>37</sup> Racist and sexist views are openly and routinely articulated by public officials, broadcast by traditional and social media outlets, and invoked in outbreaks of physical violence against women and minorities.<sup>38</sup> The Supreme Court, the final arbiter of who and what the First Amendment protects, was composed entirely of white men until 1967 and entirely of men until 1981; of the 113 Supreme Court Justices that have served in its 228-year history, all but six have been white men. Of the roughly 500 First Amendment freedom of expression cases the Supreme Court has heard, 89% were brought by men,<sup>39</sup> and 93% were litigated by men.<sup>40</sup> Of the top twenty most-cited constitutional law scholars from 2013 to 2017, nineteen are male.

Simply put, free speech in the United States has never truly been about “freedom for the thought we hate,” or protecting the speech of the vulnerable. Free speech doctrine and practice has instead been dominated by the interests of powerful groups, even when their speech causes injury rather than mere offense.

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<sup>34</sup> *New Poll: Some Americans Express Troubling Racial Attitudes Even as Majority Oppose White Supremacists*, U. VA. CTR. FOR POLITICS (Sept. 14, 2017), <http://www.centerforpolitics.org/crystalball/articles/new-poll-some-americans-express-troubling-racial-attitudes-even-as-majority-oppose-white-supremacists/> [https://perma.cc/RXQ9-YBJE].

<sup>35</sup> Juliana Menasce Horowitz, Kim Parker & Renee Stepler, *Wide Partisan Gaps in U.S. Over How Far the Country Has Come on Gender Equality*, PEW RESEARCH CTR.: SOCIAL & DEMOGRAPHIC TRENDS (Oct. 18, 2017), <http://www.pewsocialtrends.org/2017/10/18/wide-partisan-gaps-in-u-s-over-how-far-the-country-has-come-on-gender-equality/> [https://perma.cc/6UFA-LLND].

<sup>36</sup> *Public Opinion on Abortion*, PEW RESEARCH CTR.: RELIGION & PUBLIC LIFE (Oct. 15, 2018), <http://www.pewforum.org/fact-sheet/public-opinion-on-abortion/> [https://perma.cc/27EE-VXM6].

<sup>37</sup> A majority of Republicans—55%—felt that it should not. Tim Marcin, *Sexual Assault Should Not Disqualify Kavanaugh if Proven, Majority of Republicans Believe: Poll*, NEWSWEEK (Sept. 27, 2018), <https://www.newsweek.com/sexual-assault-should-not-disqualify-kavanaugh-proven-majority-republicans-1141877> [https://perma.cc/WG7V-TVMD].

<sup>38</sup> Max Boot, *Fox News and the Rest of the Right-Wing Media Can't Escape Responsibility*, WASH. POST (Oct. 28, 2018), [https://www.washingtonpost.com/opinions/ask-the-questions-about-right-wing-terrorists-that-we-ask-about-islamist-militants/2018/10/28/64403b32-daec-11e8-b3f0-62607289efee\\_story.html?utm\\_term=.2b7ffcdade5cc](https://www.washingtonpost.com/opinions/ask-the-questions-about-right-wing-terrorists-that-we-ask-about-islamist-militants/2018/10/28/64403b32-daec-11e8-b3f0-62607289efee_story.html?utm_term=.2b7ffcdade5cc) [https://perma.cc/TAH4-DYMQ].

<sup>39</sup> Research compiled from Westlaw searches, finding 515 cases involving First Amendment freedom of expression, of which 59 were brought by women.

<sup>40</sup> Ronald K. L. Collins, *FAN 199 (First Amendment News) SPECIAL ISSUE: 38 Women Who Argued First Amendment Free Expression Cases in the Supreme Court: 1880 -2018*, CONCURRING OPINIONS (Aug. 7, 2018), <https://concurringopinions.com/archives/2018/08/fan-199-first-amendment-news-special-issue-38-women-who-argued-first-amendment-free-expression-cases-in-the-supreme-court-1880-2018.html> [https://perma.cc/7UBX-2WHH].

## II. WITCH HUNTS

If a commitment to free speech truly entails, as the ACLU describes it, protecting the speech of “the people whose opinions are the most controversial or extreme . . . [whose] rights are most often threatened,” then it is women’s speech that should be the most protected. Women’s speech, particularly when it challenges the power and authority of men, has been prohibited, regulated, and punished from ancient times to the present.

## A. A Brief History of Silencing Women

In a 2015 article in the *Telegraph*, historian Amanda Foreman writes,

[T]he silencing of women is as old as civilization itself. Two thousand years before Homer labeled speech as “the business of men” and Sophocles wrote that “silence is a woman’s garment,” the first laws to have come down to us included a speech code for women. The people responsible for these laws were the Sumerians of Mesopotamia, in now modern Iraq.<sup>41</sup>

Foreman notes that Sumerian law codes dating back four thousand years include a specific provision regarding women’s speech: “a woman who speaks out of turn to a man will have her teeth smashed by a burnt brick.”<sup>42</sup> This ancient legal restriction on women’s speech confirms, concludes Foreman, that “freedom of speech is the ultimate power struggle.”<sup>43</sup>

Historian Mary Beard concurs, observing that one of the opening scenes of the *Odyssey*, the foundational text of Western literature written almost 3000 years ago, is of young Telemachus telling his mother Penelope to “go back up into your quarters, and take up your own work, the loom and the distaff . . . speech will be the business of men, all men, and of me most of all; for mine is the power in this household.”<sup>44</sup> Beard notes that “Telemachus’ outburst was just the first case in a long line of largely successful attempts stretching throughout Greek and Roman

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<sup>41</sup> Amanda Foreman, *Why I’m Shouting about the 4,000 Year Campaign to Gag Women in Our History Books*, TELEGRAPH (Sept. 1, 2015), <https://www.telegraph.co.uk/women/womens-life/11837025/BBC-documentary-Amanda-Foreman-on-silent-womens-history.html> [<https://perma.cc/VH2Z-MT8Y>].

<sup>42</sup> *Id.*

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

<sup>44</sup> Mary Beard, ‘Mansplaining’ and Silencing of Women a Problem That Goes Back to Ancient Times, SYDNEY MORNING HERALD (Jan. 27, 2018), <https://www.smh.com.au/opinion/mansplaining-and-silencing-of-women-a-problem-that-goes-back-to-ancient-times-20180123-h0n0uj.html> [<https://perma.cc/ZF6V-WFMW>].

antiquity, not only to exclude women from public speech but also to parade that exclusion.”<sup>45</sup> While women were permitted to speak in limited circumstances, such as in defense of their families, a woman was generally expected to “as modestly guard against exposing her voice to outsiders as she would guard against stripping off her clothes.”<sup>46</sup> Examples of silencing women are particularly abundant in Greek mythology, from Tereus cutting out Philomela’s tongue after he rapes her, to Apollo cursing Cassandra so that her truthful prophecies will never be believed after she rejects his sexual advances.<sup>47</sup>

Roberta Magnani details the longstanding prohibition and punishment of women’s speech in the Christian tradition, noting St. Paul’s admonition that women must not be permitted to teach “because of their inherent sinfulness and moral corruption:” in his words, “[l]et the woman learn in silence, with all subjection. But I suffer not a woman to teach, nor to use authority over the man: but to be in silence. For Adam was first formed; then Eve.”<sup>48</sup> Magnani suggests that men’s need to silence women stemmed from their desire to reduce women to “disposable commodities, a mirror reflecting back the predator’s own sense of dominance and superiority.”<sup>49</sup> She recounts the grisly fates of the virgin martyrs who resisted sexual assault, including the story of St. Agnes, who was stabbed in the throat and then thrown into a fire for rejecting the sexual advances of a Roman official’s son; St. Petronilla, tortured on the rack for refusing to marry the pagan king Flaccus; and St. Agatha, whose breasts were cut off after she resisted a Roman prefect’s sexual overtures, concluding, “this brutality was done to silence them. Much like they are now, women’s voices were seen as troubling.”<sup>50</sup>

In Blackstone’s *Commentaries on the Laws of England*, the offense of being a “common scold” (*communis rixatrix*) was punishable by being “placed in a certain engine of correction called the trebucket, castigatory, or *cucking* stool, which in the Saxon language signifies the scolding stool; though now it is frequently corrupted into *ducking* stool, because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in the water for her punishment.”<sup>51</sup> The offense,

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See Mary Anne Franks, *A Thousand and One Stories: Mythology and the #MeToo Movement IN #METOO AND THE POLITICS OF SOCIAL CHANGE* 85, 85–95 (Biance Fileborn & Rachel Loney-Howes eds., 2019).

<sup>48</sup> Roberta Magnani, *Powerful Men Have Tried to Silence Abused Women since Medieval Times*, THE CONVERSATION (Oct. 27, 2017), <https://theconversation.com/powerful-men-have-tried-to-silence-abused-women-since-medieval-times-86117> [<https://perma.cc/GHT8-8PUV>].

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> IV WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 13.5.8 111 (Wilfrid Prest, ed.) (2016).

which involves arguing noisily with one's neighbors, was understood to be almost exclusively committed by women.<sup>52</sup>

And then, of course, there were the witch hunts. Author Stacy Schiff explains that while “witches and wizards extend as far back as recorded history,” the figure conjured up by the Salem trials married general superstition with specific fear of women.

The witch as Salem conceived her materialized in the thirteenth century, when sorcery and heresy moved closer together. She came into her own with the Inquisition, as a popular myth yielded to a popular madness. The western Alps introduced her to lurid orgies. Germany launched her into the air. As the magician molted into the witch, she also became predominately female, inherently more wicked and more susceptible to satanic overtures. An influential fifteenth-century text compressed a shelf of classical sources to make its point: “When a woman thinks alone, she thinks evil.” As is often the case with questions of women and power, elucidations here verged on the paranormal. Though weak willed, women could emerge as dangerously, insatiably commanding.<sup>53</sup>

Women were considered so dangerous, in fact, that they could be hanged for offenses such as “having more wit than their neighbors” as one “witch” was in Massachusetts in 1656.<sup>54</sup> What are now known as the “Salem Witch Trials” began in Salem, Massachusetts, some decades later in 1692.<sup>55</sup> Events were set in motion by the strange behavior of several school-aged girls, who claimed that their fits of screaming and contortions were being caused by forces pinching and attacking them with pins. Serious investigations began after a sermon by the Reverend Deodat Lawson was interrupted by the girls’ outbursts.<sup>56</sup>

The first woman to be accused of causing the girls’ afflictions was a South American Indian slave from the West Indies named Tituba. Tituba fell under suspicion because of her tendency to regale the girls

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<sup>52</sup> *Id.* (“our law-latin confines it to the feminine gender”); *See also* SANDY BARDSLEY, VENOMOUS TONGUES: SPEECH AND GENDER IN LATE MEDIEVAL ENGLAND 109–10, 122–25 (2006).

<sup>53</sup> Stacy Schiff, *The Witches of Salem*, NEW YORKER (Sept. 7, 2015), <https://www.newyorker.com/magazine/2015/09/07/the-witches-of-salem> [<https://perma.cc/2ECG-WJTG>].

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

<sup>55</sup> Jess Blumber, *A Brief History of the Salem Witch Trials*, SMITHSONIAN (Oct. 23, 2007), <https://www.smithsonianmag.com/history/a-brief-history-of-the-salem-witch-trials-175162489/> [<https://perma.cc/ZM4W-ZQFA>].

<sup>56</sup> DEODAT LAWSON, A BRIEF AND TRUE NARRATIVE OF SOME REMARKABLE PASSAGES RELATING TO SUNDRY PERSONS AFFLICTED BY WITCHCRAFT, AT SALEM VILLAGE: WHICH HAPPENED FROM THE NINETEENTH OF MARCH, TO THE FIFTH OF APRIL, 1692 3 (1692).

with fantastical and often sexual stories from the *Malleus Maleficarum*.<sup>57</sup> Accusations against two other women soon followed: Sarah Good, who was homeless and despised by the community for begging for food and shelter; and Sarah Osborne, who had engendered suspicion among her neighbors by only rarely attending church and having intimate relations with a servant.<sup>58</sup> The list of the accused soon expanded beyond the community's outcasts, however, and the upstanding character of some of the alleged witches only served to fan the flames of the hysteria: if seemingly God-fearing, churchgoing pillars of the community could be revealed to be witches, then truly anyone could be.

A pair of father and son ministers, Increase and Cotton Mather, were influential figures in the progression of the witch trials. The two disagreed initially about what constituted sufficient evidence for determining the presence of witchcraft. Increase Mather maintained "that a 'free and voluntary confession' remained the gold standard . . . 'I would rather . . . judge a witch to be an honest woman than judge an honest woman as a witch.'"<sup>59</sup> His son Cotton "worried less about condemning an innocent than about allowing a witch to walk free,"<sup>60</sup> but as the list of the condemned and accused continued to grow, he eventually came around to his father's view. Cotton Mather submitted a letter requesting the court to no longer allow "spectral evidence" (i.e., "testimony about dreams and visions"),<sup>61</sup> a request that went largely ignored until the intervention of Governor Phipps.

On October 29, 1692, Governor Phipps dissolved the court that had been set up to prosecute the witchcraft accusations, released many of those accused, and prohibited further arrests. Phipps was apparently responding both to Mather's request and "his own wife being questioned for witchcraft."<sup>62</sup> He set up a new court to handle the witchcraft prosecutions that barred the use of spectral evidence and eventually pardoned many of the individuals accused of witchcraft still living in 1693. By this time, however, "the damage had been done": nineteen people were hanged on Gallows Hill, a seventy-one-year-old man was pressed to death with heavy stones, several people died in jail and nearly 200 people, overall, had been accused of practicing "the Devil's magic." In

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<sup>57</sup> See Matt Markgraf & Kala Dunn, *Datebook: March 1 - Salem Witch Trials Begin 320 Years Ago*, WKMS (Mar. 2, 2012), <https://www.wkms.org/post/datebook-march-1-salem-witch-trials-begin-320-years-ago#stream/0> [<https://perma.cc/5G4U-BVCM>].

<sup>58</sup> BRIAN ALEXANDER PAVLAC, *WITCH HUNTS IN THE WESTERN WORLD: PERSECUTION AND PUNISHMENT FROM THE INQUISITION THROUGH THE SALEM TRIALS* 139 (2009).

<sup>59</sup> Schiff, *supra* note 53; see also, Blumber, *supra* note 55 ("It were better that ten suspected witches should escape than one innocent person be condemned.").

<sup>60</sup> Schiff, *supra* note 53.

<sup>61</sup> Blumber, *supra* note 55.

<sup>62</sup> *Id.*

Salem and elsewhere in New England, more than two-thirds of the individuals who were accused and found guilty of witchcraft were women.<sup>63</sup>

B. Justice Brandeis's "Curious Concurrence" in *Whitney v. California*

When Justice Brandeis invoked the fear of women and the burning of witches in *Whitney*, he was perhaps not aware of just how apt the reference truly was: for witch hunts reveal something extremely powerful about speech, namely, the intense fear men have of women's speech. Why do men fear witches? Because *they can wreak havoc through mere words*: their incantations make milk spoil, crops fail, children corrupt, men impotent. Of course, women's words cannot actually do any of these things. The speech of women was blamed for consequences that were either a product of natural forces or, in many cases, of men's own actions. The vilification of women's speech was not just an attempt at suppression, but of inversion: to portray men as helpless victims of women, as though men did not maintain a monopoly on legal, political, and cultural power. Throughout Western history, women have been denied the right to own property, the right to vote, the right to enter contracts, the right to be educated, the right to hold public office, the right to speak in public, the right of independent legal status from their spouses, the right to serve on juries, the right to have their testimony be given the same weight as men's, and the right to refuse consent to sexual relations. All of these denials have reduced women's ability to speak to a paltry shadow of men's right to speech. And yet that shadow has been more feared than men's full-throated dominance of every form of speech.

*Whitney* is one of the rare Supreme Court cases involving a female petitioner. Fifty-two-year-old Anita Whitney, a member of the Communist Labor Party of California was charged with aiding and abetting criminal syndicalism after she gave a speech to the Women's Civic Center of Oakland on "the economic and political disenfranchisement of African-Americans and the nation's abhorrent practices of lynching."<sup>64</sup> Her speech was titled "The Negro Problem in America," and as Ronald K. Collins and David M. Skover detail, it included "shocking statistics on and descriptions of the abhorrent practice of lynching."<sup>65</sup> Whitney concluded her speech with an appeal to patriotism:

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<sup>63</sup> ELIZABETH REIS, DAMNED WOMEN: SINNERS AND WITCHES IN PURITAN NEW ENGLAND xvi (1997) (noting that "approximately 78 percent" of accused witches were women).

<sup>64</sup> Ronald K. L. Collins & David M. Skover, *Curious Concurrence: Justice Brandeis's Vote in Whitney v. California*, 2005 SUP. CT. REV. 333, 337.

<sup>65</sup> *Id.* at 344–45.

It is not alone for the Negro man and woman that I plead, but for the fair name of America that this terrible blot on our national escutcheon may be wiped away. . . . Let us then both work and fight to make and keep her right so that the flag that we love may truly wave “O’er the land of the free / And the home of the brave.”<sup>66</sup>

Whitney was convicted and given an indeterminate sentence of one to fourteen years. Her case generated significant public sympathy, and an “Anita Whitney Committee” was soon formed to prevail upon the governor to pardon her.<sup>67</sup> Whitney, however, insisted that she had “done nothing to be pardoned for.”<sup>68</sup> Moreover, she told a reporter, “If the Governor is disposed to pardon anyone, let him liberate the poor men who are now imprisoned for violation of this same law and whose guilt may be less than mine.”<sup>69</sup>

The press response to Whitney’s conviction was divided. While one newspaper “censured her for betraying her social and cultural status to consort with outlaws,”<sup>70</sup> the *San Francisco Call* situated her sentence within the history of repressive attempts to throttle dissent: “The colonists were wrong when they burned witches; the people were wrong when they spat upon the abolitionists. And the people of California may be equally wrong when they send Anita Whitney to prison.”<sup>71</sup>

In 1927, two years before the *Schwimmer* case, the Supreme Court ruled against Anita Whitney and upheld her conviction. Perhaps picking up the thread that the *San Francisco Call* had dropped, Justice Brandeis penned the famous passage, “Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.”<sup>72</sup> Justice Brandeis’s opinion reads so much like a defense of Whitney that it is easy to overlook the fact that he concurred, not dissented, in the Court’s judgment. Indeed, more than one free speech advocate has erroneously referred to Justice Brandeis’s concurrence in *Whitney* as a dissent, including Anthony Lewis in his influential book *Freedom for the Thought That We Hate: A Biography of the First Amendment*<sup>73</sup> and Nadine Strossen in a 2007 law review article

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<sup>66</sup> *Id.* at 345.

<sup>67</sup> *Id.* at 363.

<sup>68</sup> *Id.* at 377.

<sup>69</sup> *Id.* at 363.

<sup>70</sup> *Id.* at 349.

<sup>71</sup> *Id.*

<sup>72</sup> *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

<sup>73</sup> See LEWIS, *supra* note 6, at 36–37 (“Brandeis’s opinion did not then represent the law, but it helped Anita Whitney. A month after the Supreme Court turned down her appeal, the governor

warning that the United States might again be “fearing witches and burning women” in the wake of the terror attacks of 9/11.<sup>74</sup>

Justice Brandeis’s opinion in *Whitney* was indeed a “curious concurrence,” as Collins and Skover call it,<sup>75</sup> in that Brandeis simultaneously championed the right to engage in injurious speech, while agreeing that Whitney should be punished for hers. It is also telling that the gulf between the theoretical commitment to protecting injurious speech and its practical application should be so vividly exposed in a case about a woman’s words—words that directly challenged white male supremacy. It is almost as though Justice Brandeis invoked the idea of the “witch hunt,” a historical phenomenon that targeted women’s speech in particular, only to strip it of its specific lessons of gender and power.

### III. #METOO & THE INVERSION OF THE WITCH HUNT

While Justice Brandeis’s rhetorical invocation of the witch hunt may have failed to fully reckon with its gender and power dynamics, this pales in comparison to the grotesque repurposing of the concept in modern times to portray women’s very speech as censorship. This is the gist of the critique of the #MeToo movement. The labeling of the #MeToo movement as a “witch hunt” perversely appropriates a phrase used to describe men’s actual persecution of women and applies it to the imaginary persecution of men by women. This contemporary usage of the term does not merely erase the gendered history of violence, but inverts it.

The #MeToo movement is many things. It is an attempt to grapple with the reality of men’s systematic sexual abuse of women, as well as other forms of sexual abuse. It is an outpouring of previously silenced or disregarded personal stories. It is a political and cultural framework for understanding the relationship between sexual objectification and gender inequality. But at its most fundamental, it is speech by women that frightens men. As such, it is exactly the kind of offensive and injurious speech by a vulnerable group that should earn it the attention and protection of free speech defenders. And yet #MeToo is not only *not* generally framed as a free speech issue, but it is instead, in true Orwellian fashion, characterized as censorship.

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of California, C. C. Young, pardoned her, quoting the Brandeis dissent at length in his pardon message”).

<sup>74</sup> Nadine Strossen, *Freedom and Fear Post-9/11: Are We Again Fearing Witches and Burning Women?*, 31 NOVA L. REV. 279, 311 (2007) (“This anti-immigrant tradition also infused the World War I era ‘Red Scare’ atmosphere that fueled the law under which Anita Whitney was convicted, leading to Justice Brandeis’s eloquent dissent”).

<sup>75</sup> Collins, *supra* note 64, at 335.

Before “Me Too” went viral as #MeToo, it was a phrase used by Tarana Burke, an American social activist and community organizer.<sup>76</sup> Around 2006, Burke began using the phrase on the social network MySpace as part of a campaign to promote “empowerment through empathy” among victims of sexual abuse, especially women of color within underprivileged communities.<sup>77</sup> Following the disclosure of multiple sexual abuse allegations against Hollywood producer Harvey Weinstein in October 2017, the actress Alyssa Milano encouraged Twitter users to reply with the hashtag #MeToo if they had experienced sexual harassment or abuse. Within a few hours of her original post, the phrase had been used more than 200,000 times, and tweeted more than half a million times by the following day. On Facebook, the hashtag had been used more than 4.7 million times in over 12 million posts during the first 24 hours. Thousands of individuals, mostly women, shared #MeToo stories, including many celebrities.

The #MeToo movement is notable because it emerged in spite of, or because of, the longstanding censorship of women’s speech described briefly in the previous section. The movement emerged on the heels of months-long media attention to far-right provocateurs such as Milo Yiannopoulos and Richard Spencer, whose racist and sexist tirades against women, minorities, LGBTQ individuals, and immigrants were fiercely defended as free speech not only by their ideological supporters, but by many civil libertarians and liberals.<sup>78</sup>

Yet even as Yiannopoulos and Spencer were being hailed as free speech martyrs, the women speaking out as part of the #MeToo movement quickly encountered backlash from influential individuals from across the political spectrum.<sup>79</sup> The #MeToo movement has been criticized for “going too far,” for not being subtle or careful enough, for punishing innocent behavior; in short, for being harmful to men.<sup>80</sup> This is

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<sup>76</sup> Leah Fessler, *Tarana Burke, Creator of Me Too, Believes You Don’t Have to Sacrifice Everything for a Cause*, QUARTZ (Feb. 6, 2018), <https://qz.com/work/1193569/me-too-movement-creator-tarana-burke-says-you-dont-have-to-sacrifice-everything-for-a-cause/> [https://perma.cc/2N3Q-DF2M].

<sup>77</sup> Abby Ohlheiser, *The Woman behind ‘Me Too’ Knew the Power of the Phrase When She Created It—10 Years Ago*, WASH. POST (Oct. 19, 2017), [https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/?utm\\_term=.22b83af69ff6](https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/?utm_term=.22b83af69ff6) [https://perma.cc/RUY9-8RG5].

<sup>78</sup> See Katie Herzog, *Counterpoint: Yes, There’s a Free Speech Crisis and No, I Won’t Shut Up About It*, THE STRANGER (Mar 15, 2018), <https://www.thestranger.com/slog/2018/03/15/25912839/counterpoint-yes-theres-a-free-speech-crisis-and-no-i-wont-shut-up-about-it> [https://perma.cc/HC M6-LPS8].

<sup>79</sup> See Jia Tolentino, *The Rising Pressure of the #MeToo Backlash*, NEW YORKER (Jan. 24, 2018), <https://www.newyorker.com/culture/culture-desk/the-rising-pressure-of-the-metoo-backlash> [https://perma.cc/XBH7-78Y8].

<sup>80</sup> See, e.g., Agence France-Presse, *Catherine Deneuve Says Men Should Be ‘Free to Hit on’ Women*, GUARDIAN (Jan. 9, 2018), <https://www.theguardian.com/film/2018/jan/09/catherine-deneuve>

despite the fact that the #MeToo movement, unlike the alt-right movement, has not inspired or advocated violence. For that matter, many within the #MeToo movement have refrained from even specifying precisely what consequences should obtain for egregious conduct. Most #MeToo stories have neither been intended to, nor have in fact had legal repercussions; only a handful have resulted in reputational or financial consequences for the alleged perpetrators, all of which may prove to be short-lived. For better or worse, the #MeToo movement has, to date, been almost exclusively pure speech, not action. And yet it is already too much for the many high-profile individuals who have referred to #MeToo as a “witch hunt.”<sup>81</sup>

The first notable characterization of the #MeToo movement as a witch hunt came from the director Woody Allen, who told the BBC in October 2017 that while he was glad that the allegations against Weinstein had led to criminal investigations, “You also don’t want it to lead to a witch hunt atmosphere, a Salem atmosphere, where every guy in an office who winks at a woman is suddenly having to call a lawyer to defend himself. That’s not right either.”<sup>82</sup> In January 2018, the actor Liam Neeson similarly expressed support for the #MeToo movement but stated that it has created “a bit of a witch hunt.”<sup>83</sup> Neeson went on to say, “There’s some people, famous people, being suddenly accused of touching some girl’s knee or something and suddenly they’re being dropped from their program.”<sup>84</sup> This comment was apparently referring to Minnesota Public Radio personality Garrison Keillor, whom MPR

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ve-men-should-be-free-hit-on-women-harvey-weinstein-scandal [https://perma.cc/38KP-ZQPT]; Laura Kipnis, *Has #MeToo Gone Too Far, or Not Far Enough?*, GUARDIAN (Jan. 13, 2018), https://www.theguardian.com/commentisfree/2018/jan/13/has-me-too-catherine-deneuve-laura-kipnis [https://perma.cc/5Y5X-CYUC]; Daphne Merkin, *Publicly, We Say #MeToo. Privately, We Have Misgivings*, N. Y. TIMES (Jan. 5, 2018), https://www.nytimes.com/2018/01/05/opinion/golden-globes-me-too.html [https://perma.cc/DM6S-YLRC].

<sup>81</sup> These include the film director Woody Allen, actress Catherine Deneuve, director Michael Haneke, and actor Liam Neeson. See discussion *infra*.

<sup>82</sup> Emma Stefansky, *Woody Allen Warns of “Witch Hunt Atmosphere” Following Weinstein Scandal*, VANITY FAIR (Oct. 15, 2017), https://www.vanityfair.com/hollywood/2017/10/woody-allen-harvey-weinstein-witch-hunt-atmosphere [https://perma.cc/HM6X-RXNG] (“Allen himself has been accused of abusing his daughter, Ronan [sic—Allen’s daughter’s name is Dylan] Farrow, and the BBC notes that Weinstein has been credited with ‘reviving Allen’s career’ after that scandal broke in the 1990s.”).

<sup>83</sup> *Liam Neeson: “Bit of a Witch Hunt” Over Sex Allegations*, ASSOCIATED PRESS (Jan. 13, 2018), https://apnews.com/4ac64c7334db423f842692587c011974 [https://perma.cc/6EQF-WLB9]. Actress Catherine Deneuve joined in signing a letter by one hundred women that expressed similar sentiments. Paul Pradier and Lesley Messer, *Catherine Deneuve: #MeToo Movement Is a ‘Witch Hunt’ That Has ‘Punished’ Men*, ABC NEWS (Jan. 9, 2018), https://abcnews.go.com/Entertainment/catherine-deneuve-slams-metoo-movement-witch-hunt-punished/story?id=52243767 [https://perma.cc/FW3M-G3E6].

<sup>84</sup> *Id.*

says it fired after receiving multiple allegations over an extended period. Neeson also dismissed allegations against Dustin Hoffman, including that he “touched some girls’ breasts” as “childhood stuff.”<sup>85</sup>

In February 2018, Austrian filmmaker Michael Haneke, two-time winner of the Cannes Palme d’Or, bemoaned

This new puritanism coloured by a hatred of men, arriving on the heels of the #MeToo movement . . . this hysterical pre-judgment which is spreading now, I find absolutely disgusting . . . This has nothing to do with the fact that every sexual assault and all violence—whether against women or men—should be condemned and punished. But the witch hunt should be left in the Middle Ages.<sup>86</sup>

The import of the label “witch hunt” is clear, though often not directly expressed: women’s speech is so dangerous that it should not be considered merely speech, but violence, and as such must be stopped. This backlash against #MeToo has not simply been on the level of rhetoric. Women who have accused men of sexual misconduct, or provided channels of communications to disseminate warnings about predatory men, face threats, harassment, and defamation lawsuits, all aimed at silencing their speech.<sup>87</sup>

In Dr. Christine Blasey Ford’s account of how now-Supreme Court Justice Brett Kavanaugh had attempted to rape her at a party when the two were both teenagers, one detail in particular stood out: her description of Kavanaugh’s hand over her mouth. Her testimony so many years later, in an open Senate hearing on September 27, 2018, seemed like a long-delayed breaking away from that silencing grip. But Dr. Ford faced many more attempts at silencing before she stood before the Senate on that day. After she went public as the source of the allegations that had been anonymously reported by the *Washington Post*, Dr. Ford’s private information was posted online, and she received death

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<sup>85</sup> Roisin O’Connor, *Liam Neeson Calls Allegations against Dustin Hoffman ‘Childhood Stuff’*, INDEPENDENT (Jan. 13, 2018), <https://www.independent.co.uk/arts-entertainment/liam-neeson-hollywood-sex-scandal-dustin-hoffman-childhood-stuff-weinstein-spacey-behaviour-late-a8157411.html> [https://perma.cc/4XAU-JLRA].

<sup>86</sup> Gwilym Mumford, *Michael Haneke: #MeToo Has Led to a Witch Hunt ‘Coloured by a Hatred of Men.’* GUARDIAN (Feb. 12, 2018), <https://www.theguardian.com/film/2018/feb/12/michael-haneke-metoo-witch-hunt-coloured-hatred-men> [https://perma.cc/3JRT-UGM4].

<sup>87</sup> See, e.g., Tyler Kingkade, *As More College Students Say “Me Too,” Accused Men Are Suing for Defamation*, BUZZFEED (Dec. 5, 2017), <https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing> [https://perma.cc/3BLX-F55E]; Tara Golshan, *Study Finds 75 Percent of Workplace Harassment Victims Experienced Retaliation When They Spoke Up*, VOX (Oct. 15, 2017), <https://www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts> [https://perma.cc/X8DV-86DZ].

threats that forced her and her husband and sons to leave their home.<sup>88</sup> In addition, someone hacked her email account and sent out messages recanting the allegations.<sup>89</sup> Her credibility and character were impugned by multiple Republican members of Congress and by President Donald Trump.<sup>90</sup> Her lawyers stated that Dr. Ford had made the decision to testify “[d]espite actual threats to her safety and her life.”<sup>91</sup>

Olympic medalist Jamie Dantzscher was the first victim to report being sexually assaulted by USA Gymnastics team doctor Larry Nassar. After a newspaper article disclosed details of her anonymous 2016 lawsuit against Nassar and USA Gymnastics without identifying her, Dantzscher was outed by coaches and friends on social media.<sup>92</sup> Attorneys for USA Gymnastics called her former boyfriends, making inquiries about her sexual past. Dantzscher became worried about her safety and “wondered if people who wanted to protect Nassar were ‘going to send somebody after me.’”<sup>93</sup>

When Moira Donegan created the “Shitty Media Men List,” a crowdsourced Google spreadsheet that allowed women to anonymously communicate with each other about predatory behavior by men in the media industry in October 2017, she had no idea that the list would go viral within hours.<sup>94</sup> When Donegan realized this, and learned that BuzzFeed was planning to publish an article about the list, she took the spreadsheet down. The list had been captured in screen shots before she did so, however, and these shots were posted to various online sites. One of the men whose name was added to the list, Stephen Elliott, the founder and former editor-in-chief of the literary website “the Rumpus,”

<sup>88</sup> Jessica Contrera et al., *Kavanaugh Accuser Christine Blasey Ford Moved 3,000 Miles to Reinvent Her Life. It Wasn't Far Enough*, WASH. POST (Sept. 27, 2018), [https://www.washingtonpost.com/local/christine-blasey-ford-wanted-to-flee-the-us-to-avoid-brett-kavanaugh-now-she-may-testify-against-him/2018/09/22/db942340-bdb1-11e8-8792-78719177250f\\_story.html?utm\\_term=.f68b19835d29](https://www.washingtonpost.com/local/christine-blasey-ford-wanted-to-flee-the-us-to-avoid-brett-kavanaugh-now-she-may-testify-against-him/2018/09/22/db942340-bdb1-11e8-8792-78719177250f_story.html?utm_term=.f68b19835d29) [https://perma.cc/5Z62-9YKD].

<sup>89</sup> Bryan Logan, *'My Greatest Fears Have Been Realized': Christine Blasey Ford Reveals 'Constant Harassment and Death Threats' Have Turned Her Family's Lives Upside-Down*, BUS. INSIDER (Sept. 26, 2018), <https://www.businessinsider.com/christine-blasey-ford-testimony-threats-brett-kavanaugh-sexual-assault-2018-9> [https://perma.cc/6EWE-TBNH].

<sup>90</sup> Peter Baker, *In Risky Shift, Trump and G.O.P. Directly Assail Christine Blasey Ford*, N.Y. TIMES (Oct. 3, 2018), <https://www.nytimes.com/2018/10/03/us/politics/blasey-ford-trump-republicans.html> [https://perma.cc/ZU6F-V9YW].

<sup>91</sup> Oliver Laughland, *Brett Kavanaugh Accuser Will Testify before Congress on Thursday*, GUARDIAN (Sept. 23, 2018), <https://www.theguardian.com/us-news/2018/sep/23/brett-kavanaugh-accuser-set-to-testify-before-congress> [https://perma.cc/H93Z-4ACZ].

<sup>92</sup> Ashley May, *Sexual Assault Survivors Risk Lives, Reputations to Stand Up To Powerful Men*, USA TODAY (Sept. 21, 2018), <https://www.usatoday.com/story/news/nation-now/2018/09/21/christine-blasey-ford-kavanaugh-death-threats-reporting-sexual-assault/1355798002/> [https://perma.cc/65YF-Z5TF].

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

<sup>94</sup> Moira Donegan, *I Started the Media Men List-My name is Moira Donegan*, THE CUT (Jan. 10, 2018), <https://www.thecut.com/2018/01/moira-donegan-i-started-the-media-men-list.html> [https://perma.cc/6SAP-T3ZW].

sued Donegan for \$1.5 million in damages for what he characterized as malicious actions “taken solely to damage [his] reputation and career.”<sup>95</sup> Elliot intends to subpoena Google to determine the identities of all individuals who submitted his name to the list and has stated his plans to sue them, as well as Donegan.<sup>96</sup>

The stories of Ford, Danztscher, and Donegan represent only three examples of the physical, professional, financial, psychological, and other risks women face when they speak out about sexual assault, especially against powerful and influential men. Their speech is treated as so frightening and offensive as to inspire threats, harassment, and litigation, all aimed at silencing them. And yet they are not the names associated with free speech martyrdom in popular discourse, or the figures championed as bravely resisting censorship, or cited as examples of mavericks whose “tell-it-like-it-is” attitudes inspire respect even in their detractors. Instead, these women are vilified as censors, witch hunters, and a lynch mob.

The figures who do get celebrated as free speech martyrs are very often high-profile “alt-right” provocateurs. This is despite the fact that, unlike the women of the #MeToo movement, these figures say very little that can be characterized as brave; have been known to engage in direct and personal attacks on vulnerable individuals; and attract followers who exhibit violent tendencies. Take, for example, Milo Yiannopoulos. Yiannopoulos is a senior editor for the far-right publication *Breitbart* and an enthusiastic Donald Trump supporter who is notorious for racist, misogynist, homophobic (despite being gay himself), and Islamophobic diatribes.<sup>97</sup> Yiannopoulos helped facilitate an online harassment campaign against Leslie Jones, an African American actress who starred in the 2016 reboot of *Ghostbusters*, which temporarily drove the actress off Twitter. During an appearance at the University of Wisconsin-Milwaukee, Yiannopoulos named and ridiculed a transgender student by name.<sup>98</sup> During a protest of Yiannopoulos’s speech at the University of Washington, a Yiannopoulos supporter shot a demonstrator in the stomach, critically wounding him.<sup>99</sup> Or consider Richard Spencer,

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<sup>95</sup> Christina Cauterucci, *Does Stephen Elliott’s Lawsuit Against Moira Donegan Have a Chance to Succeed?*, SLATE (Oct. 12, 2018), <https://slate.com/news-and-politics/2018/10/stephen-elliott-moira-donegan-lawsuit-analysis.html> [<https://perma.cc/6YMF-QM9Z>].

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

<sup>97</sup> Lloyd Grove, *How Breitbart Fell Back in Love With Alt-Right Troll Milo Yiannopolous*, DAILY BEAST (July 13, 2017), <https://www.thedailybeast.com/how-breitbart-fell-back-in-love-with-alt-right-troll-milo-yiannopolous> [<https://perma.cc/99ZH-URLY>].

<sup>98</sup> Claire Landsbaum, *Alt-Right Troll Milo Yiannopoulos Uses Campus Visit to Openly Mock a Transgender Student*, THE CUT (Dec. 15, 2016), <https://www.thecut.com/2016/12/milo-yiannopoulos-harassed-a-trans-student-at-uw-milwaukee.html> [<https://perma.cc/7ZRD-5GXQ>].

<sup>99</sup> See Mike Carter & Steve Miletich, *Couple Charged with Assault in Shooting, Melee during UW Speech by Milo Yiannopoulos*, SEATTLE TIMES (April 24, 2017), <https://www.seattletimes.com/>

who was an organizer of the 2017 Unite the Right rally in Charlottesville, Virginia, which left a female counter-protester dead. Following a speech Spencer gave at the University of Florida in October 2017, three men allegedly made Nazi salutes, chanted slogans involving Hitler, and fired at a group of protesters, narrowly missing them.<sup>100</sup>

Both Yiannopoulos and Spencer received an extraordinary amount of news coverage and attention from free speech advocates as their scheduled appearances on college campuses were rocked by protests. According to the civil libertarian narrative, their speech should be protected precisely because of, not in spite of, the serious offense it causes, because that is what the First Amendment is intended to protect.<sup>101</sup> Those who attempted to protest their events were ridiculed as “snowflakes” and denounced as anti-civil liberties. Speech is, after all, only speech, not violence.<sup>102</sup>

#MeToo allegations, on the other hand, are widely treated as violence, instead of speech. Dr. Ford’s testimony was characterized as depriving Justice Kavanaugh of his good name, and of endangering his rightful entitlement to a seat on the Supreme Court; Jamie Danzschler’s accusations against Larry Nassar were viewed as destroying his professional reputation; Stephen Elliott complained that the allegations against him within the Media Men spreadsheet “caused him to become depressed, get disinvited from multiple book readings, be defriended or blocked on social media by several people, and lose the opportunity to sell his book for film or television adaptation.”<sup>103</sup> While these supposed injuries pale in comparison to targeted harassment campaigns and physical violence, they have been used to justify the suppression and backlash against women who speak out about men’s sexual abuses. Even if the offenses supposedly inflicted by women’s speech were as significant as #MeToo’s detractors make them out to be, this should only serve as more reason to protect women’s speech, not suppress it.

But there has been no attempt by the ACLU or prominent civil libertarians to champion the women of the #MeToo movement as free speech heroes or to denounce the aggressive attempts to censor them. There was no similar national handwringing over the free speech crisis

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seattle-news/crime/couple-charged-with-assault-in-shooting-melee-during-uw-speech-by-milo-yiannopoulos/ [https://perma.cc/J3WW-7UJ9].

<sup>100</sup> Eric Levenson, *Police: 3 Men Made Nazi Salutes, Shot at Protesters after Richard Spencer Event*, CNN (Oct. 21, 2017), <https://www.cnn.com/2017/10/20/us/richard-spencer-florida-speech-arrest-shooting/index.html> [https://perma.cc/3Z7Z-9VWE].

<sup>101</sup> See, e.g., Nathan Kreider, *Free Speech: No Exceptions*, BEING LIBERTARIAN (July 6, 2018), <https://beinglibertarian.com/free-speech-no-exceptions/> [https://perma.cc/Q6DE-Y4MC].

<sup>102</sup> *Id.*

<sup>103</sup> Cauterucci, *supra* note 95.

created by the threats, harassment, and lawsuits against women who spoke out about male sexual abuse as there was over the supposed free speech crisis on college campuses when students protested appearances by white male supremacists.

The reaction to speech supporting white male supremacy and the speech challenging it could not be more different. Speech that comports with or at least refrains from threatening white male supremacy is regarded as mere speech: it is at most offensive, and offensive speech must be given the maximum amount of breathing room possible. At the same time, speech that challenges white male supremacy is treated as not speech, but as violence that must be stamped out.

### CONCLUSION

The case that led to Justice Holmes's ringing defense of "freedom for the thought we hate" was, like *Whitney*, one of the few Supreme Court free speech cases that involved a female petitioner. It was also one of the few First Amendment cases that involved a female lawyer.<sup>104</sup> Olive H. Rabe represented Rosika Schwimmer, a Hungarian-born pacifist, whose citizenship application was denied due to her stated refusal to take up arms to defend the country.<sup>105</sup> The majority held that this refusal indicated that Schwimmer was "not well bound or held by the ties of affection to any nation or government," and thus "liable to be incapable of the attachment for and devotion to the principles of our Constitution that are required of aliens seeking naturalization."<sup>106</sup>

In dissent, Justice Holmes wrote that while Schwimmer's position "might excite popular prejudice," this was not an adequate basis for punishing it.<sup>107</sup> The principle of "freedom for the thought we hate" was inspired by an immigrant woman refusing to commit violence in the name of patriotism.

For all of Justice Brandeis's eloquence regarding fearing witches and burning women, it is perhaps Justice Holmes in *Schwimmer* who came closest to understanding what a true commitment to the principle of free speech demands: an examination of gender and power. If American commitment to free speech is ever to be more than a seductive fraud, it must grapple with the history of gender inequality and the reality of power.

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<sup>104</sup> See Mary Anne Franks, *FAN 200 (First Amendment News) Mary Anne Franks, "The Free Speech Fraternity,"* CONCURRING OPINIONS (Sept. 20, 2018), <https://concurringopinions.com/archives/2018/09/fan-200-first-amendment-news-mary-anne-franks-the-free-speech-fraternity.html> [https://perma.cc/LC6P-AYNM].

<sup>105</sup> *United States v. Schwimmer*, 279 U.S. 644, 646–47 (1929).

<sup>106</sup> *Id.* at 652.

<sup>107</sup> *Id.* at 654.