Anti-Pornography Legislation as Viewpoint-Discrimination

Geoffrey R. Stone
COMMENT
ANTI-PORNOGRAPHY LEGISLATION AS VIEWPOINT-DISCRIMINATION

GEOFFREY R. STONE*

The central principle of the First Amendment is that government may not excise specific viewpoints from public debate.1 This is so because government suppression of particular points of view would effectively mutilate "the thinking process of the community" and thus undermine core First Amendment values.2 A law, for example, prohibiting any person from criticizing the Social Security system or the draft would seriously distort the search for truth, block meaningful self-governance, and frustrate individual self-fulfillment.3 Such viewpoint-based restrictions are thus presumptively unconstitutional; they may be upheld in only the most extraordinary of circumstances, if ever.4

In American Booksellers Association v. Hudnut,5 the United States Court of Appeals for the Seventh Circuit held, and the Supreme Court summarily affirmed, that the Indianapolis anti-pornography ordinance6 violates the First Amendment. The

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* Harry Kalven, Jr. Professor of Law, University of Chicago Law School. I would like to thank my colleagues Paul Bator, Mary Becker, Michael McConnell, Geoffrey Miller, Stephen Schulhofer, David Strauss, and Cass Sunstein for their helpful comments on an earlier draft of this article. I would also like to thank Enid Van Hoven for her research assistance.


4. See generally Stone, supra note 1.

5. 771 F.2d 323 (7th Cir. 1985) aff'd mem. 106 S. Ct. 1172 (1986).

6. The Indianapolis ordinance provides that "pornography" means the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

   (1) Women are presented as sexual objects who enjoy pain or humiliation; or
   (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
   (3) Women are presented as sexual objects tied up or cut up or mutilated.
court of appeals reached this result on the ground that the ordi-

nance expressly discriminated on the basis of viewpoint:

Under the ordinance graphic sexually explicit speech is "pornography" or not depending on the perspective the author adopts. Speech that "subordinates" women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in "positions of servility or submission or display" is forbidden. . . Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an "approved" view of women, of how they react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.7

The Court of Appeals concluded that the First Amendment for-
bids government to "ordain preferred viewpoints in this way."8

In this article, I examine five arguments that might be made against the court of appeals's conclusion that anti-pornography legislation embodies unconstitutional viewpoint discrimi-
nation: (1) Such legislation does not absolutely prohibit expres-
sion of the disfavored viewpoint, but limits its expression only by means of graphic sexually explicit speech; (2) such legisla-
tion is not viewpoint-based; (3) such legislation does not pose the dangers usually associated with viewpoint-based restric-
tions; (4) such legislation passes muster under even the most stringent standards of viewpoint-based review; and (5) such legislation restricts only "low" value speech, and thus should not be tested by the stringent standards of viewpoint-based re-

See Indianapolis & Marion County, Ind., Ordinance 35, §§ 2 & 16-3(q) (June 15, 1984).

This article uses the phrase "obscenity" to refer to those materials that meet the Supreme Court's definition set forth in Miller v. California, 413 U.S. 15, 24 (1973). It uses the phrase "pornography" to refer to those materials, described in the Indianapolis ordinance, that associate the physical abuse or degradation of women with sexual pleasure. Although the concepts of "obscenity" and "pornography" overlap, they are analytically and constitutionally distinct.

7. 771 F.2d at 328.
8. Id. at 325.
pornography legislation is unconstitutional viewpoint-discrimination.

I

Although anti-pornography legislation expressly discriminates on the basis of viewpoint, it does not ban all advocacy of the view that women may be sexually aroused by pain, humiliation, or rape. Rather, it restricts expression of this view only by means of graphic sexually explicit speech. Other means of expressing the disfavored point of view are unimpaired. Thus, unlike a law prohibiting all advocacy of the view that women may be sexually aroused by pain, humiliation, or rape, anti-pornography legislation is more modest in scope. One might therefore argue that such legislation does not threaten the values underlying the First Amendment to the same degree as more suppressive viewpoint-based restrictions, and that such legislation should thus be tested by a less stringent standard of review.

The Supreme Court has never accepted this argument. To the contrary, the Court has consistently applied the stringent standards of viewpoint-based review even to modest viewpoint-based restrictions. In Schacht v. United States,9 for example, the Court invalidated a federal statute prohibiting actors from wearing the uniform of a branch of the armed forces of the United States in a theatrical or motion-picture production if the portrayal tended "to discredit that armed force." Although the statute imposed only a modest restriction on the ability of individuals to oppose government policy, the Court held the statute unconstitutional because a law "which leaves Americans free to praise the war in Vietnam but can send persons . . . to prison for opposing it, cannot survive in a country which has the First Amendment."10

The doctrine illustrated by Schacht is not only settled, it is sound. Three considerations combine both to explain and to justify the doctrine.11 First, even if modest viewpoint-based restrictions do not skew public debate to the same degree as laws

11. See Stone, supra note 1, at 200-33.
that absolutely prohibit the advocacy of particular viewpoints, they necessarily distort public debate to some degree. That is in itself an important constitutional concern. But beyond this, there is the further and perhaps more important fact that viewpoint-based restrictions cannot be neatly divided into those that do and do not "seriously" distort public debate. The question is one of degree, and such a line would be extraordinarily difficult to draw on a case-by-case basis. Moreover, an error in line-drawing in this context could have extraordinarily serious consequences for public debate. Thus, the safest and most sensible course is simply to test all viewpoint-based restrictions by the same stringent standards of review.\footnote{See id. at 224-26.}

Second, the Court has long recognized that government may not restrict speech because it disapproves of a particular message. In a democratic society, it is for the people and not the government to decide what ideas are "good" or "bad."\footnote{See, e.g., Cornelius v. NAACP Legal Def. & Educ. Fund, 105 S. Ct. 3439, 3454 (1985); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980); United States Postal Serv. v. Council of Greenburg Civic Ass'ns, 453 U.S. 114, 132 (1981).} Government will rarely admit, however, that it is attempting to restrict a particular viewpoint because it disagrees with the ideas expressed. The problem is thus to ferret out such improper motivations when in fact they exist. The risk of improper motivation is especially high in the context of viewpoint-based restrictions, for in considering the enactment of such laws, government officials are especially likely to be affected, consciously or unconsciously, by their own sympathy or hostility to the particular views sought to be restricted. In such circumstances, the most sensible course is to presume improper motivation and to permit government to negate that presumption by satisfying the stringent standards of viewpoint-based review.\footnote{See Stone, supra note 1, at 227-33.}

Third, even modest viewpoint-based restrictions are usually designed to restrict speech because of its "communicative impact"—that is, because of "a fear of how people will react to what the speaker is saying."\footnote{J. Ely, Democracy and Distrust 111 (1980); see L. Tribe, American Constitutional Law 580 (1978).} This is important because governmental efforts to restrict speech because of its communicative impact usually rest upon constitutionally "disfavored"
justifications. That is, such restrictions are typically defended either on the ground that government does not trust its citizens to make wise decisions if they are exposed to the expression, or on the ground that the expression would offend others and perhaps lead to a hostile audience response. Such paternalistic or intolerance-based justifications for the suppression of particular viewpoints are incompatible with the basic premises of the First Amendment. Laws that restrict speech for such reasons are thus presumptively unconstitutional, whether or not they significantly distort public debate.\textsuperscript{16}

Anti-pornography legislation poses each of these concerns. First, although such legislation limits communication of the disfavored message only by means of graphic sexually explicit speech, even the proponents of such legislation concede that this is the most effective means of conveying the disfavored point of view. Indeed, suppression of this means of expression would significantly affect communication of the disfavored message. That, after all, is what anti-pornography legislation is all about. Second, it is highly likely that, in deciding to enact such legislation, legislators will be affected not only by their desire to prevent the harms associated with pornography, but also by their understandable dislike for the message itself. Would they be so quick to suppress speech for similar reasons if they were sympathetic to the message restricted? Third, a primary concern underlying anti-pornography legislation is the impact pornography has on its audience. This is, of course, a concern with communicative impact based on the paternalistic judgment that government does not trust its citizens to deal with “dangerous” and “undesirable” ideas.

Consequently, although anti-pornography legislation does not prohibit all advocacy of the view that women may be sexually aroused by pain, humiliation, or rape, and permits this view to be expressed by means other than graphic sexually explicit expression, this is not in itself sufficient justification to dilute the standard of review. Anti-pornography legislation is indistinguishable in this respect from most other modest viewpoint-based restrictions—no Nazi may march in Skokie; no Communist may teach in a public school; no person may criticize the war to an audience that may contain soldiers. Any effort to di-

\textsuperscript{16} See Stone, supra note 1, at 215-17.
lute the standard of review for anti-pornography legislation on this basis would require a dramatic and unwarranted restructuring of First Amendment doctrine.

II

Although the court of appeals in Hudnut characterized anti-pornography legislation as viewpoint-based, one might argue that such legislation should more appropriately be characterized as "harm-based."\(^{17}\) A harm-based statute defines the speech to be restricted in terms of its capacity to cause specific, identifiable harm. Laws that prohibit "any demonstration near a hospital when the noise may disturb patients," or "any speech that may trigger a hostile audience response," or "any publication that may persuade listeners to refuse induction into the army" are examples of harm-based statutes.

Some harm-based restrictions, illustrated by my hospital example, are content-neutral on their face and do not turn in application on the communicative impact of expression. Such laws do not pose any greater risk of distortion, improper motivation, or disfavored justification than other content-neutral restrictions. They should be tested by the ordinary standards of content-neutral review.\(^{18}\)

Other harm-based restrictions are more problematic. Consider, for example, my hostile audience illustration. Although the hypothetical hostile audience statute does not expressly single out a particular viewpoint for restriction, it turns in application on communicative impact, has distinct viewpoint-differential effects, is defended in terms of a constitutionally disfavored intolerance-based justification, and raises serious concerns about improper motivation.\(^{19}\) Thus, although such a law may seem content-neutral on its face, it should be tested by the standards of viewpoint-based review.\(^{20}\) Similarly, a law

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17. Professor Cass Sunstein has offered this argument in conversation.
18. On content-neutral review, see generally L. Tribe, supra note 15, at 682-700; Stone, supra note 1, at 190-93.
19. The risk of improper motivation is enhanced in this situation because government officials know that in actual operation such restrictions will limit only some messages—most likely those that are most offensive or controversial. Thus, official hostility to, or lack of sympathy for, the restricted speech is more likely in this context than in the context of other, more conventional content-neutral restrictions.
prohibiting any person from making a speech that might persuade others to commit unlawful acts should be deemed viewpoint-based, and tested by the standards of Brandenburg v. Ohio, 21 even though it may at first glance seem content-neutral on its face.

Finally, there are those harm-based restrictions, like my draft induction example, that are functionally indistinguishable from expressly viewpoint-based restrictions. From a First Amendment standpoint, there is no relevant difference between a law that prohibits criticism of the draft and a law that prohibits any speech that may cause persons to refuse induction if the latter is construed to prohibit any expression that criticizes the draft. Although the harm-based statute is facially content-neutral, it poses precisely the same dangers of distortion, improper motivation, and disfavored justification as the expressly viewpoint-based statute.

Anti-pornography legislation is, at best, analogous to my last illustration. That is, such legislation restricts expression that causes a specific, narrowly defined harm because of its communicative impact. Like my draft induction example, anti-pornography legislation—even if labelled "harm-based"—poses precisely the same dangers as an expressly viewpoint-based restriction. The problem, however, runs deeper. For even if the hypothetical draft induction statute were constitutionally distinguishable from a law directed expressly at criticism of the draft, that distinction would not save anti-pornography legislation. Anti-pornography legislation, unlike the examples examined above, is not viewpoint-neutral. Such legislation prohibits, not sexually explicit expression that might cause certain harms, but sexually explicit expression that portrays women, for example, as sexual objects who may enjoy pain, humiliation, or rape. Such legislation is thus expressly directed at a particular viewpoint. It cannot be defended on the ground that it is "merely" harm-based.

III

Although anti-pornography legislation is viewpoint-based on


its face, one might argue that it should nonetheless be tested by a less stringent standard of review because it does not pose the dangers posed by other viewpoint-based restrictions. There are two versions of this argument.

A

First, one might argue that the viewpoint-based character of anti-pornography legislation does not reflect any governmental hostility to the particular ideas restricted, but is simply a product of the fact that only the restricted ideas cause the relevant harms. The argument runs as follows: Anti-pornography legislation is designed to restrict speech that may cause discrimination against women, sexual subordination, rape, and related harms. In light of this purpose, it would make no sense to restrict speech that portrays women as equal or as victims of humiliation and pain, for such speech does not cause the relevant harms. Anti-pornography legislation, in other words, is not underinclusive—it restricts all messages and only those messages that cause the relevant harms. The viewpoint-based character of the legislation thus derives not from any improper motivation, but from the very nature of the harms sought to be prevented. Accordingly, an important concern posed by other viewpoint-based restrictions—the risk of improper motivation—is lacking in this context. A reduced standard of justification is therefore warranted.

This argument is unpersuasive. Although underinclusiveness dramatizes the risk of improper motivation by highlighting a potential inequality in the drafting of the legislation, the risk of improper motivation is by no means limited to underinclusive laws. Indeed, the risk is present in all viewpoint-based restrictions. Consider, for example, a law prohibiting any person from criticizing the war to an audience that may contain soldiers. As in the anti-pornography context, defenders of this law might argue that the restriction is viewpoint-based not be-

22. Under this argument, anti-pornography legislation is not underinclusive in terms of the viewpoints restricted. It is underinclusive, however, insofar as it restricts expression of the disfavored view only through graphic sexually explicit speech. But that is a different problem, which poses questions of "means" rather than viewpoint discrimination.

cause legislators oppose criticism of the war, but because the restricted views are the only ones that cause the relevant harms—refusal of duty and insubordination. It seems clear, however, that the decision of legislators to enact the legislation may well have been affected not only by their concern about refusal of duty and insubordination, but also by their hostility to criticism of the war generally. In such circumstances, we test the claim of good motives not by accepting the protestation of innocence, but by demanding a showing of harm that convinces us that the legislators would have adopted the law even if they had strongly favored the restricted views.24 Similarly, in the anti-pornography context, the decision to adopt anti-pornography legislation may well be affected not only by a desire to prevent discrimination against women, sexual subordination, and rape, but also by the legislators' hostility to the view that women are unequal and that they may derive sexual satisfaction from humiliation, pain, or even rape. As in the criticism of the war illustration, we test this proposition by the ordinary standards of viewpoint-based review.

B

The second argument for the proposition that anti-pornography legislation does not pose the same dangers as other viewpoint-based restrictions focuses on the "coercion" justification for the legislation. Proponents of anti-pornography legislation maintain that women are coerced into performing in pornographic works and that suppression of such works is necessary to remove the incentive for such coercion.25 This justification for the legislation does not turn on the communicative impact of expression and thus does not rest on a constitutionally disfavored justification.26 That is, the coercion justification rests neither on government's paternalistic judgment that it cannot trust its citizens to make wise decisions if they are allowed to receive the message,27 nor on government's concern that the

24. See Clark, Legislative Motivation and Fundamental Rights in Constitutional Law, 15 San Diego L. Rev. 953, 990-96 (1978); See also Stone, supra note 1, at 227-233.
26. For discussion of the relationship between communicative impact and constitutionally disfavored justifications, see Stone, supra note 1, at 207-17.
ideas expressed may offend others or trigger a hostile audience response. Rather, it rests on government's constitutionally less problematic interest in protecting the health and safety of the participants themselves. Accordingly, such legislation can be defended in a way that eliminates one of the three primary dangers of viewpoint-based restrictions.

The Court has never regarded the absence of a constitutionally disfavored justification as sufficient reason in itself, however, to justify a dilution of the standard of review for expressly viewpoint-based restrictions. To the contrary, the Court in such circumstances routinely applies the stringent standards of viewpoint-based review despite the absence of a constitutionally disfavored justification. Suppose, for example, a city prohibits all anti-war demonstrations because anti-war demonstrators have tended to be unruly in past demonstrations. Although this law does not rest on either a paternalistic or intolerance-based justification, and does not turn on the communicative impact of expression, the Court would surely test it by the most stringent standards of viewpoint-based review. Even in the absence of a constitutionally disfavored justification, the law poses the two other dangers of viewpoint-based restrictions—it expressly distorts public debate in a viewpoint-based manner and poses a significant risk that it was enacted in part because of a legislative hostility to anti-war protests. Anti-pornography legislation is governed by the same principle.29


29. A related argument for the proposition that anti-pornography legislation does not rest on a constitutionally disfavored justification turns on the notion that paternalistic justifications for restrictions on expression are constitutionally disfavored only when government attempts to suppress a viewpoint because of its concern that individuals exposed to that viewpoint may make unwise decisions in the political process. In the pornography context, the paternalistic justification is not directed at political judgments. Rather, the concern is that individuals exposed to pornography may behave "badly" in other ways— they may discriminate, subordinate, and rape.

This argument defines the concern about paternalism too narrowly. The First Amendment is concerned with personal autonomy and individual decisionmaking not only in the political context, but in the social, personal, and economic realms as well. To prevent individuals from learning of ideas or information because government does not trust them to make wise personal, social, or economic decisions is also constitutionally disfavored. See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Kingsley Int’l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959).

It might be argued further, however, that concerns about impermissible paternalism make little sense when, as in the pornography context, the government restricts speech because it may lead persons to commit criminal acts, such as rape. If government’s deri-
This is not to suggest that the presence or absence of a constitutionally disfavored justification is constitutionally irrelevant. To the contrary, this factor may play an important role in deciding how to analyze a law that is not viewpoint-based on its face. For example, the Court has considered the presence or absence of constitutionally disfavored justifications a significant factor in deciding on the appropriate standard of review for both content-neutral and subject-matter restrictions. But when a law is expressly viewpoint-based on its face, the absence of a constitutionally disfavored justification will not save it.

It may be useful in this respect to contrast anti-pornography legislation with the child pornography legislation upheld in New York v. Ferber. In Ferber, the Court upheld a state law prohibiting the distribution of material depicting a "sexual performance" by a child. The purpose of the law was to prevent the sexual exploitation and abuse of minors who participate in such performances. Thus, like the purpose of preventing the sexual exploitation and abuse of women performers in the pornography context, the government's purpose in Ferber was unrelated to either of the constitutionally disfavored justifications for restricting free expression. A critical factor in Ferber, how-

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31. See, e.g., City of Renton v. Playtime Theaters, Inc., 106 S. Ct. 925 (1986); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980); see Stone, supra note 1, at 239-42.
ever, was the viewpoint-neutrality of the restriction. As the Court observed, the child pornography legislation raised "no question . . . of censoring a particular literary theme." Sexual performances involving children were prohibited regardless of the particular messages conveyed. Anti-pornography legislation, however, is expressly viewpoint-based. Ferber, therefore, offers no answer to the viewpoint discrimination objection to anti-pornography legislation.

In any event, there is a further difficulty with the coercion justification, for anti-pornography legislation is obviously underinclusive insofar as it is designed to deal with this problem. The risk that women performers will be coerced or exploited in the production of graphic sexually explicit speech is wholly unrelated to the particular viewpoint expressed. The coercion rationale thus provides no justification for the viewpoint-based discrimination.

IV

Although anti-pornography legislation is viewpoint-based on its face, one might argue that it is nonetheless constitutional because it satisfies even the stringent standards of viewpoint-based review. Three harms are usually associated with pornography: (a) Its production involves the coercion and exploitation of women performers; (b) it perpetuates the social and economic subordination of women; and (c) it causes rape and other sexual abuse of women. There can be little doubt that, to at least some extent, pornography generates these harms. The question is whether this is sufficient justification for the legislation.

Government has a compelling interest in preventing the coercion and exploitation of women who perform in pornographic works. For two rather obvious reasons, however, this is

33. 458 U.S. at 763.
34. There are at least two further distinctions between anti-pornography legislation and the child pornography legislation upheld in Ferber. First, the Court held in Ferber that a prohibition on the use of children in "sexual performances" had only a "de minimis" effect on free expression and that the legislation thus restricted only low value speech. 458 U.S. at 762. A similar claim cannot be made about anti-pornography legislation. See text accompanying notes 57-60. Second, the government's interest in preventing adult women from consenting to perform in sexually explicit works in order to protect them from exploitation and abuse is highly paternalistic and not of the same order as its interest in protecting children. See Branit, supra note 27, at 452-53.
35. See Branit, supra note 27, and authorities cited therein.
not a constitutionally sufficient justification for anti-pornography legislation. First, as noted earlier, such legislation is underinclusive in a viewpoint-based manner with respect to this interest. There is no good reason to protect only those women who perform in works that espouse the disfavored point of view. A law directed at this concern should, at the very least, be viewpoint-neutral. Second, the legislation is overinclusive with respect to this interest. Although some women may be coerced into performing in such works, there is no constitutionally sufficient basis to presume conclusively that all women who perform in such works are coerced and exploited. The general First Amendment requirement that government adopt "the least restrictive means" of achieving its ends clearly disposes of the coercion rationale.36

Government also has a compelling interest in preventing discrimination against women. As the Court has observed, legislation prohibiting such discrimination "plainly serves compelling interests of the highest order."37 In Roberts v. United States Jaycees,38 the Court held that, in light of this interest, Minnesota could constitutionally prohibit the Jaycees from discriminating against women, despite the Jaycees' claim that the challenged law infringed their First Amendment freedom of association. It is useful to contrast the legislation upheld in Roberts with anti-pornography legislation.

The legislation upheld in Roberts declared it unlawful to deny any person "the full and equal enjoyment" of any "place of public accommodation because of . . . sex." In upholding this legislation, the Court emphasized that the statute did "not aim at the suppression of speech," did "not distinguish between prohibited and permitted activity on the basis of viewpoint,"39 and was directed at "activities that produce special harms distinct from their communicative impact."40 The legislation upheld in Roberts, in other words, posed much less of a danger to free expression than a viewpoint-based restriction on speech. Because it was not directed at speech, there was no significant

38. Id.
39. Id.
40. Id. at 3255.
danger of improper motivation or distortion of public debate.\textsuperscript{41} Because the harm at which the law was directed was unrelated to communicative impact, the law was not defended in terms of any constitutionally disfavored justification. Thus, although the interest in preventing discrimination against women provides sufficient justification for government to prohibit the Jaycees from discriminating against women, it surely would not justify a law prohibiting the Jaycees from advocating the legalization or desirability of such discrimination. This distinction—between laws that are viewpoint-neutral and have only an incidental effect on free expression, and laws that are expressly viewpoint-based and are designed to restrict free expression—is central to the First Amendment. It explains why it is permissible for government to prohibit acts of gender discrimination, even when the prohibition has an incidental effect on speech, but impermissible for government to prohibit speech that supports the view that such discrimination is desirable.\textsuperscript{42}

In \textit{Police Department of Chicago v. Mosley},\textsuperscript{43} the Court declared that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”\textsuperscript{44} Although this declaration has proved somewhat overstated with respect to subject-matter restrictions\textsuperscript{45} and laws directed

\textsuperscript{41} Even content-neutral laws can have unintended distorting effects. In \textit{Roberts}, for example, the prohibition on sex discrimination might disadvantage organizations that use such discrimination as a means of symbolic expression more than it disadvantages other organizations. Such indirect and unintended distorting effects are not analogous, however, to the distorting effects of expressly viewpoint-based restrictions. See Stone, \textit{supra} note 1, at 217-27.

\textsuperscript{42} A similar point might be made with respect to the distinction between laws prohibiting adultery and laws prohibiting expression that portrays adultery as desirable. In \textit{Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.}, 360 U.S. 684 (1959), for example, the Court overturned a New York statute that required the denial of a license to exhibit any motion picture that presented adultery “as being right and desirable.” The Court explained that by preventing “the exhibition of a motion picture because that picture advocates an idea, [New York] has thus struck at the very heart of constitutionally protected liberty.” \textit{Id.} at 688. The First Amendment’s “guarantee is not confined to the expression of ideas that are conventional or shared by a majority.” \textit{Id.} at 689. Moreover, the Court declared that even where, as in \textit{Kingsley}, the speech advocated “conduct proscribed by law” and the restriction was limited to a single medium of expression, the speech could not constitutionally be suppressed “where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.” \textit{Id.} (quoting \textit{Whitney v. California}, 274 U.S. 357, 376 (1927) (Brandeis, J. concurring)).

\textsuperscript{43} 408 U.S. 92 (1972).

\textsuperscript{44} \textit{Id.} at 95.

\textsuperscript{45} See, e.g., \textit{Lehman v. City of Shaker Heights}, 418 U.S. 298 (1974); see Stone, \textit{supra} note 1, at 239-42.
at "low" value speech, it remains stunningly true with respect to viewpoint-based restrictions on "high" value expression. The Court has not upheld a viewpoint-based restriction in the realm of "high" value speech for more than thirty years, and although the Court has never expressly held that such restrictions are per se unconstitutional, one might fairly read that lesson into the actual record of the Court's decisions. But even if that lesson is overdrawn, it is clear that viewpoint-based restrictions on high value speech are permissible in only the most extraordinary of circumstances.

Moreover, even if viewpoint-based restrictions are permissible if the restricted speech creates a clear-and-present danger, anti-pornography legislation cannot meet that standard. Whatever the connection between pornography and its harms, there is no plausible danger that each exhibition of pornography is likely to cause an immediate act of discrimination, sexual abuse or rape. This is not to say that such speech never contributes to these harms. A causative correlation may well exist. But the sort of remote and attenuated correlation that may exist in this context has never been thought sufficient to satisfy the modern version of clear-and-present danger.

One might argue, of course, that it makes no sense to prohibit the suppression of pornography in the absence of proof that each exhibition creates a clear and present danger of harm. One might argue that such speech should be suppressed so long as at least some exhibitions of pornography will eventually cause harm. Why should it matter that the danger is not "clear" and "present" with respect to each particular exhibition, so long as the speech as a class is harmful?

These questions raise fundamental issues about the structure and theory of First Amendment doctrine. They call to mind the historical "bad tendency" test and Dean Wigmore's complaint that Justice Holmes's articulation of the modern version of clear-and-present danger in his dissenting opinion in Abrams v. United States failed to consider the potential cumulative effect of many individually harmless speakers. These issues have

47. See Stone, supra note 1, at 197.
been resolved, however.

There are at least five compelling reasons for rejecting the argument that the correlation between speech and harm that may exist in the pornography context is sufficient to justify a viewpoint-based restriction.

(1) The argument that speech may be restricted if it causes harm assumes that the harm is more important than the speech. As we have seen, however, viewpoint-based restrictions pose an especially serious threat to the system of free expression. Only an extraordinary threat of harm is sufficient to support such restrictions.

(2) By insisting that the proponents of viewpoint-based restrictions demonstrate that each particular act of speech is likely to produce an imminent harm, the clear-and-present danger test makes more difficult the general suppression of particular points of view.

(3) By insisting on imminence, the clear-and-present danger test holds the speaker responsible for the acts of others only when the speaker can fairly be said to have “caused” those acts by his expression.

(4) By insisting on imminence, the clear-and-present danger test reduces the difficulty of predicting causation and thus reduces the probability that improper motivations will lead legislators to exaggerate the potential harm.

(5) The clear-and-present danger test compels government to attempt to achieve its objectives by means other than the suppression of speech. It requires government to prove that suppression is essential if it is effectively to achieve its ends. It thus permits government to restrict speech only as a last resort when all other means of dealing with the problem have failed.50

V

Finally, one might argue that the ordinary standards of viewpoint-based review are inapplicable to anti-pornography legislation because pornographic expression is of only “low” First Amendment value. Pornography does not fall within any of the

50. By insisting on imminence, for example, the clear-and-present danger test adopts the assumption that “unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion,” the “remedy to be applied is more speech, not enforced silence.” Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis J., concurring).
established categories of low value speech: it is not obscenity, incitement, false statement of fact, child pornography, fighting words, or commercial advertising. The question, then, is whether pornography constitutes a new category of low value expression.

There are at least two interesting arguments one might make along these lines. First, one might argue that pornographic expression has an insidious, almost subliminal, effect on its audience. Such expression arguably alters values, assumptions, and expectations not by logic, reason, or persuasion, but by indirectation. It works at the unconscious rather than the conscious level. Moreover, such expression arguably affects the reader or viewer in a manner akin to behavior modification—exposure to the idea that women are unequal or may derive sexual satisfaction from pain, humiliation, or rape is accompanied by sexual arousal, thus making it more difficult for the reader or viewer to resist the idea, for it is unconsciously associated with strong positive reinforcement.

One might argue that expression that influences individuals in this manner is not entitled to full First Amendment protection, for such expression arguably undermines individual autonomy, distorts rather than enhances public debate, and cannot meaningfully be answered by effective "counter-speech." This argument is not without force. But it proves

51. Although anti-pornography legislation is directed against expression dealing with sex, it is not limited to obscenity. See Miller v. California, 413 U.S. 15 (1973); see also Branit, supra note 27, at 438.

52. Although anti-pornography legislation is directed in part against the unlawful acts that pornography may "cause," it is not limited to express advocacy of imminent and unlawful conduct. See Brandenburg v. Ohio, 395 U.S. 444 (1969); see also Note, Anti-Pornography Laws and First Amendment Values, 98 Harv. L. Rev. 460, 463-65 (1984).

53. Although critics of pornography suggest that such expression communicates a "false" message that all women enjoy humiliation and rape, pornography cannot reasonably be said to communicate a false statement of fact. On false statements of fact as low value speech, see Gertz v. Robert Welch, Inc., 418 U.S. 323, 240 (1974). Although the concept of group libel offers a somewhat closer analogy, see Note, supra note 52, at 467-69, the doctrine of group libel, first recognized in Beauharnais v. Illinois, 343 U.S. 250 (1952), seems to have no present vitality. See American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).


56. Although pornography may, like many other forms of expression, have a commercial motivation, this has never been thought sufficient to bring expression within the concept of commercial speech. See Bolger v. Youngs Drug Prod's Corp., 463 U.S. 60 (1983).

57. See Note, supra note 52, at 471-72; see also Scanlon, Freedom of Expression and Categories of Expression, 40 U. Pitt. L. Rev. 519, 546-48 (1979).
too much. There are no doubt some forms of expression that operate in an unconscious, deceptive manner that government may constitutionally regulate or even prohibit. For example, government could surely ban subliminal advertising, in which commercial or political messages are flashed on the television or movie screen so quickly that they are discerned only by the unconscious mind. Such a ban could be accomplished in a content-neutral manner, without focusing in any way on the particular viewpoints involved. Once one moves beyond this, however, government efforts to regulate or prohibit other forms of emotional or non-rational appeals, especially when tied to particular viewpoints, run head-on into the First Amendment. As the court of appeals recognized in Hudnut, "racial bigotry, anti-semitism, violence on television, reporters' biases—these and many more influence the culture and shape our socialization.... Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all the institutions of culture...." In other words, it is too easy to characterize "undesirable" ideas as insidious. The concept is too open-ended, too subject to manipulation to justify viewpoint-based discrimination.

Second, analogizing to obscenity, one might argue that pornography is of low First Amendment value because it (1) appeals primarily to the prurient interest in sex, and thus is not "speech" in the constitutional sense, and (2) is without serious literary, artistic, political, or scientific value. Under this view, pornography is of low First Amendment value for essentially the same reason obscenity is of low value, but is restricted not because it offends standards of decency, but because of the harms it causes to women. Although there may be merit in this approach, particularly insofar as it might ultimately redefine the obscenity doctrine, it would not save existing anti-pornography legislation. To the contrary, this approach would require the re-drafting of anti-pornography legislation to incorporate the prurient interest and "no serious value" elements.

58. 771 F.2d at 330.
59. Just as touching a person's thigh is arguably not "speech" within the meaning of the First Amendment, expression that has primarily the same purpose and effect as touching a person's thigh is arguably not "speech" within the meaning of that amendment. See Schauer, Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 Geo. L.J. 899, 922-26 (1979).
60. See Note, supra note 52, at 473-74.
Such re-drafting might save the legislation, but at the cost of significantly narrowing its scope.

There is, in any event, a further difficulty with the low value defense of anti-pornography legislation. For even if pornography falls within some category of low value expression, it is not at all clear that government can constitutionally enact viewpoint-based restrictions within the context of low value speech. False statements of fact have only low First Amendment value, but could government constitutionally prohibit only false statements of fact that criticize the conduct of a war? Obscenity is of low First Amendment value, but could government constitutionally prohibit obscene expression only if it advocated "loose" morals? Express incitement is of low First Amendment value, but could government prohibit express incitement of violence only by those who criticize the government?

In other words, even within the realm of low value speech, government may not adopt viewpoint-based restrictions without meeting the standards of viewpoint-based review. This is not surprising, for the special dangers of viewpoint-based restrictions—distortion of public debate, improper motivation, and reliance on constitutionally disfavored justifications—are present in the low value realm to precisely the same extent that they are present in the realm of high value speech. Moreover, when we say that speech is of low First Amendment value, we mean, at most, that it is not "speech" within the meaning of the First Amendment. But the First Amendment prohibits viewpoint-based discrimination even in the regulation of conduct that has nothing to do with free speech. Consider, for example, a state law that punishes assassination more severely if it is committed by opponents of the war. For the same reason that such a statute constitutes unconstitutional viewpoint-discrimination, it is unconstitutional for government to restrict pornography in a viewpoint-based manner, even if pornography is only low value expression. The low value characterization, in other words, does not legitimate an otherwise unconstitutional viewpoint-based restriction.

VI

The harms associated with pornography cannot be easily dismissed. But the harms associated with anti-pornography legislation are serious as well. Such legislation undermines our
commitment to viewpoint-neutrality and thus strikes at the very core of our First Amendment jurisprudence. Government cannot suppress graphic sexually explicit expression because it portrays women as sexual objects who enjoy humiliation and rape without opening the door to other forms of viewpoint-based suppression. If viewpoint-based restrictions are permissible in this context, there is no principled basis for distinguishing other speech that may also have harmful effects. This is a door best left closed.

This is not to say that society should ignore the harms of pornography. To the contrary, we should vigorously pursue other, less constitutionally problematic, means of addressing these harms. The coercion and exploitation of performers should be prohibited. Laws prohibiting rape, sexual abuse, and discrimination should be strengthened and rigorously enforced. And, perhaps most important, the issue of pornography should remain a central topic of public discussion and debate.

Our acceptance of racist expression has changed radically in recent years without the aid of government suppression. Individuals who once found the characterizations in "Amos and Andy" amusing would now be shocked to see their children amused by such fare. A similar change is possible with respect to pornography. As we become more sensitive to the actual message of such expression and to the harms it may inflict, we may eventually come to regard Playboy as as embarrassing and as inappropriate as we now regard "Amos and Andy." It is through education and "raising of consciousness," rather than censorship, that such change will come about.