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What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression

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Some portion of the political left in the United States has called for the restriction of pornography and hate speech. Those who advocate such censorship do so on the ground that pornography and hate speech cause harm to disadvantaged "outsider" groups in society. For this reason, the leftist censorship advocates do not accept traditional First Amendment doctrines that protect much pornography and hate speech. In calling for censorship, the author argues, leftists endanger a great deal of activist speech, particularly in the form of artwork, that in fact seeks to undermine the very pornography and hate speech the censorship advocates target. Because much postmodern art appropriates the language and images of hate speech and pornography in order to deconstruct or otherwise subvert them, leftist attempts at censorship carry a grave danger of silencing leftist activists. Furthermore, the author maintains, leftist advocates of censorship have not, and ultimately cannot, develop theories of interpretation capable of protecting activist expression while still restricting or banning pornography and hate speech. Because of the indeterminacy of language, censorship advocates must choose whether to sacrifice vital voices of protest and criticism from within the left or whether to suppress pornography and hate speech.

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No, no the word "anti" annoys me a little, because whether you're anti or for, it's two sides of the same thing.

Marcel Duchamp¹

INTRODUCTION

Recently, in a startling reversal of tradition, the American political left² has let out a cry for the censorship of speech. With a symmetry so perfect it approaches artifice—and therefore is ironically suited to the problem of artistic expression—this new leftist movement mirrors the censorship of the right, leaving a large sector of speech doubly threatened from opposing camps. Two separate leftist schools of thought have entered the fray: the feminist anti-pornography movement, led by Catharine MacKinnon,³ and the anti-"hate speech" school, led by a group of legal scholars who wish to prohibit speech that harms historically victimized classes of society.⁴ Like a rebel band besieging an entrenched fortress, these new scholars—mostly women and people of color—are waging nothing less than a war on traditional First Amendment jurisprudence.

Reigning First Amendment standards allow for limitations on offensive or hurtful language only in certain extreme (and somewhat peculiar) circumstances, such as when hateful speech amounts to "fighting words"⁵ or incitement to "imminent lawless action,"⁶ or when sexual

1. Marcel Duchamp, *quoted in* Francis Roberts, "I Propose to Strain the Laws of Physics," *ART NEWS*, Dec. 1968, at 46, 62.

2. Throughout this Article, I use the word "left" to refer to social movements that seek equality or empowerment for marginalized or oppressed groups, such as women, people of color, gays and lesbians. See Ellen Willis, *Porn Free: MacKinnon's Neo-statism and the Politics of Speech*, *TRANSITION*, Issue 63 (1994), at 4, 7. As the Article will establish, however, I think the "left" is, in fact, deeply divided.

3. See CATHARINE A. MACKINNON, *ONLY WORDS* (1993) [hereinafter *MACKINNON, ONLY WORDS*]; CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter *MACKINNON, FEMINIST THEORY*]; CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter *MACKINNON, FEMINISM UNMODIFIED*]. MacKinnon has worked extensively with writer Andrea Dworkin, with whom she has co-authored anti-pornography legislation. See ANDREA DWORKIN & CATHARINE A. MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY* (1988). For examples of Dworkin's independent work, see ANDREA DWORKIN, *WOMAN HATING* (1974); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 *HARV. WOMEN'S L.J.* 1 (1985) [hereinafter *Dworkin, Against the Male Flood*].

4. This new jurisprudence arises out of a group of legal scholars known as "critical race theorists" who explicitly consider the perspectives of people of color. See *infra* note 48 and accompanying text. See generally Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 *VA. L. REV.* 461 (1993) (collecting works by critical race theorists).

5. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (defining "'fighting' words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" and finding them outside the scope of First Amendment protection). The continuing validity of *Chaplinsky* has been the subject of some debate in the wake of such expansive decisions as *Cohen v. California*, 403 U.S. 15 (1971), the notorious "Fuck the Draft" case in which the Court protected

speech meets the tortured constitutional definition of “obscenity.”⁷ Both schools of leftist censors, however, seek to redefine the categories of what speech may be restricted constitutionally. In pursuit of this end, to varying degrees, they deliberately disregard the measures of value—such as “public debate”⁸ or “artistic expression”⁹—that traditionally have been the foundation of First Amendment law. They argue instead that the harm hate speech and pornography causes to the equal rights of women, blacks, and other victimized or “outsider”¹⁰ groups must outweigh free speech considerations.¹¹

Cohen’s right to wear a jacket bearing the offending words in public. *Id.* at 16, 26. Justice Harlan, writing for the Court, proclaimed that “[n]o individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a direct personal insult.” *Id.* at 20. Thus, he distinguished *Chaplinsky* by reasoning that Cohen’s message, albeit “provocative,” was not “directed to the person of the hearer.” *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)). See also *Street v. New York*, 394 U.S. 576, 592 (1969) (arguably limiting the scope of *Chaplinsky* by referring to “small class of ‘fighting words’”). The Court did not reach the issue of *Chaplinsky*’s continuing validity in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992), the recent cross-burning case.

6. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

7. *Miller v. California*, 413 U.S. 15, 20 (1973) (describing the “somewhat tortured history of the Court’s obscenity decisions”). *Miller* sets forth the modern constitutional definition of obscenity: “(a) whether ‘the average person, applying contemporary community standards,’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value” (citations omitted); see also *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987) (attempting to clarify third prong of *Miller* definition by ruling that serious value must be judged from the reasonable person’s standpoint).

For criticism of *Miller*, see Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990) [hereinafter Adler, *Post-Modern Art*]; Amy M. Adler, *Why Art Is On Trial*, 22 J. ARTS MGMT. L. & Soc’y 322 (1993) [hereinafter Adler, *Why Art Is On Trial*].

There is currently a new vigor in the war on obscenity as concern mounts about sexually explicit material on the Internet. See *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996) (affirming conviction of couple for disseminating obscene materials by computer in violation of 18 U.S.C. § 1465), cert. denied, 1996 U.S. LEXIS 4789 (Oct. 7, 1996); Amy Adler, *Buttoning Up Porn*, NATION, Oct. 16, 1995, at 408; cf. *ACLU v. Reno*, 929 F. Supp. 824, 826-27, 883 (E.D. Pa. 1996) (granting motions for preliminary injunction against provisions of the Communications Decency Act of 1996, Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-35 (1996), which criminalizes certain uses of obscene or indecent material on-line), prob. juris. noted, 117 S.Ct. 554 (1996); *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), petition for cert. filed Oct. 15, 1996.

8. See *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (stating that “debate on public issues should be uninhibited, robust, and wide-open”).

9. See *Miller*, 413 U.S. at 24 (exempting work that as a whole demonstrates “serious literary, artistic, political, or scientific value” from the constitutional definition of obscenity).

10. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2323 n.15 (1989) (defining “outsider” jurisprudence and rejecting the label “minority”). I will adopt the term “outsider” throughout this Article to refer generally to marginalized or oppressed groups—people of color, gay men, lesbians, and also women as a whole.

11. Although I recognize that complex and significant differences exist between anti-pornography theory and anti-hate speech theory, I will nonetheless concentrate on a common strain that runs throughout the various leftist censorship movements. In particular, I wish to focus on those

But a major problem looms: leftist censorship is on a collision course with a new kind of political speech that is developing in outsider communities. As the legal academy struggles with the question of how to control disturbing or possibly harmful representations of marginalized groups, a similar debate has been raging in the art world, yet it has yielded strikingly different results. While the new censors want to ban speech to achieve their goals, the new artists want to use and exploit the very speech that censors would ban.¹²

Race, gender, and sexual orientation have become the subjects of art, and art has become a central medium to activists concerned with achieving equality in these realms.¹³ This turn toward the political in art has been intricately bound up with the "culture wars"¹⁴ of the past seven years, both responding to and provoking an escalating series of right-wing attacks on artistic expression.¹⁵

theories that go well beyond regulation of face-to-face incidents and attempt to regulate publicly disseminated speech. I do not mean to ignore the differences between pornography and hate speech in terms of harm, nor in terms of proposed remedies. See Matsuda, *supra* note 10, at 2331-32 & n.66 (describing differences between pornography and hate speech); cf. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 436 n.27 ("Although much of my analysis applies to violent pornography and homophobic hate speech, I will not address those problems directly."); MACKINNON, *ONLY WORDS*, *supra* note 3, at 71-110 (addressing both issues while remarking on what distinguishes them).

12. The new censors and the new artists do share a recognition of the political power of representation. As an art curator explained, "There is no question that representation is central to power. The real struggle is over the power to control images." Thelma Golden, *My Brother*, in *BLACK MALE: REPRESENTATIONS OF MASCULINITY IN CONTEMPORARY AMERICAN ART* 19, 23 (1994) (catalogue of exhibition at Whitney Museum of American Art); see also Gina Dent, *Black Pleasure, Black Joy: An Introduction*, in *BLACK POPULAR CULTURE: A PROJECT BY MICHELE WALLACE* I, 6 (Gina Dent ed., 1992). Yet the new censors and the new artists diverge on what to do about this power.

13. See, e.g., *OUT THERE: MARGINALIZATION AND CONTEMPORARY CULTURES* (Russell Ferguson et al. eds., 1990) [hereinafter *OUT THERE*] (collection of essays addressing the marginalization of groups along the lines of race, gender, and sexual orientation); Coco Fusco, *Passionate Irreverence: The Cultural Politics of Identity*, in 1993 BIENNIAL EXHIBITION (catalogue of exhibition at Whitney Museum of American Art) 74, 80-81 (1993) (citing the increasing emphasis on "symbolic representation as a key site of political struggle"). Part of this tendency may be traced to AIDS activism; since the advent of AIDS, art has never been more closely aligned with politics. Numerous AIDS activist artists' collectives sprang up in the 1980s, such as Gran Fury, Diva TV (Damned Interfering Video Activists), Testing the Limits, Visual AIDS, Boys with Arms Akimbo, and Art Positive.

14. See generally *CULTURE WARS: DOCUMENTS FROM THE RECENT CONTROVERSIES IN THE ARTS* (Richard Bolton ed., 1992); JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

15. For a discussion of contemporary art and its vulnerability to government censorship, see Adler, *Post-Modern Art*, *supra* note 7; Adler, *Why Art Is On Trial*, *supra* note 7. For some opinions on the politics of the art wars, see ALICE GOLDFARB MARQUIS, *ART LESSONS: LEARNING FROM THE RISE AND FALL OF PUBLIC ARTS FUNDING* (1995); Martha Bayles, Editorial, *The Philistine Consensus*, N.Y. TIMES, Jan. 30, 1995, at A19 (describing battle over leftist politics); Lynne A. Munson, Editorial, *Art By Committee*, N.Y. TIMES, Sept. 21, 1995, at A23 (criticizing trend of funding art that expresses leftist identity politics).

Ironically, however, many of the latest assaults on artistic expression have come not just from right-wing sources, but from outsider groups themselves.¹⁶ This conflict is odd given that the new censorship and the new political art tend to be motivated by the same goal: the pursuit of equality for outsider groups. And yet, the left has increasingly attacked art, denouncing it as racist or sexist even when the artists responsible for the work claim that they intended to criticize racism and sexism.¹⁷ How could this have happened? How could leftist censors have generated theories that now threaten activist speech arising in their own communities?

The answer stems from a dangerous combination of two factors: (1) the surprising nature of the new political art, and (2) the naive interpretive theories that underlie the new censorship proposals. Leftist censors have overlooked a dramatic shift in contemporary political and artistic speech that directly defies their theories—the move toward a subversive use of hate speech and pornography. Thus, while leftist censors propose banning certain harmful words and images, a remarkable thing is occurring: activists and artists are increasingly using these very same words and images as part of their political discourse.

In fact, leftist censors have entered the debate at a particularly critical moment—just as the attack escalates on visual art in this country. 1-3 PEOPLE FOR THE AMERICAN WAY, ARTISTIC FREEDOM UNDER ATTACK (1992-95) [hereinafter ARTISTIC FREEDOM UNDER ATTACK] (documenting increasing attacks on artistic speech). Beginning in 1989, after controversy erupted over grants made by the National Endowment for the Arts (“NEA”) that helped to support exhibitions of the work of artists Robert Mapplethorpe and Andres Serrano, Congress amended the statutory rules that govern the awarding of NEA grants to deny funding to “obscene” art. Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741 (1989). The new law was declared unconstitutionally vague. *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 781-82 (C.D. Cal. 1991). In 1990, Congress added the so-called “decency rule” to the statute governing NEA grants. 20 U.S.C. § 954(d) (Supp. 1993). This rule was declared unconstitutional on grounds of vagueness and overbreadth. *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1471-76 (C.D. Cal. 1992), *aff’d*, 100 F.3d 671 (9th Cir. Nov. 5, 1996).

While examples of recent art controversies beyond those involving the NEA are too numerous to catalogue here, several authors have analyzed and documented the growing incidence of attacks on artistic expression. *See, e.g.*, STEVEN C. DUBIN, *ARRESTING IMAGES: IMPOLITIC ART AND UNCIVIL ACTIONS* (1992) (analyzing new climate of anger against art); MARJORIE HEINS, *SEX, SIN, AND BLASPHEMY: A GUIDE TO AMERICA’S CENSORSHIP WARS* (1993) (describing numerous cases of attacks on art). In addition, a number of newsletters are devoted to documenting art controversies. *See* ARTS CENSORSHIP PROJECT NEWSL. (American Civil Liberties Union Arts Censorship Project) 1991-present; CENSORSHIP NEWS (National Coalition Against Censorship) 1993-present (monitoring censorship of the arts and other media); CULTURE WATCH (Datacenter) 1993-present (tracking the roles of both the religious and secular right in censorship battles); *see also The FileRoom* (visited Dec. 16, 1996) <<http://fileroom.aaup.vic.edu/documents/CategoryHomePage.html>>.

16. *Battle Over Art ‘Hitting Home’ in Hundreds of Communities: Censors Score 63% Success Rate*, PEOPLE FOR THE AMERICAN WAY (Washington, D.C.), Mar. 28, 1994, at 1 (press release) (“The impulse to censor art . . . is now coming from both the right and the left.”).

17. For a few examples of assertedly leftist artworks that have been challenged because of their own alleged racism and sexism, see 3 ARTISTIC FREEDOM UNDER ATTACK, *supra* note 15, at 59, 62, 87, 96, 114, 125.

In recent years, advocates of rights for women, gays, lesbians, blacks, and other outsiders have turned increasingly to a subversive style of political argument. Using this subtle and pervasive mode, "victims" adopt the language of "victimizers" to turn oppression on its head. Just as African-Americans once co-opted the formerly racist label "black" and converted it into a term of respect, homosexuals are increasingly embracing the derogatory word "queer," and many women are relying on the vernacular of pornography to advance women's rights. Thus, rather than creating a new language free of homophobic, racist, or sexist imagery, many activists have begun appropriating such imagery as a means of subverting and attacking it from within.

This technique—which draws on a variety of related practices including "appropriation,"¹⁸ "excorporation,"¹⁹ "subversion,"²⁰ or "deconstruction"²¹—recurs throughout activist artwork.²² It may function on multiple levels: to frame the horror and absurdity of the speech it appropriates, to erase its sting by taking it as its own, to borrow its effectiveness, or to destroy its power to hurt. This kind of language, which I shall argue is as central to leftist political movements as are the calls to ban hate speech, bears a deliberate resemblance to the very racist, sexist, or homophobic speech it attacks. And yet, leftist censors have not accounted for this large sector of speech that is vital to their own goals and that directly defies their own theories. A consideration of this problem is crucial for any theory of censorship, but particularly for leftist censorship, because, as I shall argue, subversion lies at the heart of the leftist activist speech tradition.

I will not join the chorus of those who make the traditional First Amendment argument against leftist censorship. Most of these traditional arguments go something like this: "The problem of hate speech can be solved only by more speech,"²³ or, "However vile, it is only by

18. For a discussion of the centrality of appropriation as a strategy in contemporary art, see Hal Foster, *Re: Post*, in *ART AFTER MODERNISM* 189, 197 (Brian Wallis ed., 1984).

19. JOHN FISKE, *UNDERSTANDING POPULAR CULTURE* 15 (1989).

20. See SUSAN RUBIN SULEIMAN, *SUBVERSIVE INTENT: GENDER, POLITICS, AND THE AVANT GARDE* (1990) (discussing the centrality of subversion to contemporary art and politics).

21. For a discussion of the meaning of this term, see *infra* notes 76-82 and accompanying text.

22. The deconstructive technique is central to contemporary activism regarding race, gender, sexual orientation, and AIDS. See James Meyer, *AIDS and Postmodernism*, *ARTS MAG.*, Apr. 1992, at 63 [hereinafter Meyer, *AIDS and Postmodernism*]; James Meyer, *Notes on a Video* (1992) [hereinafter Meyer, *Notes on a Video*] (unpublished manuscript, on file with author) (describing AIDS activists' reliance on deconstruction); Craig Owens, *The Discourse of Others: Feminists and Postmodernism*, in *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* 57 (Hal Foster ed., 1983) [hereinafter *THE ANTI-AESTHETIC*] (describing links between feminism and deconstruction).

23. See, e.g., *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); see also LEE C. BOLLINGER, *THE*

guaranteeing free speech for hate-mongers and violent pornographers that we can ensure free speech for minorities and women.” These arguments fail to address a sophisticated new claim in support of censorship: pornography and hate speech *impoverish* public debate by *silencing* women and minorities.

The new leftist censors portray their conflict with free speech absolutists as one between the old left, exemplified by the seemingly antiquated American Civil Liberties Union (“ACLU”),²⁴ and the new left, which no longer accepts that free speech for the Klan is necessary to ensure free speech for blacks. The tensions within the left on the issue of censorship, however, are far more complex than this simple exchange would suggest. Rifts exist not only between the old left and the new, but, more subtly, within the new left itself—between feminists and AIDS activists, between feminists and feminists, between blacks and blacks.

Traditional First Amendment scholars continue to argue that censorship will not work, but their arguments are largely anecdotal. This Article examines contemporary activist art and the critical theory that undergirds it to show *why* censorship will not work—to demonstrate that even the best drafted censorship proposal would impose costs on the very communities it is designed to assist.

In Part I of the Article, I trace the basic outlines of anti-pornography and anti-hate speech theories. Part II introduces the recent movement toward political art and tests the new censorship proposals against actual examples of art. Part III examines the hermeneutical underpinnings of the new art and the new censorship proposals to explain on a theoretical level why these censorship proposals fail on a practical level. In Part IV, I consider the possibility of refining leftist censorship theories in a way that will both prohibit “bad” speech—hate speech and pornography—and protect “good” speech—activist art. I evaluate methods such as inquiring into a speaker’s intent or a victim’s

TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986) (arguing that a primary reason to protect hate speech is to strengthen the value we place as a society on tolerance); ARYEH NEIER, *DEFENDING MY ENEMY* (1979).

Catharine MacKinnon responds to this line of argument by contending that

The liberal theory underlying First Amendment law proceeds on the belief that free speech, including pornography, helps discover truth. Censorship, in its view, restricts society to partial truths. . . .

In liberalism, speech must never be sacrificed for other social goals. But liberalism has never understood this reality of pornography: the free so-called speech of men silences the free speech of women.

MACKINNON, *FEMINIST THEORY*, *supra* note 3, at 205 (footnote omitted).

24. See, e.g., Nat Hentoff, *What’s Happening to the ACLU*, *VILLAGE VOICE*, May 15, 1990, at 20; Lawrence, *supra* note 11, at 476-81 (criticizing the ACLU for its “resistance” to condemning hate speech); DWORKIN & MACKINNON, *supra* note 3, at 83-85 (1988) (objecting to the ACLU’s role in defending pornography and its “history of protecting the most virulent racism”). But see Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 *DUKE L.J.* 484 (defending the ACLU position).

subjective understanding of harm as techniques for achieving a coherent distinction. I conclude, however, that the nature of contemporary activism, as well as the nature of language itself, precludes the possibility of banning harmful pornography and hate speech while simultaneously protecting activist art. Leftist censors cannot have it both ways.

I sharply criticize leftist censors in this Article.²⁵ I do so, however, with shared hope and great respect for the goals that the anti-pornography and anti-hate speech theorists wish to achieve: an end to the subordination, pain, second-class status and victimization of women, people of color, and other outsiders. My disagreement with these theorists lies with their chosen methods, not their aims. For the sake of argument, I will accept the premise of the leftist censors that some speech may be too vile to merit full protection, that its harms to equal rights are so sweeping and atrocious that its existence as speech should no longer be dispositive in considering its constitutionally protected status. I will accept the possibility that the constitutional protection afforded speech should vary depending on its political ramifications in light of the historical and ongoing oppression of certain groups in this country. But, even then, even making these assumptions, I fear that these new theories have failed on their own terms. The political accomplishments of the left in banning speech could be its greatest undoing, restricting the very activists who depend on *subversion* and *reversal* as their primary techniques of political criticism. In rushing to silence its opposition, the left may inadvertently silence itself. Ultimately, it is not just art that is at stake. A case study of the problem for political art will reveal the deep hermeneutical flaw in the new censors' proposals, a flaw that I believe will ultimately wreak havoc with their goals.

* * *

A note about definitions: In large part, this Article is about the impossibility of coherently defining terms such as "pornography" or "art" or "hate speech." I believe that such words defy definition; I will therefore not attempt to define them. Instead, I will use these words, whose definitions I contest, as placeholders for contested meaning.²⁶ I use them, because I must, to build an argument that will undermine their usage.

25. Throughout this Article, I use the word "censorship" broadly to mean any system or practice of "examin[ing] in order to suppress or delete anything considered objectionable." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 220 (1991). I do not mean to invoke the negative connotations that the word censorship usually harbors. See, e.g., *id.* (listing alternative meaning of censorship as "censorial control exercised repressively"). Indeed, MacKinnon and Dworkin point out that because they view pornography as silencing women, pornography itself is "a practice of censorship." DWORKIN & MACKINNON, *supra* note 3, at 62.

26. See W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1956); Kai Nielsen, *On Rationality and Essentially Contested Concepts*, 16 COMM. & COGNITION 269 (1983).

I will therefore use the term “pornography” broadly to refer to sexually explicit words or images that arguably fall within the definitional boundaries of anti-pornography theorists from both the left and the right.²⁷ In the same way, I will use the term “hate speech” to refer to words or images that arguably fall within the definitional boundaries offered by anti-hate speech theorists. I will use the term “art” to describe works that critics, scholars, galleries, museums, and “artists” generally discuss as “art;” I will also use the term to include work that may be art, but is not currently recognized as such.²⁸ By using these terms so broadly, I mean to illustrate a central point of this Article: there is no way to draw a principled distinction between “art” and “pornography,” or “art” and “hate speech”; a substantial overlap between these terms will always exist.

Numerous other definitional problems will become apparent. Although these problems are detailed within the footnotes, I warn the reader to be particularly wary of such words as “left,”²⁹ “political,” and “activist.”³⁰ In fact, I warn the reader to be wary of words whose

27. Writers have repeatedly noted the difficulty of defining the term “pornography”; many have argued that any definitions of this term are inherently subjective. See, e.g., WALTER KENDRICK, *THE SECRET MUSEUM: PORNOGRAPHY IN MODERN CULTURE* 237 (1987) (asserting that “pornography” is a term used historically to describe sexual materials that ruling classes wished to keep from lower classes); JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENTS* 232 (1985) (arguing that “‘pornography’ is an exceptionally ambiguous yet emotive term, which takes on different meanings in different discourses.”); LINDA WILLIAMS, *HARD CORE: POWER, PLEASURE, AND THE “FRENZY OF THE VISIBLE”* 2 (1989) (discussing “this most difficult and politically charged term”); cf. SUSAN SONTAG, *The Pornographic Imagination*, in *STYLES OF RADICAL WILL* 35, 35 (1969) (noting three types of pornography: “an item in social history . . . a psychological phenomenon . . . [and a] modality or convention within the arts”).

28. This is not to say that critical acceptance by that community is definitive about what “art” means. From my point of view, critical acceptance is a sufficient reason to call a work “art,” but not a necessary one; works currently not accepted by the “art” world nonetheless may be “art.” Ultimately, I believe the word “art” defies definition because “art” may be that which contests the meaning of “art.” See Adler, *Post-Modern Art*, *supra* note 7 (addressing the impossibility of defining “art”); see also DICK HEBDIGE, *SUBCULTURE: THE MEANING OF STYLE* 128-33 (1979) (noting the problem of distinguishing “art” from non-“art”).

29. See *supra* note 2.

30. I use the terms “political” or “activist” art freely to describe the artwork discussed herein. But what is political or activist art? In my view, political or activist art includes not only art that is explicitly political—such as a textual painting that says, “End Pornography Now”—but also artwork that is more subtly political. An artwork may become political because the artist intended it to be so, or because a viewer interpreted it as such. For example, a traditional painting of a slave from the late 18th century may be re-exhibited in a political show about the history of American racism. For a discussion of an art exhibition based on this notion, see *infra* note 229 and accompanying text. Although the artwork may not originally have been intended or received as political, it has become so by virtue of its exhibition.

Many critics have viewed even the most formalistic artwork as having a political dimension. Take, for example, the high minimalist art of the 1960s—pure white cubes or bare fluorescent bulbs. The artists who made this work described it in purely formal terms. Yet in 1968, some critics began to attack this art in political terms, arguing that it participated in capitalist commodity fetishism. Telephone Interview with James Meyer about his forthcoming book, *THE GENEALOGY OF*

meanings may appear to be obvious, such as the categorization of some speech as "good" or "bad" for certain outsider groups. The problem of determining what is "feminist" and what is "sexist," or what is "racist" and what is "anti-racist," is the subject of this Article. These terms should all be read, as should the terms discussed above, as if there were quotation marks around them throughout the Article.

I

LEFTIST CENSORSHIP THEORIES

A. *Feminist Anti-Pornography Theories*

The work of Catharine MacKinnon and Andrea Dworkin dominates discourse on the feminist movement to restrict pornography.³¹ MacKinnon is unabashed; in her view, pornography "is a form of forced sex, a practice of sexual politics, an institution of gender inequality."³² Because MacKinnon believes that pornography "institutionalizes a subhuman, victimized, second-class status for women,"³³ she argues that even if a work has value, it should not be protected if it harms women.³⁴

MINIMALISM (July 1, 1996). Others now reinterpret this same minimalist work with a different political meaning, arguing that it is sexist because it supposedly enshrines a white male point of view. See Anna C. Chave, *Minimalism and the Rhetoric of Power*, ARTS MAG., Jan. 1990, at 44.

Thus, the question of whether artwork is "political" is, in my view, a question of interpretation. I do not mean to assert that all contemporary art is political (just as I do not mean to suggest that it is all "leftist" either in intention or effect). As will become clear, I believe that the question of what political significance an artwork or text should bear depends on the complex interaction of context, audience and artist; the difficulty of making this determination is in large part the subject of this Article.

31. I will focus on their theories when discussing the feminist anti-pornography movement in this Article. Another notable contributor to this field is Cass Sunstein. See Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 [hereinafter Sunstein, *Pornography*]. Sunstein proposes the following definition of regulable pornography: it "must (a) be sexually explicit, (b) depict women as enjoying or deserving some form of physical abuse, and (c) have the purpose and effect of producing sexual arousal." *Id.* at 592. See also CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 803-13 (1993). For a powerful critique of Sunstein's vision of the First Amendment, see Burt Neuborne, *Blues for the Left Hand: A Critique of Cass Sunstein's Democracy and the Problem of Free Speech*, 62 U. CHI. L. REV. 423 (1995). For an evaluation of the relative accuracy of the Sunstein model, the MacKinnon-Dworkin model, and the traditional law of obscenity in defining the speech that they target, see James Lindgren, *Defining Pornography*, 141 U. PA. L. REV. 1153 (1993). I should note, however, that I question Lindgren's implicit assumption that he can distinguish "feminist" sexual speech from "real" or "sexist" pornography.

32. MACKINNON, *FEMINIST THEORY*, *supra* note 3, at 197 (footnote omitted). See generally MACKINNON, *ONLY WORDS*, *supra* note 3. MacKinnon criticizes the protection of pornography as speech, arguing that it is more akin to conduct or action. *Id.* at 10-14. For an argument that MacKinnon is mistaken in perceiving a conflict between free speech and equality, see C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181 (1994).

33. DWORKIN & MACKINNON, *supra* note 3, at 46. MacKinnon has argued that "pornography, with the rape and prostitution in which it participates, institutionalizes the sexuality of male supremacy, which fuses the eroticization of dominance and submission with the social construction of

The traditional test for obscenity,³⁵ set out by the Supreme Court in *Miller v. California*,³⁶ protects any work from being labeled "obscene" that demonstrates "serious literary, artistic, political, or scientific value."³⁷ MacKinnon believes, however, that there should be no exception for works of perceived value. As she explains, concern for literary and artistic value is misplaced:

[I]f a woman is subjected, why should it matter that the work has other value? Perhaps what redeems a work's value among men enhances its injury to women. Existing standards of literature, art, science, and politics are, in feminist light, remarkably consonant with pornography's mode, meaning, and message.³⁸

MacKinnon and Dworkin's most detailed definition of pornography arises in the form of their model civil rights ordinance. This ordinance defines pornography as:

[T]he graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things, or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures or positions of sexual submission, servility, or display; or (vi) women's body parts—including but not limited to vaginas, breasts, or buttocks—are

male and female." MACKINNON, *FEMINIST THEORY*, *supra* note 3, at 197. Pornographic images are doubly harmful from MacKinnon's and Dworkin's perspective; not only do they represent a specific harm done to an actual woman—the sexual act or "traffic in female sexual slavery" documented—but also, by this very representation, they harm women beyond those in the pictures by "conditioning orgasm to sex inequality." DWORKIN & MACKINNON, *supra* note 3, at 46.

34. The question whether pornography causes harm is hotly debated. I will explore that question. For views on this subject, see EDWARD DONNERSTEIN ET AL., *THE QUESTION OF PORNOGRAPHY* (1987); MARCIA PALLY, *SEX & SENSIBILITY* (1994); U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT (1986); Diana E.H. Russell, *Pornography and Rape: A Causal Model*, 9 POL. PSYCHOL. 41 (1988); Mimi H. Silbert & Ayala M. Pines, *Pornography and Sexual Abuse of Women*, 10 SEX ROLES 857 (1984); Evelyn K. Sommers & James V.P. Check, *An Empirical Investigation of the Role of Pornography in the Verbal and Physical Abuse of Women*, 2 VIOLENCE & VICTIMS 189 (1987).

35. In a tortured series of opinions since *Roth v. United States*, 354 U.S. 476 (1957), the Supreme Court has defined "obscenity" as a constitutional term of art. In contrast, the Court has never defined "pornography." It has, however, defined the term "child pornography" as a distinct category of speech beginning with *New York v. Ferber*, 458 U.S. 747, 764-65 (1982).

36. 413 U.S. 15 (1973).

37. *Id.* at 24.

38. MACKINNON, *FEMINIST THEORY*, *supra* note 3, at 202 (footnote omitted); *see also id.* at 199 ("[S]ex in life is no less mediated than it is in art. . . . It is not that life and art imitate each other; in sexuality, they are each other."); *id.* at 203 ("Commercial sex resembles art because both exploit women's sexuality.").

exhibited such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.³⁹

The statute also defines as pornography "[t]he use of men, children, or transsexuals in the place of women."⁴⁰

Operating only through civil remedies, the model ordinance provides five possible causes of action to individuals claiming to have been harmed by pornography.⁴¹ Slightly modified versions of this ordinance were passed by the City Councils of Minneapolis and Indianapolis in the 1980s, but neither is currently in effect.⁴² The Mayor of Minneapolis refused to sign his city's bill,⁴³ and the Seventh Circuit Court of Appeals

39. DWORKIN & MACKINNON, *supra* note 3, at 36.

40. *Id.*

41. The statute restricts pornography by exposing producers and distributors of such material to substantial liability, including damages and injunctive relief. The five causes of action are for: (1) coercion into pornography, (2) trafficking in pornography, (3) forcing pornography on a person, (4) assault or physical attack due to pornography, and (5) defamation through pornography. DWORKIN & MACKINNON, *supra* note 3, at 41-52. Although an injunction under the statute could thereby "stop materials proven to subordinate on the basis of sex from being made, circulated, sold, or shown," MacKinnon and Dworkin nonetheless dispute the characterization of such an injunction's effect as a "ban." *Id.* at 56. Of particular concern from a traditional First Amendment perspective are the trafficking and assault provisions. For example, the model trafficking provision that proclaims, "It shall be sex discrimination to produce, sell, exhibit, or distribute pornography," would allow causes of action to be brought against anyone who makes or displays material that falls within the definition of pornography. *Id.* at 44-45. Although this provision exempts libraries from its purview, it makes no such exception for museums, galleries, political and public fora, or educational venues other than libraries. *See id.*

42. The Minneapolis City Council passed a version of the model statute, which the mayor later vetoed; it included a definition almost identical to the one quoted above. *See The Minneapolis Civil Rights Ordinance, With Proposed Feminist Pornography Amendments*, 2 CONST. COMMENTARY 181, 183-84 (1985) (reprinting proposed amendments to MINNEAPOLIS, MINN., CODE OF ORDINANCES, tit. 7, chs. 139 & 141). The Indianapolis City Council passed a modified version of this definition into law, eliminating subsections (i), (v), (vi), and (vii), and substituting instead as (vi) "[w]omen are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display." INDIANAPOLIS, IND., CODE § 16-3(q) (1984), *reprinted in* American Booksellers Ass'n v. Hudnut, 771 F. 2d 323, 324 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

The Indianapolis City Council further modified the MacKinnon-Dworkin model ordinance by restricting the reach of the trafficking provision. Whereas the other three offenses could involve material from any of the above categories, the trafficking provision applied only to the first five categories of pornography. Material from the sixth category, involving what is presumably less explicitly violent material, could not form the basis for a trafficking offense. *See* INDIANAPOLIS, IND., CODE §§ 16-1, -17, -24, -26 (1984), *reprinted in* Hudnut, 771 F. 2d at 326, 329; *see also* Hudnut, 771 F. 2d at 334 (striking down ordinance as unconstitutional).

43. *See* James Tigue, *Civil Rights and Censorship: Incompatible Bedfellows*, 11 WM. MITCHELL L. REV., 81, 82 (1985); Lindgren, *supra* note 31, at 1156-57. *See generally* Paul Brest & Ann Vandenburg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607 (1987) (describing events surrounding passage of ordinance).

struck down the Indianapolis ordinance on constitutional grounds, terming it "thought control."⁴⁴ MacKinnon has achieved greater success in Canada, where the Supreme Court in *Regina v. Butler*⁴⁵ crafted a new obscenity law premised on the MacKinnon-Dworkin view that pornography should be censored because of the harm it causes to society in general,⁴⁶ and to women in particular.⁴⁷

B. Anti-Hate Speech Theories

1. Background

In recent years, a growing number of critical race scholars have sought to ban hateful speech.⁴⁸ In their quest to reshape the contours of

44. *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986). One startling feature of the *Hudnut* opinion is that the Seventh Circuit accepted part of MacKinnon's premise—that pornography harms women—while nonetheless striking down the anti-pornography ordinance that was based on that premise. The court stated, "Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets." *Id.* at 329. Yet, by invalidating the ordinance nonetheless, the Seventh Circuit in effect decided that the danger of restricting speech was more grave than the harm caused by pornography.

45. [1992] 1 S.C.R. 452 (Can.).

46. The court found that pornography causes harm by "predispos[ing] persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse." *Id.* at 485; see also Jodi Aileen Kleinick, *Suppressing Violent and Degrading Pornography to "Prevent Harm" in Canada: Butler v. Her Majesty the Queen*, 19 BROOK. J. INT'L L. 627, 629 (1993) ("The Canadian Supreme Court reasoned that violent or degrading pornography harms women by changing societal attitudes towards them, contributing to their victimization, and affecting their rights to equality."); Brian Bergman, *The Battle Over Censorship*, MACLEAN'S, Oct. 24, 1994, at 26; Paul Kaihla, *Sex and the Law: Judges Set the Standards on Obscenity*, MACLEAN'S, Oct. 24, 1994, at 30.

47. According to the Court, "Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on the individual's sense of self-worth and acceptance." 1 S.C.R. at 497 (internal quotation marks omitted). For a discussion of the impact of the Canadian ruling, see *infra* notes 136-139 and accompanying text. It is important to note that MacKinnon has explicitly denounced the apparently discriminatory application of the decision by the Canadian government. See *infra* note 138.

48. See *supra* note 4. For further work addressing the problem of hate speech and other issues central to critical race theory, see DERRICK BELL, *AND WE ARE NOT SAVED* (1987); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); David Cole, *Neutral Standards and Racist Speech*, 2 RECONSTRUCTION 65 (1992); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990); Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 SOC. PHIL. & POL'Y 81 (1991); Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95; Lawrence, *supra* note 11; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) [hereinafter Lawrence, *The Id, the Ego*]; Frank Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 HARV. C.R.-C.L. L. REV. 339 (1992); Martha Minow, *Speaking and Writing Against Hate*, 11 CARDOZO L. REV. 1393 (1990); Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 371 (1992); Symposium, *Free Speech and Religious, Racial, and Sexual Harassment*, 32 WM. & MARY L. REV. 207 (1991); Symposium, *Frontiers of Legal Thought II: The New First Amendment*, 1990 DUKE L.J. 375; Symposium, *Hate*

the First Amendment, these scholars catalogue overwhelming harms caused by hate speech. Their arguments against hate speech are varied and, to varying degrees, persuasive. They contend that tolerance⁴⁹ of hate speech represents an intrinsic insult to egalitarian ideals and that such speech harms oppressed groups by reinforcing or creating oppression. They maintain that hate speech causes unspeakable pain to individuals, operating as a form of "spirit-murder."⁵⁰ They argue that rather than ensuring a robust public debate, the tolerance accorded to hate speech under the First Amendment impoverishes the fabled marketplace of ideas by silencing minorities and removing their voices from public debate.⁵¹

Speech After R.A.V.: More Conflict Between Free Speech and Equality?, 18 WM. MITCHELL L. REV. 889 (1992); Henry Louis Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37.

49. For a classic example of the tolerance accorded to hate speech under the First Amendment, see *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (finding that certain ordinances of Skokie, Illinois, drafted to prevent a Nazi demonstration, violated the First Amendment).

50. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987) (recognizing the psychic destruction hate speech victims experience).

51. See Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 275 (1991). Post divides the harms said to arise from racist speech into five rough categories, the first four of which I have identified. See *id.* at 273-277. Post also proposes a fifth category: the problem of hate speech on campus, which raises its own special concerns. See *id.* at 275-77.

This Article will not consider directly the special problem of controlling hate speech on campuses. As many scholars have noted, such factors as the vulnerability of students, the importance of having an open learning environment, and the absence of government funding at some schools raise certain questions for school speech codes that are different from the questions posed by criminal or civil government speech laws. See, e.g., Alan E. Brownstein, *Regulating Hate Speech at Public Universities: Are First Amendment Values Functionally Incompatible With Equal Protection Principles?*, 39 BUFF. L. REV. 1 (1991) (examining regulation of hate speech on public property); J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991) (arguing that different rules should apply to university settings); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) (examining racism on campus); Thomas C. Grey, *Responding to Abusive Speech on Campus: A Model Statute*, 1 RECONSTRUCTION 50 (1990) (proposing speech regulation policy); Rhonda G. Hartman, *Revitalizing Group Defamation As a Remedy for Hate Speech on Campus*, 71 OR. L. REV. 855 (1992) (advancing theory for hate speech restriction); Lawrence, *supra* note 11, (discussing debate over racist speech on campus); Henry W. Saad, *The Case for Prohibitions of Racial Epithets in the University Classroom*, 37 WAYNE L. REV. 1351 (1991) (arguing for restriction of racial slurs); Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933 (1991) (asserting that university hate speech restrictions are illegitimate); Strossen, *supra* note 24 (arguing against regulation of hate speech on campus).

For two cases striking down campus speech codes, see *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991) (invalidating system-wide university code as vague and overbroad), and *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (voiding speech code as vague and overbroad, in violation of the First Amendment).

Despite these two decisions, and the Supreme Court's ruling in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), invalidating a hate speech ordinance, universities persist in examining ways to restrict racist speech. See, e.g., Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities:*

Two general approaches to prohibiting hate speech have emerged.⁵² The first approach, termed “accommodationist” for its attempt to incorporate traditional First Amendment concerns, endorses narrow measures that proscribe only face-to-face, intentional vilification of a person or small group of persons on the basis of a protected characteristic such as race.⁵³ The second approach is more far-reaching; it leaves the First Amendment behind and looks to the Fourteenth Amendment and its guarantee of equality to justify bans on a wide array of hate speech. Theorists who follow this approach would make hate speech unlawful in a broad range of settings, not merely in face-to-face individual confrontations.⁵⁴

It is this latter, far-reaching school that I wish to consider here. Like the feminist anti-pornography school that also seeks to prohibit objectionable speech in almost all settings, this school presents the greatest interpretive challenge to those who wish to devise and execute a scheme of political censorship. Face-to-face insults do not present the myriad interpretive difficulties that are raised when speech is presented publicly or circulated freely.⁵⁵ In face-to-face incidents, the perpetrators and the victims are identifiable, and the context is fixed. In contrast, the regulation of freely disseminated or publicly displayed speech presents more formidable interpretive problems. In such cases, victims are no longer a readily identifiable class. Furthermore, the stuff of activism—books, pamphlets, posters, videos, film, works of art—has no limit on

Why Our Notion of “A Just Balance” Changes So Slowly, 82 CALIF. L. REV. 851 (1994) (proposing two ways hate speech rules could be drafted in the wake of *R.A.V.*).

52. In an earlier jurisprudential era, the concept of “group libel” would have proved to be a promising theory under which to restrict hate speech. See *Beauharnais v. Illinois*, 343 U.S. 250 (1952). Indeed, many of the new anti-hate speech theorists deliberately hearken back to that concept. See, e.g., Hartman, *supra* note 51. In *Beauharnais*, the Court upheld a statute criminalizing speech that “exposes the citizens of any race, color, creed or religion to contempt.” 343 U.S. at 251 (quoting ILL. REV. STAT. ch. 38, div. 1, § 471 (1949)). The defendant, *Beauharnais*, was president of a racist organization that had distributed racist leaflets. See *id.* at 481. Although never formally overruled, *Beauharnais* is generally considered to be a dead letter in light of subsequent expansive First Amendment decisions such as *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Garrison v. Louisiana*, 379 U.S. 64 (1964), and *New York Times v. Sullivan*, 376 U.S. 254 (1964). See also RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 161 (1992) (stating that the *Beauharnais* theory of the First Amendment is “no longer viable; modern First Amendment principles have passed it by”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-17, at 926 (2d ed. 1988) (observing that “subsequent cases seem to have sapped *Beauharnais* of much of its force”).

53. See Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 249 (1991). According to Massaro, this approach describes her own work as well as Greenawalt’s, *supra* note 48, and Grey’s, *supra* note 48.

54. See Massaro, *supra* note 53, at 235.

55. I do not mean to suggest, however, that face-to-face incidents are interpretively unproblematic. Rather, I believe that the interpretive problems present in such situations are multiplied in the case of publicly disseminated speech.

who may view it, who may present it, or where or in what context it may be seen.⁵⁶

2. Definitions of Hate Speech

For the purposes of analyzing the anti-hate speech school in this Article, I will focus on the work of a scholar who is one of the leading proponents of the anti-hate speech movement: Mari Matsuda. I have chosen Matsuda's work, rather than that of other significant anti-hate speech scholars, because in formulating her definition of actionable hate speech, Matsuda has made the most elaborate attempt to overcome the interpretive hurdles inherent in any such definition.⁵⁷

Matsuda calls for formal criminal and administrative sanctions as a response to racist hate speech.⁵⁸ As she explains, "[r]acist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group."⁵⁹ She describes in chilling detail the harms that speech such as "insulting nouns for racial groups, degrading

56. A further crucial distinction between the two schools is that the aim of the accommodationist school—the regulation of face-to-face insults—may be possible to accomplish within existing parameters of First Amendment law, whereas the aim of the latter, more far-reaching school, almost certainly will not. Some face-to-face insults are sure to fall under the "fighting words" doctrine of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). *Chaplinsky* has been limited in effect by *Cohen v. California*, 403 U.S. 15 (1971), to apply only to direct personal insults in face-to-face situations. *See id.* at 20; *see also* *Street v. New York*, 394 U.S. 576, 592 (1969) (arguably limiting the scope of *Chaplinsky* by referring to a "small class of 'fighting words'"). *See supra* note 5.

Of course, in the wake of the Supreme Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), any statute that seeks to curtail hate speech by banning fighting words must avoid the fate that the St. Paul ordinance met in that case. *R.A.V.* invalidated an ordinance criminalizing speech that "one knows . . . arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender," as applied to burning a cross on the property of a black family. *Id.* at 2541 (quoting St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990)). The Court held that an ordinance banning fighting words cannot be "underinclusive" in a way that evidences content discrimination; it cannot constitutionally proscribe only one class of fighting words, such as those based on race or gender, without banning all fighting words, no matter what their content. *See R.A.V.*, 505 U.S. at 377; Elena Kagan, *Regulation of Hate Speech and Pornography after R.A.V.*, 60 U. CHI. L. REV. 873, 874-75 (1993).

As the Court's decision in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), revealed, however, the decision in *R.A.V.* is no constitutional impediment to criminal sentencing statutes that enhance a defendant's penalty whenever he or she "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person" *Id.* at 481; (quoting Wis. STAT. § 939.645(1)(b) (1989-90)) (alteration in original).

57. *See* Matsuda, *supra* note 10. Matsuda's argument for imposing criminal sanctions on racist speech expands on Richard Delgado's call for a tort remedy for racist insults and epithets. *See id.* at 2321; Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

58. In this respect, her theory differs markedly from Catharine MacKinnon's: while the latter relies on a private scheme of civil sanctions under which pornography is defined as a civil rights violation, *see* DWORKIN & MACKINNON, *supra* note 3, at 41-57, Matsuda envisions a day in which there is public, criminal enforcement of anti-hate speech rules. *See* Matsuda, *supra* note 10, at 2321.

59. *See* Matsuda, *supra* note 10, at 2332.

caricatures, [and] threats of violence"⁶⁰ causes its victims. Racist speech, she contends, is both *sui generis* and universally condemned.⁶¹ Therefore, Matsuda argues, we should restrict racist speech based on content and abandon the value-neutral approach of traditional First Amendment jurisprudence.

Wary of the overbreadth problems that often plague proposals to ban speech, Matsuda believes that a class of prohibited racist hate speech can be narrowly defined. She writes,

In order to distinguish the worst, paradigm example of racist hate messages from other forms of racist and nonracist speech, three identifying characteristics are suggested here:

1. The message is of racial inferiority;
2. The message is directed against a historically oppressed group; and
3. The message is persecutorial, hateful, and degrading.

Making each element a prerequisite to prosecution prevents opening of the dreaded floodgates of censorship.⁶²

After setting forth this definition, Matsuda considers how to resolve the "hard cases"⁶³—cases in which it is questionable whether speech should be actionable. These hard cases include whether to prohibit wordless symbols (such as the Nazi swastika) that proliferate without a textual context to guide our interpretation of them, racist speech by outsider group members against insider groups (anti-white speech by blacks, for example), or cases of literary realism or "neutral reportage" in which hate speech is employed in the pursuit of authenticity or accuracy.⁶⁴ Matsuda believes that her "narrow" three-pronged definition of hate speech will guide decisions about whether to ban speech in each of these examples.⁶⁵

Thus, in cases involving wordless symbols such as swastikas or burning crosses, Matsuda explains that "[i]f the historical message, known to both victim and perpetrator, is racist persecution, then the sign is properly treated as actionable racist speech."⁶⁶ In the case of literary realism or reportage, Matsuda would look to the intent of the presenter

60. *Id.* at 2333.

61. *But see* Post, *supra* note 51, at 291 (arguing that the prevalence of racist speech and racist incidents "substantially undermines the conclusion that racism is 'universally condemned' in any sense relevant for first amendment analysis") (footnote omitted).

62. Matsuda, *supra* note 10, at 2357-58.

63. *Id.* at 2361.

64. *See id.* at 2363-64, 2367-68.

65. Thus, in the case of racist speech directed by blacks against whites, because the message is not "directed against a historically oppressed group," the speech is protected under her theory. Matsuda states, however, that she would be "inclined to prohibit" racist speech directed, for example, by blacks against Jews, because Jews are a historically oppressed group. *Id.* at 2364.

66. *Id.* at 2366.

of such material and also to the “victim-group members to tell us whether the harm is real harm to real people.”⁶⁷ In all of these cases then, Matsuda stresses that her definition, along with consideration of the “victim group’s story,” will determine whether speech should be actionable.

On closer reading however, Matsuda’s stance on how to decide the “hard cases” remains curiously muddled. In her attempt to navigate between concern for the victim’s story and principles of free speech, Matsuda does not settle the issue of which should matter more: a victim’s pain or a speaker’s intent. As we shall see, her failure to do so has dramatic implications, because the rivalry between these two concerns strikes at the heart of the debate over contemporary activist speech.⁶⁸

II

ACTIVIST REALITY: WORKS AT RISK

[A]mong the radical fringe of the contemporary “arts community[.]” [s]ubversion is art, art subversion.

Martha Bayles⁶⁹

67. *Id.* at 2368. Matsuda has explicitly restricted her theory to the problem of racist and anti-Semitic speech, stating that although anti-gay and anti-lesbian speech “require public restriction, these forms also require a separate analysis because of . . . the different way in which sex operates as a locus of oppression.” *Id.* at 2332. She has also exempted pornography from the scope of her definition. *See id.* at 2331-32. In a footnote, she continues this argument: “Violence and hate speech directed against women, gays, and lesbians, for example, are commonplace, socially accepted, and widely distributed across lines of race, class, and geography.” *Id.* at 2332 n.66. In this way, Matsuda implies that the reason homophobic speech presents problems beyond the scope of her article is that racist speech is “universally condemned,” whereas homophobic speech is not. *Id.* at 2359. Others, however, have questioned whether racism is in fact universally condemned. *See Post, supra* note 51, at 291; *see also* Massaro, *supra* note 53, at 245 (claiming that the “wrongness” of hate speech, including racist speech, remains contested). This argument undermines one of Matsuda’s bases for limiting her analysis to racist speech.

A potentially more persuasive argument for restricting only racist hate speech, as opposed to hate speech directed at other groups, may lie in the Reconstruction Amendments, which enshrined the constitutional commitment to racial equality. *See* Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992) (arguing that the Justices in *R.A.V.* overlooked the centrality of the Reconstruction Amendments in the hate speech debate). *But see* Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639 (1993) (criticizing Amar’s thesis).

Despite Matsuda’s express limitation of her work, I will nonetheless consider the implications of her theory for all kinds of hate speech—not just the racist speech she considers, but also the homophobic speech that she does not. I will do so for two reasons. First, Matsuda has produced what I consider to be the most detailed and thoughtful definition of hate speech. Second, I believe that pushing Matsuda’s theory beyond its stated scope reveals the problem that underlies its application to any hate speech, including the speech that she wishes it to govern.

68. *See infra* Part IV.E.

69. Bayles, *supra* note 15, at A19.

[A]ll destructive discourses . . . must inhabit the structures they demolish . . .

Jacques Derrida⁷⁰

[T]he author employs the speech of another, but . . . he introduces into that other speech an intention which is directly opposed to the original one. The second voice, having lodged in the other speech, clashes antagonistically with the original, host voice and forces it to serve directly opposite aims. Speech becomes a battlefield for opposing intentions.

Mikhail Bakhtin⁷¹

Is there a way to distinguish work that looks sexist and participates in sexism from work that looks sexist in order to defeat sexism? In this Part, I will analyze political and artistic speech that reappropriates, reclaims, and reverses pornographic and hateful words and images. I believe that the authors of such speech, despite what many interpret to be their activist goals,⁷² would be at risk under leftist censorship regimes. Their artwork—which demonstrates the possibility of a subversive use of sexist, pornographic, homophobic, or racist language—poses significant problems for leftist censorship theories. As these theories now stand, they would ban this work just as surely as they would ban the very pornography and hate speech this work purports to subvert.

A. *The New Political Art*

[T]he arts . . . have become highly politicized. Many academics and artists now see their purpose not as revealing truth or beauty, but as achieving social and political transformation.

Lynne V. Cheney⁷³

The late 1980s and early 1990s introduced a dramatic shift in contemporary art. The shift has occurred on two levels. First, art has become overtly political; artists have made race, gender, sexual orientation, and the AIDS crisis their subjects. Second, unlike previous artistic

70. JACQUES DERRIDA, *La Parole Soufflée*, in WRITING AND DIFFERENCE 194 (Alan Bass trans., 1978).

71. Mikhail Bakhtin, *Discourse Typology in Prose*, in READINGS IN RUSSIAN POETICS 176, 185 (Ladislav Matejka & Krystyna Pomorska eds., 1971).

72. I will address two separate questions in Part IV: whether their intentions are truly activist, and whether their intentions should even matter for leftist censors who are interpreting their speech.

73. *National Endowment for the Humanities, National Endowment for the Arts: Hearing of the Subcommittee on Interior Appropriations of the House Appropriations Committee*, 104th Cong., 1st Sess. 940 (1995) (testimony of Lynne V. Cheney, Distinguished Fellow, American Enterprise Institute).

turns toward the political, recent contemporary art has been distinctly postmodern in its strategies.⁷⁴

Attempts to define postmodernism—a movement that has swept the arts (and other disciplines) over the last two decades—have often failed, perhaps because postmodernism represents not a single clear movement, but a pluralist and multi-faceted rebellion against the dictates of high Modernism.⁷⁵ To evaluate the new political art for the purposes of leftist censorship, however, one consistent aspect of postmodernism is essential to understand—its reliance on principles of deconstruction. As the late critic Craig Owens explained, deconstruction “is characteristic of postmodernist art in general. . . . When the postmodern work speaks of itself, it is no longer to proclaim its autonomy, its self-sufficiency, its transcendence; rather it is to narrate its own contingency, insufficiency, lack of transcendence.”⁷⁶

Drawn from such fields as linguistics, philosophy, psychoanalysis, and literary criticism, deconstruction is a critical practice⁷⁷ that explores the failures and contradictions of language and of the systems of thought derived from it. As the guru of deconstruction, the French critic Jacques Derrida writes that deconstruction begins from the notion that words “have a double, contradictory, undecidable value.”⁷⁸

I do not purport to offer here an introduction to deconstruction or its relation to postmodernism. But as this Article unfolds, I will focus on

74. The postmodern tendency of this work defies the classic Marxist model of political art as propaganda, based on a straightforward teleological narrative. See Meyer, *AIDS and Postmodernism*, *supra* note 22.

75. See Fredric Jameson, *Postmodernism and Consumer Society*, in *THE ANTI-AESTHETIC*, *supra* note 22, at 111, 112. See generally *ART AFTER MODERNISM*, *supra* note 18; Adler, *Post-Modern Art*, *supra* note 7. Although Modernism as a movement had its origins in the nineteenth century, it was a particular breed of Modernism—“late Modernism”—that became the focus for postmodern artists and critics. Late Modernism, associated with the critics Clement Greenberg and Michael Fried in the 1950s and 60s, was a purist, formalist doctrine. For two classic works of late Modernist art theory, see CLEMENT GREENBERG, *ART AND CULTURE* (1961), and Michael Fried, *Art and Objecthood*, *ARTFORUM*, Summer 1967, at 12. See generally *MODERN ART AND MODERNISM* (Francis Francina & Charles Harrison eds., 1982).

76. CRAIG OWENS, *The Allegorical Impulse: Toward a Theory of Postmodernism, Part 2*, in *BEYOND RECOGNITION: REPRESENTATION, POWER, AND CULTURE* 70, 85 (Scott Bryson et al. eds., 1992). See generally Meyer, *Notes on a Video*, *supra* note 22 (noting pervasive use of deconstruction in AIDS and feminist activism).

77. Because deconstruction explores the failures of thought systems, it is conceived of as a practice rather than as a theory. See CHRISTOPHER NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* 31 (1982) (“Deconstruction is . . . an activity of reading which remains closely tied to the texts it interrogates, and which can never set up independently as a self-enclosed system of operative concepts.”). See generally JONATHAN CULLER, *ON DECONSTRUCTION* (1982); J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743 (1987).

78. JACQUES DERRIDA, *DISSEMINATION* 221 (Barbara Johnson trans., 1981). Or as the literary critic Geoffrey Hartman argues, “Is it not better to suppose that words are inscribed for reinscription rather than for definitiveness; that all texts are infinitives; that revision, reinterpretation, rewriting are not flaws . . . ?” GEOFFREY H. HARTMAN, *CRITICISM IN THE WILDERNESS* 169 (1980).

different aspects of deconstruction that are directly relevant to the new postmodern political art and that help to explain its vulnerability to leftist censorship. In the following Section, I wish to focus on one aspect of deconstructive practice in particular: its tendency to work from *within* the system that it criticizes, revealing internal contradictions by using "the conceptual apparatus of the very thing that it wishes to subvert."⁷⁹ As one scholar writes, "[t]he practitioner of deconstruction works within the terms of the system but in order to breach it."⁸⁰ Thus, "to deconstruct a discourse is to show how it undermines the philosophy it asserts, or the hierarchical oppositions⁸¹ on which it relies."⁸²

Out of the deconstructive vision of language has sprung a postmodern art that depends on co-opting, reversing, and destabilizing words and images. Rather than attempting to create new, "original" work, many contemporary artists rely on the appropriation of preexisting images and words.⁸³ As a result, contemporary anti-pornography and anti-hate speech works are often difficult to distinguish from the pornography and hate speech that they attack. Recognizing the manifesto that "the text deconstructs itself," the artists and political speakers whom I will describe below seize directly on the failures of the hate

79. Balkin, *supra* note 77, at 760. Derrida writes, "Deconstruction does not consist in passing from one concept to another, but in overturning and displacing . . ." JACQUES DERRIDA, *MARGINS OF PHILOSOPHY* 329 (Alan Bass trans., 1982). This tendency is evident in the postmodernist rejection of the modernist belief that there is a possibility of working from a "pure" position. Rather, as postmodern artists such as Barbara Kruger recognize, "One has to work within the confines of the system." Barbara Kruger, *quoted in* JAMES MEYER, *WHAT HAPPENED TO THE INSTITUTIONAL CRITIQUE?* 11 (1993) (catalogue from American Fine Arts Gallery).

As critic Judith Butler explains it, there is a political urgency to this strategy of working within the system:

If sexuality is culturally constructed within existing power relations, then the postulation of a normative sexuality that is "before," "outside," or "beyond" power is a cultural impossibility and a politically impracticable dream, one that postpones the concrete and contemporary task of rethinking subversive possibilities for sexuality and identity within the terms of power itself.

JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 30 (1990).

80. CULLER, *supra* note 77, at 86.

81. A central project of deconstruction is to examine and reverse traditional hierarchical oppositions as a means of exposing that accepted notions of "truth" are socially constructed. Derrida demonstrates the way in which each term in a hierarchical opposition depends on the other, in part by bearing within it the trace of its opposite. (Derrida uses the word "trace" as a metaphor for the effect of the opposite concept, which is no longer present but has left its mark on the concept we are now considering.) See JACQUES DERRIDA, *OF GRAMMATOLOGY* 46-47 (Gayatri Chakravorty Spivak trans., 1976).

82. CULLER, *supra* note 77, at 86. As Derrida has argued, deconstruction through "a double gesture . . . put[s] into practice a reversal of the classical opposition and a general displacement of the system. It is on that condition alone that deconstruction will provide the means of *intervening* in the field of oppositions it criticizes." DERRIDA, *supra* note 79, at 392.

83. See Jean Baudrillard, *The Precession of Simulacra*, in *ART AFTER MODERNISM*, *supra* note 18, at 253, 254; Rosalind Krauss, *The Originality of the Avant-Garde: A Postmodernist Repetition*, *OCTOBER*, Fall 1981, at 47, 64-66.

speech and pornography they oppose, co-opting what they despise; they mine the potential of language to do itself in. Leftist censorship is therefore a threat to leftist political art. While the former denies the contradictory nature of language, the latter exploits it.

B. Activist Uses of Hate Speech

I've shed "nigger boy." Now I'm "faggot queen fairy."

Marlon T. Riggs (gay, black filmmaker)⁸⁴

Infected Faggot:

name of group for HIV-positive members of
"Queer Nation," a gay activist organization.⁸⁵

Contemporary art which examines racial themes is commonly satirical, ironic, and multi-dimensional, making it subject to many interpretations. Typically, then, it raises many more questions than it answers, so that the reception it summons is mixed at best, furiously hostile at worst.

Steve C. Dubin⁸⁶

As legal theorists debate one another about banning the words and symbols that constitute hate speech, they have failed to notice that many of these words and symbols have taken an unforeseen twist.⁸⁷ Hate speech, it seems, can play dual roles. Sometimes, the very words and images that anti-hate speech theorists target serve as instruments of activism in the communities these theorists seek to empower through censorship.

We need look no further for an example of this activist technique of repositioning hate speech than the central symbol of the AIDS activist movement: the pink triangle. Now a symbol of empowerment for a marginalized group, the pink triangle derives not from a proud moment in gay history but from a tragic one, the Holocaust, when homosexuals were slaughtered and the pink triangle was the equivalent for homosexuals of the yellow star for Jews.⁸⁸ This symbol of hatred and victimization, now turned right-side up, has become the sign of awareness, liberation, and life and death stakes in quite another context.

84. Marlon T. Riggs, *quoted in TONGUES UNTIED* (Frameline 1991).

85. Dennis Cooper, *Johnny Noxzema to the Gay Community: "You Are the Enemy," VILLAGE VOICE*, June 30, 1992, at 31, 32.

86. DUBIN, *supra* note 15, at 55.

87. My analysis of hate speech is identical to my analysis of pornography. For the sake of clarity, I have divided these analyses into two Sections because scholars have tended to view them as distinct, albeit closely related concerns. See *supra* note 11.

88. See Stuart Marshall, *The Contemporary Political Use of Gay History: The Third Reich, in HOW DO I LOOK?: QUEER FILM AND VIDEO* 65, 68-71 (Bad Object Choices ed., 1991) [hereinafter *HOW DO I LOOK?*].

In a similar reversal, the word "queer," an epithet connoting not just hatred but often impending violence—"queer bashings"—has given birth to a militant gay activist group, "Queer Nation." This group wears the epithet of hatred as a badge of pride. Indeed, the word "queer" has become the word of choice for many gays and lesbians. Consider as well the name of a recently formed subgroup of HIV positive members of Queer Nation, mentioned above: "Infected Faggot."⁸⁹ Two new gay publications, called *Fruit* and *Lisp*, continue this trend of appropriating negative stereotypes and words about homosexuals.

Similar reversals are occurring with other hate speech words. Even the hateful word "nigger" has taken on an activist use, functioning, for example, as part of the title of the rap band N.W.A ("Niggaz With Attitude").⁹⁰ Although the term "nigger" has long been an element of black vernacular, the word has recently emerged into the mainstream, primarily through rap music, and has come to be viewed by some as a term of empowerment when used by blacks.⁹¹ Similarly, some women in rap culture have embraced the word "bitch" to refer to themselves and each other, defiantly responding to the prevailing use of the word by many male rappers.⁹² Still other women have begun to call themselves "girls," violating the taboo on the use of the term since the feminist movement of the 1960s.⁹³ Young punk rock women calling themselves "riot grrrls" wield the word girl (with a fierce change of spelling) as a challenge. Street culture is rife with reversals, as if the very act of switching the meaning of a word were itself subversive.⁹⁴

Yet leftist anti-hate speech scholars have largely ignored this phenomenon,⁹⁵ even as it occurs with increasing frequency in the very

89. Cooper, *supra* note 85, at 32. See also Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1, 27 n.79 (1995) (citing Allan Hunter, *Same Door Different Closet: A Heterosexual Sissy's Coming-Out Party*, in *HETEROSEXUALITY* 150, 152-53 (Sue Wilkinson & Celia Kitzinger eds., 1993) (describing a man who embraced the derogatory term "sissy").

90. See Michel Marriott, *Rap's Embrace of "Nigger" Fires Bitter Debate*, *N.Y. TIMES*, Jan. 24, 1993, § 1, at 1.

91. See *id.* at 1. Other outsider cultures use this technique. See, e.g., ELAINE H. KIM, *ASIAN AMERICAN LITERATURE* 244-45 (1982) (quoting poems called "Chinks" and "Japs" that are filled with hate language and stereotypes about Asian Americans).

92. There is even a female rap group called B.W.P.—"Bitches With Problems." Interview with Rob Tannenbaum, rock critic for *Details*, in East Hampton, N.Y. (Aug. 24, 1995).

93. The use of the word "gid" is particularly evident in "zine" culture. See, e.g., BUST, Spring/Summer 1996 ("Bad Girls" issue).

94. For example, the word "bad" underwent a reversal to signal its precise opposite. The word "black" (when used to refer to African-Americans) was considered to be a derogatory term until it was adopted by "blacks" themselves.

95. Matsuda does acknowledge, for example, that certain communities "may tolerate racial insults as a form of word play," and she insists that the recipient community's standard must be called on to distinguish playful insults from serious ones. Matsuda, *supra* note 10, at 2364. At another point in her article, Matsuda recognizes "the use of racist slurs in the interest of realism in books, films, and

communities they seek to empower. As one leftist censorship advocate writes, "Most people today know that certain words are offensive and only calculated to wound. *No other use remains* for such words as 'nigger,' 'wop,' 'spick,' or 'kike.'"⁹⁶ Such critics have overlooked what is actually happening with activist speech.

Consider, for example, the recent *Black Male* show at the Whitney Museum of American Art, an important exhibition exploring racial themes. This show was replete with racist stereotypes. The introductory wall text to the exhibition emphasized this tactic: "Many artists appropriate the media imagery that has long promoted stereotypes of the black male Others use the very parody or exaggerated characteristics of stereotyped images to shock us into recognizing that the images present an obviously false reality."⁹⁷

Adrian Piper's *Vanilla Nightmare* series, for example, included monstrous images of blacks drawn onto pages of the *New York Times*, presenting blacks as dangerous savages or sexual predators.⁹⁸ Lyle Ashton Harris explained his series of photographs called *Constructs* by stating, "I chose to reclaim and play on dominant racial and sexual myths about black people. . . ."⁹⁹ The explanatory text to his self-portraits stated that Harris "reverses the historical terms of . . . stereotypical black behavior."¹⁰⁰ *Black Male* also included work by Robert Colescott, who takes exaggerated stereotypes of blacks and inserts them into canonical (i.e., white) art masterpieces. Colescott's work, despite his activist intentions, has nonetheless sparked controversy among blacks.¹⁰¹

Consider from this perspective one of the most important targets of the leftist censors: the symbols generated by and associated with the Ku

theater." Again, she calls on the experience of victim group members as a guide. *Id.* at 2369. However, the kind of reversal I am discussing goes beyond mere "word play" or "realism." It is deadly serious and it is the central thrust of activist speech.

96. Delgado, *supra* note 57, at 145 (emphasis added) (footnote omitted).

97. Introductory wall text, *Black Male*, Whitney Museum of American Art (1994). Many of the works are directly critical of the media. For example, Glen Ligon's *Profiles Series* (1990-91) presents profiles of the eight defendants in the Central Park jogger rape trial as featured in the *New York Times*. Ligon appropriates news media coverage of the defendants to highlight what he believes are the racist stereotypes that "objective" mainstream media perpetuate.

98. See Golden, *supra* note 12, at 81. Other works by Adrian Piper exhibit a similar strategy. For example, her *Four Intruders Plus Alarm Systems* (1980) consists of slide projections of black men "pictured in an overtly racist manner." *Id.* at 26. Accompanying it is a narrative soundtrack of viewers responding with fear.

99. Wall text, *Black Male*, Whitney Museum of American Art (1994) (accompanying display of Harris' work).

100. *Id.*

101. See DUBIN, *supra* note 15, at 56 & n.43; see also Roberta Smith, *Art in Review*, N.Y. TIMES, Jan. 12, 1996, at C31 (describing black artist Fred Wilson's recent show in which he exhibited, altered, and in some cases smashed ceramic figures of mammies, picaninnies, and other "blatantly racist" images).

Klux Klan.¹⁰² While the sight alone of a white Klan robe can conjure up tremendous psychic pain and fear for blacks, these same images provide fodder for anti-Klan speakers; the work they produce is sometimes even difficult to distinguish from pro-Klan propaganda. Andres Serrano, the Hispanic/black artist who achieved notoriety when Senator Jesse Helms singled out a Serrano photograph entitled *Piss Christ* in a show partially sponsored by the National Endowment for the Arts ("NEA"), went on to make enormous, regal, even glorious color photographs of Klansmen in their white robes.¹⁰³ One might interpret these photographs as conveying a powerful anti-Klan message. But how do we know that these presumably activist images are intended as such, or actually function in an activist fashion? And if indeed the work does play an activist anti-Klan role, is there a rule of censorship that would exempt Serrano's photographs while banning other symbols of the Klan that perpetuate rather than protest its racist agenda?

Nor is homophobic speech immune from such interpretively challenging uses. A piece called *America* by David Wojnarowicz,¹⁰⁴ an extremely outspoken AIDS activist who died in 1992 of AIDS,¹⁰⁵ presents a photograph of the words "Fight AIDS Kill a Quere [sic]" scrawled in graffiti.¹⁰⁶ Wojnarowicz mirrors the homophobic graffiti he discovered to subvert it and reveal its horror. The misspelling of the contemptuous word "quere" underscores the ignorance of the graffiti's author. To articulate a rule that would distinguish between David Wojnarowicz's activist work and the hate speech that he photographed is a formidable task.¹⁰⁷ As I shall argue below, I believe this is the central task facing leftist censors.

102. See, e.g., Matsuda, *supra* note 10, at 2365-66 (citing National Alliance Against Racist and Political Repression, *Draft Legislation to Stop Racist Hate Group Activity*, 44 GUILD PRAC. 131 (1987)) (recognizing that symbols such as white-hooded robes, burning crosses, and swastikas are associated with acts of violence).

103. See C. Carr, *Going to Extremes*, VILLAGE VOICE, Nov. 20, 1990, at 67.

104. Wojnarowicz's work was at the center of a controversy involving NEA funding of an AIDS show in New York. See Robert Atkins, *Black Thursday*, VILLAGE VOICE, Nov. 26, 1989, at 31; see also *Mr. Frohnmayer's Fumble*, N.Y. TIMES, Nov. 17, 1989, at A38 (approving of the decision by John Frohnmayer, director of the NEA, to re-award funding for the show); Grace Glueck, *Border Skirmish: Art and Politics*, N.Y. TIMES, Nov. 19, 1989, § 2, at 1 (describing the dispute).

105. See Michael Kimmelman, *David Wojnarowicz, 37, Artist in Many Media*, N.Y. TIMES, July 24, 1992, at D17 (obituary).

106. See WITNESSES, *supra* note 151, at 31. Another controversy arose in Richmond, Virginia, over an artist who used a similar strategy. An art gallery covered its walls with paper after a prosecutor advised them they might be subject to obscenity charges for displaying an art installation by Carlos Gutierrez-Solano which included nudity as well as anti-gay comments such as, "If you want to stop AIDS, shoot the queers." See DUBIN, *supra* note 15, at 219.

107. Wojnarowicz's work employs graphic sexual imagery that would render it vulnerable to feminist anti-pornography theory as well. For example, his *Sex Series (for Marion Scemama)* uses images of peepholes revealing explicit sex acts. See David Deitcher, *Ideas and Emotions*, ARTFORUM, May 1989, at 122, 123.

C. Feminist Art And Pornography

Lately I've been reclaiming images from a culturally abused and abusive history of sexual representation.

Marilyn Minter (artist)¹⁰⁸

To some extent the feminist debate over pornography has been caught in a binary structure: either you're pro or you're anti. While feminists like MacKinnon fight pornography as a root of women's continued victimization, other feminists rely on sexually explicit images in their work as a means of advancing feminism. Many of these women call themselves "sex positive" or "sex radical" feminists.¹⁰⁹ Coinciding with the sex positive movement has been an emergent tendency within the lesbian community to embrace pornography and sex, exemplified in the popularity of lesbian magazines such as *On Our Backs* and

108. Marilyn Minter, quoted in *Does Gender Make a Difference in Contemporary Art?*, TEMA CELESTE (International Edition), Autumn 1992.

109. See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (exploring "sex radical" critique of early 1980s and analyzing why it failed to sustain influence on feminist or other legal theory); see also NADINE STROSSEN, *DEFENDING PORNOGRAPHY* (1995); Ann Barr Snitow, *Mass Market Romance: Pornography for Women is Different*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 245 (Ann Snitow et al. eds., 1983) (arguing that pornography can serve a liberating feminist role); Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099 (1993) [hereinafter Strossen, *A Feminist Critique*]; Sallie Tisdale, *Talk Dirty to Me: A Woman's Taste for Pornography*, HARPER'S, Feb. 1992, at 37 (describing author's pleasure in pornography).

Some feminists have formed organizations devoted to ensuring women's free access to sexually explicit material; they include the Feminist Anti-Censorship Task Force ("FACT"), organized to oppose the MacKinnon-Dworkin ordinances, and the more recently formed Feminists for Free Expression. FACT submitted a brief in the *Hudnut* case in 1985, arguing that the Dworkin-MacKinnon Indianapolis ordinance was unconstitutional on sex equality grounds. Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Task Force, et al. in American Booksellers Ass'n Inc. v. Hudnut*, reprinted in 21 U. MICH. J.L. REFORM 69 (1987-88).

In addition to these groups, the National Coalition Against Censorship ("NCAC") established a "Working Group on Women, Censorship and 'Pornography'" in 1992. See National Coalition Against Censorship, *The Sex Panic: Women, Censorship and "Pornography"* (1993) (conference report); see also MARCIA PALLY, *SENSE & CENSORSHIP* (1991) (analyzing studies and disputing arguments that pornography causes violence, rape, and sexism).

In addition to those who see the possibility of a feminist use of pornography, there are others who attribute other forms of "value" to pornography. See, e.g., SONTAG, *supra* note 27, at 70-71 (contending that pornography has "peculiar access to some truth"). For an analysis of the history of pornography and its frequent links to political subversion, see *THE INVENTION OF PORNOGRAPHY* (Lynn Hunt ed., 1993); see also Gertrud Koch, *The Body's Shadow Realm*, OCTOBER, Fall 1989, at 3.

The MacKinnon-Dworkin statute would certainly threaten work by feminists who use sexual imagery to support an explicitly pro-pornography (not merely anti-censorship) stance. In 1992, students at the University of Michigan Law School removed part of an art exhibit from a conference on prostitution sponsored by the law school and the *Michigan Journal of Gender & Law*. See Tamar Lewin, *Furor on Exhibit at Law School Splits Feminists*, N.Y. TIMES, Nov. 13, 1992, at B16. The removed work included a videotape by a former prostitute, Veronica Vera, incorporating her anti-censorship advocacy and footage from sex films. See *id.* MacKinnon, a professor at the law school, was not involved in the students' removal of the videotape. She did comment after the fact, however, that she supported the students' action. See *id.*

Bad Attitude, which feature centerfolds, sexual photo spreads, and erotic articles, often with an emphasis on sadomasochism.¹¹⁰

MacKinnon summarily dismisses feminists who support pornography. Her attitude toward such women wavers only between pity and contempt: pity, because in her view these women are so victimized that they have been deluded into viewing their victimization as a form of empowerment; and contempt, because these women should know better than to collude with the very power structure that has led to their victimization. MacKinnon asserts that “the liberal defense of pornography as human sexual liberation, as derepression—whether by feminists, marxists, or neo-Freudians—is a defense not only of force and sexual terrorism, but of the subordination of women.”¹¹¹ As for the argument that women as well as men may enjoy sexual imagery of female subordination, she states that “female masochism [is] the ultimate success of male supremacy.”¹¹² MacKinnon and Dworkin respond with disbelief to the recent resurgence of interest in pornography by lesbians: “We are frankly mystified as well as anguished that there are lesbians who identify with and defend the pornographers’ woman-hating so-called lesbian sexuality. All lesbians . . . must live with the fact that the pornographers have made lesbianism into a pornographic spectacle in the eyes of men.”¹¹³

But alongside this binary structure of feminist argument has emerged a third way of looking at pornography, an anti-censorship position that doubts assumptions held by both the pro-sex and anti-pornography camps. On the one hand, these “third way” feminists dismiss as naive many anti-pornography feminist assumptions, such as the belief in the possibility of creating a feminist language free of pornography and the male power structure. On the other hand, because they recognize the complexity with which pornography functions, they

110. I do not mean to suggest that all lesbians support the current vogue of lesbian pornography. Indeed, as I explain in Part IV, outsider community reactions to speech are often mixed. I believe this mixed perception is inevitable given not only the nature of language and interpretation, but also the diversity within outsider communities.

111. MACKINNON, *FEMINIST THEORY*, *supra* note 3, at 198. “[W]hat is done to women in pornography is not . . . an act of liberation . . . but an on-going social atrocity.” Catharine A. MacKinnon, *Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace*, 83 *Geo. L.J.* 1959, 1964 (1995).

112. *Id.* at 125; see also Ti-Grace Atkinson, *Why I’m Against S/M Liberation*, in *AGAINST SADOMASOCHISM: A RADICAL FEMINIST ANALYSIS* 90, 91 (Robin Ruth Linden et al. eds., 1982).

113. DWORKIN & MACKINNON, *supra* note 3, at 87. MacKinnon has written elsewhere,

Some have argued that lesbian sexuality—meaning here simply women having sex with women, not with men—solves the problem of gender by eliminating men from women’s voluntary sexual encounters. Yet women’s sexuality remains constructed under conditions of male supremacy . . . the definition of women as men’s inferiors remains sexual even if not heterosexual, whether men are present at the time or not.

MACKINNON, *FEMINIST THEORY*, *supra* note 3, at 141-42 (footnote omitted).

are less sanguine about the positive value that is at times attributed to pornography by some pro-sex feminists.

Indeed, some of these anti-censorship feminists agree with MacKinnon's criticism of the new "celebratory" use of pornography by women. For example, feminist activist and artist Marlene McCarty¹¹⁴ recently said that although she opposes censorship, the simplistic stance of some anti-censorship feminists troubles her: "[Some sex-positive feminists] say, 'I'm going to take pornography and reclaim it.' They think that just by claiming it, it is redeemed. Well, it just isn't. I don't think there's anything liberating there. It's totally supporting the status quo. There's an inherent critique that's being avoided."¹¹⁵

McCarty and others, therefore, have turned to a different type of feminist use of pornography that MacKinnon has apparently not considered. These feminists use pornography not as a celebration of sex, but rather to express views on feminism, sexuality, and sometimes even pornography that bear much in common with MacKinnon's. Many openly lament the impossibility of sexual freedom for women, the alliance between rape and intercourse, the objectification of women, and even the role played by commercial pornography or the sex industry in victimizing women. MacKinnon's failure to consider this work, and its vulnerability under her ordinance, may undermine her very project.

Walk into an art museum these days and you may think you have wandered into a peep show. Pornography is alive and well in art, and the artists making it are women. Consider the controversy over Karen Finley,¹¹⁶ a feminist performance artist and writer who depicts a world of rape and sexual violence against women and children in her work. Finley's work raises numerous problems for anti-pornography feminists. She routinely defiles and objectifies her body¹¹⁷ using explicit language to depict sexual violence. For instance, her piece entitled *I'm an Ass Man* is a brutal monologue about a rape from the rapist's point of view:

Once I spotted her in the subway . . . with a huge butt just waiting to be fucked, just asking to be fucked. She was short-waisted and all I wanted to do was get her against that cold, slimy, rat turd wall and get my cock inside her. . . .

114. McCarty works as an individual artist and graphic designer but has also participated in activist art collectives. She has worked with Gran Fury, the AIDS art collective, as well as the Women's Action Coalition ("WAC"). She currently works in New York with artist Donald Moffett in a design studio they call "Bureau." Interview with Marlene McCarty, in New York, N.Y. (Oct. 19, 1994).

115. *Id.*

116. See *Finley v. NEA*, 795 F. Supp. 1457 (C.D. Cal. 1992) (suit by Karen Finley and other artists against NEA for withdrawal of grants), *aff'd*, 100 F.3d 671 (9th Cir. 1996).

117. In one routine, she smears chocolate on herself; in another, she stuffs food into her anus. See C. Carr, *Unspeakable Practices, Unnatural Acts: The Taboo Art of Karen Finley*, VILLAGE VOICE, June 24, 1986, at 17.

...
 I crack open the seat of her pants, just listening to the fabric tear. . . . Then I get my fist, my hand, and I just push myself up into her ass. I'm feeling the butt pressure on my arm, on my wrist, it's feeling good. I'm feeling her up. It's turning me on.¹¹⁸

Finley does not celebrate pornography as a liberating genre. Nor does she take an explicit anti-pornography stance. Rather, she appears to use the language of violent pornography to force us to question a world where such violent imagery is sexual reality for many women. This is the kind of work that MacKinnon utterly ignores, work that uses violent sexual imagery to decry sexual violence toward women.

Other examples abound of feminist activists and artists who use pornography in a similarly politicized fashion.¹¹⁹ Feminist political artist Sue Coe's *Gray Rape* is a sexually explicit, violent picture of men gang-raping a woman on a pool table.¹²⁰ What is the difference between this work and "pornography"? Although the picture may resemble a pornographic image of rape produced for male sexual consumption, Coe appears to use the image to make a feminist point.

Marlene McCarty's work, in which she appropriates pornographic images and negative stereotypes of women, provides another example. One series of her paintings boldly proclaims slurs for women's sexual organs; included is a piece called *Twat. Cunt. Pussy*. Her matchbook series alternates stock pictures of topless women with disarming

118. KAREN FINLEY, *SHOCK TREATMENT* 49-51 (1990). Is there a difference between this passage from an avowedly feminist artist and, for example, the following passage from a novel that MacKinnon cites as an example of objectionable speech?

She had never offered me the slightest chink through which to view the glow of her nakedness. And now suddenly the butcher knife of fear had slit her open. She was as open to me as the carcass of a heifer slit down the middle and hanging on a hook. . . . [A]nd suddenly I felt a violent desire to make love to her. Or to be more exact, a violent desire to rape her.

MILAN KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING* (Michael Henry Heim trans., 1980), quoted in MACKINNON, *FEMINIST THEORY*, *supra* note 3, at 126.

119. Further examples of artists in this category include Sue Williams, who explores graphic sexual violence toward women, and Cindy Sherman, who has recently focused on grotesque sexual images as part of her longstanding exploration of the way we view and construct images of women. See, e.g., Charles Hagen, *Cindy Sherman*, N.Y. TIMES, Apr. 24, 1992, (Art in Review), at C32 (noting pornography and fetishism as sources for Sherman's work); Roberta Smith, *Up and Coming: Sue Williams; An Angry Young Woman Draws a Bead on Men*, N.Y. TIMES, May 24, 1992, § 2, at 25 (describing Sue Williams' work); see also *THE SUBTLETY OF SUBVERSION* (catalogue from Exit Art exhibition) (1993); Ginger Strand, "Femme Porn," CELLULOID CULTURE, May 26, 1993, at 22 (discussing women artists who use sexually explicit imagery).

These contemporary artists who explore the language of pornography draw on a tradition of feminist "body art" from the 1960s. Some artists associated with this 1960s movement were Hannah Wilke, Carolee Schneeman, Judy Chicago, and Nancy Spero.

120. The piece documents a gang rape that occurred in New Bedford, Massachusetts in 1983. See *The Crime That Tarnished a Town: New Bedford's Notorious Gang-Rape Case Goes to Trial*, TIME, Mar. 5, 1984, at 19.

rhetoric.¹²¹ McCarty believes that her work depends on the “subversion of accepted imagery of females, imagery that’s seductive to males. I’m claiming that imagery and turning it in on itself.”¹²²

Indeed, the language of pornography has become a central vernacular of protest for women artists. In Shu Lea Cheang’s *Those Fluttering Objects of Desire*, the artist used sexually explicit video and audio tapes in the structure of peep show booths and “900” telephone sex lines to “subvert[] conventional notions of race and [female] sexuality.”¹²³ To see the videos, the viewer was required to insert coins into slots, thereby implicating himself or herself as a consumer of pornography. Or consider the recent exhibition at the Whitney Museum entitled *The Subject of Rape*. Organized to examine the issue of rape in artistic expression, the show necessarily relied on violent and graphic sexual imagery. Displayed in the exhibition were self-portrait photographs from the *Rape/Murder Series* by feminist artist Ana Mendieta, with the artist posed as if she had been the victim of a sex crime. The photographs depicted Mendieta’s nude body lying on the ground, her head under twigs and leaves, her genitals covered in blood.¹²⁴

Such work has met with controversy. Not surprisingly, conservative religious groups attacked *The Subject of Rape* exhibition and another Whitney show called *Abject Art* that also included sexually explicit political art.¹²⁵ One of the latest NEA controversies involved two women artists who draw on pornographic imagery in their work—Merry Alpern and Barbara DeGenevieve. The dispute erupted when the NEA Advisory Council decided, in an extraordinary last-minute measure, to reject the women’s grants, which had already been approved through the customary NEA peer panel process.¹²⁶ Both of the rejected artists explicitly employ sexual images to make what they argue is feminist

121. The flip side of one matchbook reads, “I’ve got a clit so big I don’t need a dick.”

122. Interview with Marlene McCarty, artist, in New York, N.Y. (Dec. 6, 1994).

123. Thelma Golden, *What’s White . . . ?*, in 1993 BIENNIAL EXHIBITION, *supra* note 13, at 26, 33.

124. See Ana Mendieta, *Untitled*, from the *Rape/Murder* series (1972-73), reproduced in THE SUBJECT OF RAPE 57 (1993) (catalogue from exhibition at Whitney Museum of American Art). The photographs document a performance by Mendieta.

125. The Christian Action Network sent a letter to freshman members of Congress, contending that these exhibitions were objectionable and had been funded by the NEA, leading to a full examination of the shows in the House of Representatives’ hearings on NEA appropriations. See 139 CONG. REC. H4689, 4691-92 (July 15, 1993) (statement of Rep. Dorman). Although both shows were privately funded, they were organized by students in the Whitney Museum Independent Studies Program, which receives funding from the NEA. Telephone Interview with Steven Schlough, Public Relations Director, Whitney Museum of American Art (Sept. 7, 1993).

126. See Jacqueline Trescott, *Inside Left Jabs*, WASH. POST, Aug. 14, 1994, at G4. A third artist, Andres Serrano, was rejected at the same time. For a discussion of Serrano’s work, see *supra* text accompanying note 103; *infra* text accompanying notes 189, 236.

art.¹²⁷ Merry Alpern's rejected work consists of a series of photographs of prostitutes that she took using a zoom camera to spy through the window of a brothel.¹²⁸ There may be viewers who consider Alpern's pictures of scantily clad women to be sexually arousing; others may find them degrading to women. But Alpern uses these images in a way that may also provoke viewers to consider a feminist point: the exploitation of women who work in the sex industry, and the sexual abuse of women in general.

Some critics have noted that there is an inherently deconstructive aspect to all pornography, not just feminist reappropriations of pornography.¹²⁹ Critic Judith Butler stresses the numerous interpretations that can arise from any one pornographic image because pornographic representations "do not supply a single point of identification for their viewers."¹³⁰ Butler sees in this "possibility of a cross-identification" by the viewer the potential for feminist subversion.¹³¹ She cites, for example, Andrea Dworkin's triumphant feminist reactions to pornographic texts as evidence that "interpretive mastery can be derived from a viewing which, in [Dworkin's] view, is supposed to restrict her to a position of mute and passive injury."¹³²

Most anti-pornography activists would quickly discount the contention that even *Penthouse* or *Hustler* can serve a feminist goal because they contain within them the possibility that a viewer will read them in a feminist manner. But even those critics who reject the premise that *all* pornography contains within it its own undoing¹³³ must nonetheless consider the problem I am raising here: the subversive *appropriation* of pornography for explicitly activist purposes.¹³⁴ Much of this work would appear to fit squarely under MacKinnon and Dworkin's definition of pornography. Surely in Mendieta's, Finley's, and Coe's work,

127. For more on the feminist content of DeGenevieve's work, see Charles Storch, *On Art's Edge: Barbara DeGenevieve at Odds With the NEA*, CHI. TRIB., Aug. 18, 1994, § 5, at 7.

128. See Richard B. Woodward, *An NEA Closet Case: Photographer Merry Alpern Peeps at a Wall Street Sex Club*, VILLAGE VOICE, Dec. 13, 1994, at 37.

129. Cf. THE INVENTION OF PORNOGRAPHY, *supra* note 109 (tracing uses of pornography as a tool of political subversion and dissent in European history).

130. Judith Butler, *The Force of Fantasy: Feminism, Mapplethorpe, and Discursive Excess*, 2 DIFFERENCES: A JOURNAL OF FEMINIST CULTURAL STUDIES 105, 114 (1990).

131. *Id.*

132. *Id.*; see also Susan Etta Keller, *Viewing and Doing: Complicating Pornography's Meaning*, 81 GEO. L.J. 2195 (1993). Drawing on Judith Butler's work, Keller argues that the "meanings and messages of pornography are variable and capable of producing variable effects." *Id.* at 2197. Keller then discusses the role of pornography in general as a potential strategy for transforming sexuality. See *id.* at 2232-2239; see also Carlin Meyer, *Sex, Sin, and Women's Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097, 1134-35 (1994) (noting the richness and ambiguity of pornography).

133. I will consider this possibility more closely in Part IV.E *infra*.

134. In Part IV, *infra*, I will question just how "explicit" those activist purposes are, or whether the stated activist intention of a speaker should even make a difference when interpreting speech.

“women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt.”¹³⁵

It is therefore unsurprising that under the new, purportedly feminist obscenity law of *Regina v. Butler*,¹³⁶ crafted in 1992 by the Supreme Court of Canada with the support of MacKinnon, some of the first seizures have been of lesbian, feminist, and, in fact, anti-pornography materials. Even Andrea Dworkin’s books have been confiscated on suspicion of obscenity.¹³⁷ MacKinnon favors civil lawsuits over the criminal actions provided for in *Butler*,¹³⁸ because criminal actions rely on state officials rather than individual women to make determinations about what material is harmful.¹³⁹ The Canadian experience nonetheless

135. It is important to note that the MacKinnon-Dworkin definition requires that actionable pornography must not merely depict the subordination of women, but must actually subordinate them. One might argue that the kind of art work I have described above would be protected under this distinction. In my view, however, this distinction does nothing to solve the interpretive difficulties I describe. Although the statute does not define “subordination,” both MacKinnon and Dworkin have commented elsewhere on the meaning of this term. MacKinnon suggests that it “refers to materials that, in one way or another, are active in placing women in an unequal position.” MACKINNON, FEMINISM UNMODIFIED, *supra* note 3, at 15-16. Dworkin writes that subordination has four elements: hierarchy, objectification, submission, and violence. Dworkin, *Against the Male Flood*, *supra* note 3, at 15-16. *But see* Ellen C. DuBois et al., *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 70 (1985) (arguing that the MacKinnon definition of subordination is circular); *cf.* Carole S. Vance, *Negotiating Sex and Gender in the Attorney General’s Commission on Pornography*, in SEX EXPOSED: SEXUALITY AND THE PORNOGRAPHY DEBATE 29, 36-37 (Lynne Segal & Mary McIntosh eds., 1993) (definition of “degradation” is subjective).

Note that both the MacKinnon-Dworkin statute and their notion of “subordination” make no exception for well-intentioned work. They discuss subordination in terms of the *effect* of speech. But as I will argue below in Part IV, the effect of speech cannot be predicted—it will vary from listener to listener. Determining whether an image is actually good or bad for a particular political cause is a deeply complex and ultimately flawed endeavor. As I detail below, for example, Karen Finley’s artwork has received mixed reactions from feminists; it is likely that some viewers would perceive it as subordinating women. *See infra* note 178 and accompanying text. Indeed, in James Lindgren’s study of the MacKinnon-Dworkin definition, test subjects applying the definition to a portion of Andrea Dworkin’s own novel, *Mercy*, labelled it pornographic, presumably finding that Dworkin’s work subordinates women. *See* Lindgren, *supra* note 31, at 1202.

136. [1992] 1 S.C.R. 452 (Can.).

137. *See* Jeffrey Toobin, *X-Rated*, NEW YORKER, Oct. 3, 1994, at 70, 74; (reporting that in 1993, under the new, purportedly feminist anti-pornography law in Canada, Canadian Customs officials seized two books by Andrea Dworkin).

138. Although MacKinnon supports the decision in *Butler*, she has decried its application, particularly the “homophobic” seizures of materials by customs officials. According to MacKinnon, “[t]he homophobia reeks” in such decisions. *Id.* at 77 (quoting MacKinnon).

Andrea Dworkin, for her part, has criticized the approach taken by the Court in *Butler* because of its reliance on criminal rather than civil enforcement. According to Dworkin, “This is something MacKinnon and I disagreed on. . . . My position on obscenity law is unequivocal. Obscenity law is a total dead end in dealing with the pornography industry.” *Id.* at 78.

139. The Court placed the power to make determinations about the obscenity of certain materials largely in the hands of Canada Customs officials. Using a checklist as a guide, Canada Customs officials have the power to detain materials that they feel are obscene. Not surprisingly, materials bound for the gay and lesbian communities have been singled out for repeated seizures. *See id.* at 72-74; Tamara Packard & Melissa Schraubman, *Lesbian Pornography: Escaping the Bonds of Sexual Stereotypes and Strengthening Our Ties to One Another*, 4 UCLA WOMEN’S L.J. 299, 326

demonstrates the interpretive problems inherent in a MacKinnon-type censorship regime. Even material critical of pornography is at risk.

MacKinnon and Dworkin's failure to exempt activist work from their definition of pornography does not appear to be inadvertent, because they do not allow for the possibility that pornography can function in any way but one. Thus, even those who consider themselves devout feminists—but who defy MacKinnon and Dworkin's prohibition on the use of pornography—would merit no exception from their rule. As long as these artists graphically explore issues such as the objectification or sexual and social victimization of women, their work *could* be interpreted as "the sexually explicit subordination of women," presenting women "dehumanized as sexual objects" or "in postures or positions of sexual submission, servility, or display."¹⁴⁰ Such work would therefore be characterized as pornography under MacKinnon's definition, even though in many cases these artists may have had goals (whether realized or not) similar to MacKinnon's: to question the objectification, sexual display, and abuse of women by presenting these issues to the public.

D. AIDS, Homosexuality, and Pornography

The feminist anti-pornography movement also threatens the subversive use of sexual imagery by artists whose work addresses discrimination against gay men, lesbians, and people with AIDS. In this Section, I will consider the tension between such activist work and the MacKinnon-Dworkin model of pornography.

Caught in the middle of the feminist controversy over pornography is a sector of the political left that is already embattled: AIDS activists, gays, and lesbians.¹⁴¹ These groups depend on free speech now perhaps

(1994) ("The unfortunate reality for lesbian and gay bookstores in Canada [after *Butler*] is increased censorship and silencing."); see also Judy Stoffman, *Lawyer Challenges Customs' Power: Says Provinces Should Handle Gay Videos and Magazines*, TORONTO STAR, Dec. 15, 1994, at E8; *Gay Bookstore Sues Canadian Customs*, ORLANDO SENTINEL, Oct. 12, 1994, at A16.

140. DWORKIN & MACKINNON, *supra* note 3, at 36.

141. Prejudice against gay men, lesbians, and people with AIDS is vast. It is often associated with violence. See generally GARY DAVID COMSTOCK, *VIOLENCE AGAINST LESBIANS AND GAY MEN* (1991). One manifestation of publicly condoned prejudice against gays and lesbians is the proliferation of anti-gay legislative measures. The Supreme Court recently declared one such measure unconstitutional under the Equal Protection Clause. At issue was a Colorado state constitutional amendment that precluded all legislative, executive, or judicial action designed to protect gays, lesbians or bisexuals. *Romer v. Evans*, 116 S. Ct. 1620 (1996); see also David Cole, *Playing By Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 122 n.48 (1994) (giving other examples of legislative measures against homosexuals). Many have criticized the Court for exhibiting homophobia in its ruling in *Bowers v. Hardwick*, the Georgia sodomy case. In *Bowers*, the Chief Justice uncritically cited Blackstone's assertion that homosexual sodomy is "an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature.'" 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (quoting Blackstone). See Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v.*

more than ever in their history. Once tempted by the call of the new leftist legal scholars to ban hate speech—the cries of “dyke” and “faggot” that plague their community—many gay activists are re-thinking that temptation in light of the other plague on their community: the AIDS epidemic. These activists are face to face with the real-life damage that censorship can do to them; the anti-pornography movement, as taken up not only by the political right but by feminists as well, threatens to squelch sexually explicit speech, a major source of AIDS education and gay activism. While feminists fight pornography, while Jesse Helms campaigns for decency and morality, some AIDS activists are making “pornography”: safer sex videos that ward off death. The gay, lesbian, and AIDS activist communities, forced into activism, are speaking with increasing volume about things that the rest of America would often prefer to ignore. Censorship, whether from the left or the right, is yet another enemy for gays and lesbians to consider.

Pornography's emerging importance to the gay, lesbian, and AIDS activist communities springs from three general causes. First, AIDS activists have discovered that large sectors of communities at risk for AIDS do not respond to dry, clinical presentations of safer sex information. When safer sex is presented in the vernacular of pornography—familiar, eroticized—many of those at risk for AIDS will incorporate it into their sexual practices. For this reason, explicit, erotic images are considered to be perhaps the most effective technique of safer sex education.¹⁴²

Second, as with many feminists who incorporate pornography into their work, the use of pornography by gays, lesbians, and AIDS activists

Hardwick, 79 VA. L. REV. 1721, 1770 (1993) (criticizing the *Bowers* decision as “creat[ing] opportunities for the exercise of homophobic power”); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1806 (1993) (contending that *Bowers* reflects a “homophobic ideology”).

I do not mean to overlook the different concerns that face gay men, lesbians, and AIDS activists. Nor do I mean to suggest that being gay means having AIDS; such a link between gay desire and disease has permeated public debate and only added to prejudice.

142. See Gina Kolata, *Erotic Films in AIDS Study Cut Risky Behavior*, N.Y. TIMES, Nov. 3, 1987, at C3. See generally Douglas Crimp, *How to Have Promiscuity in an Epidemic*, in AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM 237 (Douglas Crimp ed., 1987). As an AIDS activist who distributed safer sex information in Times Square sex shops explained to me, “If all we put up was a Gay Men’s Health Crisis sticker, no one would read it. We’re working with sexuality; our work has to be very sexy, to appeal to [sexual] fantasies.” Telephone Interview with member of Gran Fury who requested individual anonymity (Mar. 15, 1990). Although this work may appear indistinguishable from pornography, the people who make it are often artists who consider it to be part of their activist art project. See MEYER, *supra* note 79, at 23. For instance, Gregg Bordowitz is an artist with AIDS who turned, for a time, from his art practice to make explicit safer sex videos. See Cindy Patton, *Safe Sex and the Pornographic Vernacular*, in *How Do I Look?*, *supra* note 88, at 31, 57 (describing artist’s plans to distribute “safe sex porn shorts” in bars and bathhouses).

For recent criticism of this and other aspects of AIDS education, see Walt Odets, *AIDS Education and Harm Reduction for Gay Men: Psychological Approaches for the 21st Century*, 6 DOCUMENTS 4, 9 (Spring/Summer 1995).

has a subversive component.¹⁴³ By displaying taboo images of gay sexuality, activist artists challenge the notion that these images, and the people represented in them, are unrepresentable or unacceptable. Appropriating the language of heterosexual pornography and inserting gay imagery into that language, this work highlights the exclusion of homosexual desire from representations of sexuality in our culture.¹⁴⁴ Furthermore, in light of the unique history of gays and lesbians closeting their sexuality,¹⁴⁵ the mere act of speaking openly about their sexuality takes on great political significance, particularly as their communities are under increasing attack. The slogan for the AIDS Coalition to Unleash Power (“ACT UP”),¹⁴⁶ a prominent AIDS activist group, reflects the importance to this community of speaking out: “Silence=Death.”

Some critics have noted that there is a broader deconstructive aspect to gay pornography: it works to subvert heterosexual and sexist notions of gender constructions. Judith Butler argues that “[t]he replication of heterosexual constructs in non-heterosexual frames brings into relief the utterly constructed status of the so-called heterosexual

143. It is no accident that AIDS activist work demonstrates the deep influence of postmodernist theory. From the start, the work of AIDS activist coalitions such as ACT UP has been described as “postmodernist” for its keen attentiveness to the role of representation in the epidemic and for the activists’ recourse to critical strategies. Meyer, *AIDS and Postmodernism*, *supra* note 22, at 64.

144. See, e.g., Richard Dyer, *Coming To Terms*, in *OUT THERE*, *supra* note 15, at 289, 291 (“Homosexual desire has been constructed as perverse and unspeakable; gay porn does speak/show gay sex. . . . It thus defends the universal human practice of same-sex physical contact . . . it has made life bearable for countless millions of gay men.”); see also Meyer, *Notes on a Video*, *supra* note 22, at 26 (“recent video practice attempts to ‘empower’ embattled forms of desire by borrowing or displacing pornographic codes”). One activist technique involves picturing same-sex couples paired next to heterosexual couples, a strategy that becomes a demand for equal treatment. Perhaps the most well-known example of this particular method is the AIDS activist poster called, *Kissing Doesn’t Kill: Greed and Indifference Do*, that appeared on New York City buses in 1989-90. These glossy posters featured a row of three youthful, multi-racial couples kissing: straight, gay, and lesbian. Cf. Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 *STAN. L. REV.* 661 (1995) (arguing that the feminist anti-pornography movement threatens gay male pornography, a valuable genre for homosexual identity).

145. Cf. John Eastburn Boswell, *Jews, Bicycle Riders, and Gay People: The Determination of Social Consensus and Its Impact on Minorities*, 1 *YALE J.L. & HUMAN.* 205, 226-27 (1989) (emphasizing history of silence of gay people and the “unmentionable” nature of homosexuality).

146. ACT UP is a self-described “nonpartisan group of diverse individuals united in anger and committed to direct action to end the AIDS crisis.” Crimp, *supra* note 142, at 7. ACT UP’s position is that government, business, and the media are guilty of inadequately addressing the AIDS crisis because of discrimination against the communities most affected by AIDS: gay men and poor, black and Hispanic intravenous drug-users. Members of ACT UP see “themselves as a despised minority, literally fighting for their lives,” and in the early years of the epidemic, they were enormously influential in affecting government policy. Jason DeParle, *Rude, Rash, Effective, Act-Up Shifts AIDS Policy*, *N.Y. TIMES*, Jan. 3, 1990, at B1. In recent years, however, as the AIDS epidemic takes an increasing toll, ACT UP has waned in membership and importance.

original."¹⁴⁷ Thus gay pornography, by inserting homosexual images into a heterosexual framework, reveals the artificiality of that framework, subverting the notion that traditional roles of male and female are "natural."¹⁴⁸

The third reason why pornography has become an activist genre for artists who work with gay, lesbian, or AIDS-related themes comes as a direct response to the conservative censorship movement against art. Indeed, the right-wing assault on the NEA and its financing of sexually explicit art has frequently been a pretext for attacks on homosexuals.¹⁴⁹ A close reading of some of the congressional debates on NEA funding reveals that the examples of pornographic art singled out as evidence of NEA failures deal almost unfailingly with homosexual and AIDS-related themes.¹⁵⁰ In light of these attacks, some activists have politicized

147. BUTLER, *supra* note 79, at 31. Discussing Michel Foucault's *The History of Sexuality* and the notion of reverse discourse, Butler argues that the very marginalization of homosexuality creates the possibility of subverting that marginalization. *See id.* at 119. Butler explains, "[T]he institution of the category of homosexuality provides a discursive site for the homosexual resistance to its pathologization; hence, homosexuals now have the discursive occasion to resignify and valorize the terms of that identity . . ." Butler, *supra* note 130, at 119.

In a sense, Butler's comment shares one thing with Catharine MacKinnon's arguments: both agree that gay male pornography replicates heterosexual conventions of pornography. The difference is that Butler sees this replication as serving a potentially subversive function, whereas MacKinnon views it as merely reinforcing heterosexual norms. As we shall see, this tension about the effectiveness of deconstruction, whether it subverts or only reinforces the status quo, is at the heart of the battle over contemporary activist speech.

148. Similarly, Carl Stychin argues that gay pornography is "liberating rather than objectifying" and has "the unique ability to destabilize the coherence of the male subject," thereby "subvert[ing] 'phallocracy.'" Carl F. Stychin, *Exploring the Limits: Feminism and the Legal Regulation of Gay Male Pornography*, 16 VT. L. REV. 857, 857 (1992); *see also* Leo Bersani, *Is the Rectum a Grave?*, in AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM, *supra* note 142, at 197, 215 (arguing that MacKinnon and Dworkin's analysis of sexuality reveals the "inestimable value of sex" and the reason why "pornography must be multiplied and not abandoned").

149. *See* Gara LaMarche & William B. Rubenstein, *Censoring Gay Expression: The Love That Dare Not Speak*, NATION, Nov. 5, 1990, at 524 (detailing a "flurry of recent censorship incidents, all involving homophobia"); *cf.* *Finley v. NEA*, 795 F. Supp. 1457, 1461 (C.D. Cal. 1992) (noting that recently "the NEA has been the target of congressional critics . . . for funding works . . . which endorse equal legitimacy for homosexual and heterosexual practices"), *aff'd*, 100 F.3d 671 (9th Cir. 1996); *Decency Rule in NEA Policy Deemed Illegal*, Hous. CHRON., June 10, 1992, at A6 (reporting that all but one of the artists whose grants were withdrawn by the NEA were gay).

150. Consider, for instance, that Representative William Dannemeyer, in one of his many attacks on the Endowment for financing sexually explicit art, chose to recite a list of objectionable grants that shared one thing in common: virtually all involved homosexual or lesbian themes. The text of Dannemeyer's remarks so reveals his motivations that I reproduce it at some length. He stated:

[T]hese are some of the projects that were funded with taxpayers' money: . . . a show about homosexuality titled "Tongue United" [sic]. . . . The program includes scenes of two men sodomizing each other in bed and a narration that included the expletive: "mother f----," and the phrase "anoint me with coconut oil and cum." In a reference to AIDS, the narrator repeats the refrain, "now we think as we f---."

Second the NEA gave a \$15,000 grant . . . for an exhibit titled "David Wojnarowice [sic]: Tongues of Flame." The exhibit contained photographs of men performing oral sex, anal sex, oral-anal sex, and masturbation.

the production and dissemination of "pornographic" homosexual images, directly confronting the conservative condemnation they have received.¹⁵¹ In contrast to those feminists who see censorship of sexual imagery as a tool for equality, many AIDS activists have come to equate art censorship with discrimination. An artist in an AIDS exhibition wrote a line in the text of his artwork that sums up this position: "AIDS: All People Who Censor Are Guilty."¹⁵²

Perhaps the best-known example of gay activist work that relies on pornographic imagery is the photography of Robert Mapplethorpe.¹⁵³ Mapplethorpe achieved national notoriety shortly after his death from AIDS when a partially government-funded exhibition of his classical black and white photographs, some of them picturing men in homoerotic and sadomasochistic positions, became the target of a congressional attack on the NEA. As the public funding debate reached its zenith and the suspect Mapplethorpe exhibition wended its way to Cincinnati, prosecutors there issued obscenity indictments against the host museum and its director for displaying several of the photographs.¹⁵⁴

Mapplethorpe's work and the controversy surrounding it take on new significance when viewed in the context of AIDS and of pornography as the vernacular commonly used to fight both the disease and its attendant discrimination. Regardless of Mapplethorpe's intent in using the conventions of pornography to document himself and his friends from the homosexual sadomasochistic community of the late

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[T]he NEA sponsored a forum on art and AIDS . . . [T]he forum included slide and video presentations that showed members of the same sex together in various stages of undress . . . [O]ne presentation contained homoerotic photographs . . .

137 Cong. Rec. H7875-86 (daily ed. Oct. 16, 1991) (statement of Rep. Dannemeyer).

151. See, e.g., David Wojnarowicz, *Postcards From America: X-Rays From Hell*, in WITNESSES: AGAINST OUR VANISHING 6, 10, 11 (Nov. 16, 1989-Jan. 6, 1990) (catalogue from Artists Space) [hereinafter WITNESSES] ("[O]ne of the last frontiers left for radical gesture is the imagination. . . [E]ven a tiny charcoal scratching done as a gesture to mark a person's response to this epidemic means whole worlds to me if it is hung in public. . ."). Wojnarowicz's essay featured a bitter attack on Jesse Helms, Cardinal O'Connor, and others for their censorship of AIDS art and information. This essay provoked the initial decision by the chairman of the National Endowment for the Arts to cancel funding for the art exhibition that the essay accompanied. See Atkins, *supra* note 104; Glueck, *supra* note 104, at 1.

152. This banner was created by the artist Steven Pico. See Shauna Snow, *Chavez Reinstates Show After Banner Squabble Ends*, L.A. TIMES, Nov. 30, 1989, at F8.

153. See ROBERT MAPPLETHORPE: THE PERFECT MOMENT (1989) (catalogue from exhibition at the Institute of Contemporary Art).

154. See *Cincinnati v. Contemporary Arts Ctr.*, 566 N.E.2d 214 (Ohio Mun. 1990) (rejecting Art Center's motion to dismiss obscenity charge); *Contemporary Arts Ctr. v. Ney*, 735 F. Supp. 743 (S.D. Ohio 1990) (granting temporary restraining order prohibiting seizure of or interference with display of Mapplethorpe exhibit until criminal case decided). A jury later acquitted the defendants on all counts. Mary T. Schmuch, *Art Gallery, Director Not Guilty: Cincinnati Jurors Clear Both of Obscenity Charges*, CHI. TRIB., Oct. 6, 1990, at 1.

1970s, his work can now be read in light of the AIDS epidemic that was just brewing as these pictures were taken, and that claimed not only Mapplethorpe's life but the lives of many of his subjects as well.¹⁵⁵ His elegantly classicized photographs of gay men, often gay black men, are portraits of marginalized members of society.¹⁵⁶ The overt classicization of Mapplethorpe's images—his heightened use of traditional light and composition, his virtuoso technique—may be read as a subversive demand that we see and reevaluate the “debased” practices and people he portrays.¹⁵⁷ It is as if his work says to a society that has discriminated against gay men (and black men): “Look at these beautiful, formally perfect, classical photographs of what you have heretofore despised. See us and accept us for what we are.”¹⁵⁸ In this way, his work can be read as serving an activist function.¹⁵⁹

155. Mapplethorpe commented on his book of black male nudes, entitled *Black Book*: “Most of the blacks don't have health insurance and therefore can't afford AZT [a common but expensive drug used to prolong the life of people with AIDS]. They all died quickly, the blacks. If I go through my *Black Book*, half of them are dead.” *The Long Goodbye: Interview with Robert Mapplethorpe*, BLITZ, May 1989, at 67-68.

156. Furthermore, Mapplethorpe's work conflates the marginalized status of the people he portrays with the traditional marginalization of photography in the course of art history—its lesser status when compared to painting. For a discussion of photography's contested status as art, see SUSAN SONTAG, *ON PHOTOGRAPHY* 115 (1977). For a classic work on photography and art, see Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in *MODERN ART AND MODERNISM*, *supra* note 75, at 217.

157. Moreover, and again regardless of Mapplethorpe's intent, I believe that terror of the AIDS epidemic was largely responsible for the censorial responses that the photographs elicited. As critics have noted, “the spectre of death” hangs over the pictures; “the information that Mapplethorpe died of AIDS is . . . always available.” Ingrid Sischy, *Photography: White and Black*, *NEW YORKER*, Nov. 13, 1989, at 124, 138-39. Members of Congress continually spoke of Mapplethorpe's disease. Senator Helms, for example, calling Mapplethorpe's work “homosexual pornography,” said Mapplethorpe “died of AIDS while spending the last years of his life promoting homosexuality.” 135 CONG. REC. S12111 (daily ed. Sept. 28, 1989) (statement of Sen. Helms). *See also id.* at H3640-41 (daily ed. July 12, 1989) (statement of Rep. Dannemeyer) (noting Mapplethorpe's death from AIDS, and calling him a “homosexual activist[.]”). In my view, perhaps the most shocking photograph in the exhibition was Mapplethorpe's frank self-portrait of his AIDS-ravaged, skeletal face, his hand gripping a cane with a death mask. Thus, there is one way to read Mapplethorpe's work as highly political; it confronts us as viewers, asking us to face images that we have marginalized and repressed, asking us to see beauty in homosexuality at a time when gay men are ravaged by an epidemic and politically reviled.

158. Since the political attacks on Mapplethorpe's photographs began, this reading of his work—that it serves a leftist activist function—has been predominant. As I will discuss in Part III, *infra*, however, this analysis is not universally adhered to; some viewers—particularly people of color—have sharply criticized Mapplethorpe's work as perpetuating discriminatory images. *Cf.* Hilton Kramer, *Is Art Above the Laws of Decency?*, *N.Y. TIMES*, July 2, 1989, § 2, at 1 (denouncing Mapplethorpe's work from an artistic, rather than political, perspective).

159. Whether or not Mapplethorpe's work achieves the activist goals that critics attribute to it is a subject of some debate. *See infra* Part III.A. As I shall explain in that Section, the complexity of the work and its resistance to definitive interpretation only prove my point: activist speech is not easily categorizable as “good” or “bad,” and political theories of censorship must reckon with the resistance of such speech to easy interpretation.

How would Mapplethorpe's photographs fare under MacKinnon and Dworkin's definition of pornography? Despite the activist aspect to his work, the answer is "not well." As explained above, the MacKinnon-Dworkin definition of pornography applies not just to sexually explicit subordinating images of women, but also to sexually explicit subordinating images of men.¹⁶⁰ In addition, the fact that Mapplethorpe's photographs are displayed as "art" and are generally not distributed as mass market¹⁶¹ pornography would not alter an analysis under the MacKinnon-Dworkin definition.¹⁶² Consider some of the Mapplethorpe photographs chosen for prosecution in Cincinnati: pictures of men bound in leather in submissive positions, a self-portrait of the artist with a bullwhip protruding from his anus, and a picture of a man urinating into the mouth of another man who kneels to accept it. Under MacKinnon and Dworkin's definition of pornography, these men are certainly "presented as sexual objects who enjoy pain or humiliation," or "in postures . . . of sexual submission, servility or

160. See *supra* text accompanying notes 39-40.

161. The Supreme Court's obscenity jurisprudence has attempted to distinguish between art and obscenity by pointing to obscenity's mass market appeal. This reasoning seems to underlie the *Miller* Court's pointed statement that its ruling affected only the "public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain." *Miller v. California*, 413 U.S. 15, 35 (1973). Yet this qualification does little to distinguish art from obscenity. Art has become a business, and mass market commerciality and reproduction are often its subject. This phenomenon originated with Marcel Duchamp's "ready-mades" and flourished in Pop Art, particularly Andy Warhol's use of commercial art techniques to reproduce images of consumer society, such as his famous silkscreens of Campbell's Soup cans and Brillo boxes. (Warhol, of course, referred to his studio as the "Factory.")

The theme of "art as commerce" recurs in the work of many contemporary artists, particularly 1980s art stars such as Jeff Koons and Ashley Bickerton. Bickerton actually sold advertising spaces on his art to stores and manufacturers. Thus, a distinction based on commercial appeal or mass market production would fail in light of contemporary art. See Carter Ratcliff, *The Marriage of Art and Money*, ART AM., July 1988, at 76; cf. *Mishkin v. New York*, 383 U.S. 502, 508 (1966) (holding work obscene because of its appeal to "deviant" sexual groups); William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 77 (1960) (arguing that obscenity is not inherent in a work, but rather is a function of its "appeal to . . . the audience to which the material is primarily directed.").

162. I do not mean to suggest that Mapplethorpe's work should be protected under a leftist censorship scheme merely because it is "art." See *infra* Part IV.A. The fact that someone is an "artist" does not mean that whatever sexual imagery he may use will be robbed of its power to harm or to demean. Although I have suggested that Mapplethorpe displayed explicit, sado-masochistic sex not to exploit it, but to defy those who disparage it and to show his pride in his homosexuality, other artists may have different motives for making sexually explicit work. For example, two prominent artists of the 1980s, Jeff Koons and David Salle, have been criticized by feminists for their use, and perhaps exploitation, of pornographic and sometimes sado-masochistic images. See JEFF KOONS, 124-61 (Angelika Muthesius ed., 1992) (featuring explicit sexual images of the artist and his wife, the Italian pornography star known as Cicciolina, from his 1991 exhibition *Made in Heaven*); Joyce Fernandes, *Exposing a Phallogocentric Discourse: Images of Women in the Art of David Salle*, NEW ART EXAMINER, Nov. 1986, at 32; Eleanor Heartney, *David Salle: Impersonal Effects*, ART AM., June 1988, at 121; see also *Mishkin*, 383 U.S. at 508 (discussing prurient appeal of sado-masochistic materials and their categorization as "obscenity").

display," or "penetrated by objects."¹⁶³ The MacKinnon-Dworkin definition makes no exception for the good intent of the producer of such an image. That we might interpret these images not as denigrating gay men, but as criticizing their oppression, does not alter the fact that Mapplethorpe works with images of sexual subjugation. His photographs are therefore without protection under the MacKinnon-Dworkin definition of pornography.

Many AIDS activist uses of pornography, particularly a great deal of safer sex information material, could meet the same fate under MacKinnon and Dworkin's theory.¹⁶⁴ It is particularly pressing to consider the risk that leftist censorship poses to these materials because they are already the target of right-wing attacks on AIDS education and funding.¹⁶⁵ The threat of criminal prosecution against safer sex material

163. DWORKIN & MACKINNON, *supra* note 3, at 36.

164. As artists have taken up AIDS activism, they have turned to the convention of pornography as a means of effectively conveying safer sex information. Some artists have produced pornographic safer sex videos, including *Play Safely*, *Top Man*, *Turbo Charge Trailer* (a public service announcement accompanying a pornographic film), *The Gay Men's Health Crisis Safer Sex Shorts*, *Car Service* (directed at gay black men), and *Current Flow* (a safer sex lesbian film). See Patton, *supra* note 142, at 48-51.

Despite the serious concerns that have led to the production of these videos, they do not present themselves as dry, educational works, nor as politicized tracts interspersed with illustrative sex scenes. Nor, despite the fact that they were produced by "artists" or displayed in "art" and academic settings as well as sexual ones, do these films present themselves as "art." These are sex films—"dirty movies." A short entitled *Midnight Snack* shows "two men meeting at the refrigerator and using whipped cream and honey to sweeten fellatio (with a condom)." *Top Man* includes "scenes of fucking," "'meat' shots," and an orgy scene. See *id.* at 50, 49. The only difference that a viewer might detect between these and conventional (gay male or lesbian) pornography is the presence of safer sex techniques and paraphernalia (condoms, surgical gloves, and dental dams). One producer of these videos, artist and activist Gregg Bordowitz, told me that he views MacKinnon's work as a direct threat to his project. Conversation with Gregg Bordowitz, in New York, N.Y. (Sept. 11, 1993).

165. See *Gay Men's Health Crisis v. Sullivan*, 792 F. Supp. 278 (S.D.N.Y. 1992) (invalidating a Centers for Disease Control provision that required federally funded AIDS education materials to be inoffensive to a majority of adults); *Gay Men's Health Crisis v. Sullivan*, 733 F. Supp. 619 (S.D.N.Y. 1989) (challenging grant restrictions on AIDS education); Katharine Q. Seelye, *Helms Puts the Brakes to a Bill Financing AIDS Treatment*, N.Y. TIMES, July 5, 1995, at A12 (describing Helms' attempt to reduce funding for AIDS treatment because he believes that homosexuals' "deliberate, disgusting, revolting conduct" makes them responsible for AIDS).

In 1987, an outraged Senator Helms displayed on the Senate floor brochures produced by the Gay Men's Health Crisis that he alleged had been produced with federal funds. The brochures explicitly depicted safer sex techniques and included a cartoon-style pamphlet illustrating sadomasochistic sexuality. See Patton, *supra* note 142, at 43; Crimp, *supra* note 142, at 260-63 (illustrating "Safer Sex" comics); see also Richard L. Berke, *Red Cross Tones Down AIDS Material*, N.Y. TIMES, Sept. 13, 1995, at A20 (reporting accusations that the Red Cross bowed to right-wing political pressure in its decision to modify AIDS educational material because of its sexually explicit content). International response to AIDS educational material has also been repressive. For example, in 1988 AIDS activists created posters picturing a huge, slick, erect penis and xeroxed and distributed them on the streets of Venice. Accompanying the image were the words "Sexism rears its unprotected head. Men use condoms or beat it. AIDS kills women too." The Venice Biennale, a large international art exhibition, tried to ban the posters. Interview with Marlene McCarty, *supra* note 122.

has also arisen: for example, a doctor in Oklahoma City was prosecuted for displaying, in the window of an AIDS clinic, a safer sex poster of a man wearing a condom.¹⁶⁶

Would anti-pornography feminists really wish to silence this kind of work given the activist role that it has come to play? At first blush, the possibility that Mapplethorpe's work or safer sex films could fall within the purview of MacKinnon and Dworkin's anti-pornography statute might seem to be merely an oversight in their definition. After all, MacKinnon and Dworkin object to pornography because it creates a victimized, second-class status for women and thereby silences them. AIDS activists use pornography not to silence but rather to enrich the voice of another traditionally silenced group; it would seem that MacKinnon and Dworkin would endorse such a goal. And even though MacKinnon and Dworkin's definition of pornography *on its face* applies equally to sexually subordinating pictures of men as well as women, their primary concern in fighting pornography is the harm it does to women, not men.

But in fact, MacKinnon and Dworkin do reserve concern for the effects of pornography on men, and in particular on gay men. MacKinnon describes the Minneapolis City Council hearings about the MacKinnon-Dworkin ordinance:

Men also testified about how pornography hurts them. One young gay man who had seen *Playboy* and *Penthouse* as a child said of such heterosexual pornography: "It . . . showed me that sex was violence. . . . In pornography I learned that what it meant to be sexual with a man or to be loved by a man was to accept his violence." For this reason, when he was battered by his first lover, which he described as "one of the most profoundly destructive experiences of my life," he accepted it.¹⁶⁷

Furthermore, MacKinnon and Dworkin have stated that "harm is still harm when done by . . . men to men."¹⁶⁸ Therefore, there is no special exemption in their anti-pornography ordinances for homosexual

166. The charges were ultimately dismissed, but the city threatened further prosecutions, leading the clinic to avoid similar displays. See John Parker, *City Doctor Found Not Guilty on Posters*, DAILY OKLAHOMAN, Oct. 3, 1991, at 1. Safer sex information on-line is also a potential target for prosecution under the 1996 Communications Decency Act, which criminalizes on-line indecency. See *supra* note 7 and accompanying text. Critical Path AIDS Project, Inc. and AIDS Education Global Information Project, both of which maintain web sites with safer sex information, were plaintiffs in the suit challenging the new law which was declared unconstitutional by a district court and is currently pending Supreme Court review. *ACLU v. Reno*, 929 F. Supp. 824, 827 n.2 (E.D. Pa. 1996), *prob. juris. noted*, 1996 U.S. LEXIS 7482 (U.S. Dec. 6, 1996).

167. MACKINNON, FEMINISM UNMODIFIED, *supra* note 3, at 189 (footnotes omitted).

168. DWORKIN & MACKINNON, *supra* note 3, at 87.

materials.¹⁶⁹ Indeed, they assert that gay men would “have strong potential cases” under the trafficking provision of the ordinance.¹⁷⁰

MacKinnon apparently views homosexual sex in terms of male power and as no less expressive of gender inequality than heterosexual sex. When she writes that “male sexual access to anything—children, other men, women with women, objects, animals—is . . . the real rule,”¹⁷¹ she aligns gay sex with heterosexual sex in her theory of sexuality. As she and Dworkin explain, “Gay men are often used literally in the same ways women are in pornography; their status being lowered to that of a woman is part of the sex.”¹⁷² Moreover, in other contexts, MacKinnon has implicitly disavowed even the possibility of an activist use of pornography. As described above, she takes issue with self-described “feminists” who claim to be using pornography to liberate women. Indeed, she is quick to deride such work even when it is produced by lesbians, who have a history of sexual silence similar to that of gay men and for whom, therefore, frankness and public expression about their sexuality take on a potentially different political meaning than for heterosexual women. In MacKinnon’s view, these so-called activists achieve nothing more than a celebration of the status quo. Although MacKinnon has never explicitly considered in her work the use of pornography by gay, lesbian, and AIDS activists, her rejection of the possibility of an activist use of pornography in other contexts suggests that she would have little concern for work like Mapplethorpe’s. Finally, even if I am wrong, even if MacKinnon *would* wish to protect sexually explicit activist art, the definition of pornography that she and Dworkin have drafted would not achieve this goal. A crucial question remains: Is it even *possible* to carve out a coherent exception for such work under any definition of pornography?

169. They write:

Is some gay men’s access to pictures of subordinating gay sex more important than the right of men or boys not to be raped or violated so that pictures can be made of them, or the desire of other gay men to shape a community free of eroticized self-hatred? . . . [I]f harm is done, and it is based on gender, neither the particular sex acts performed nor the gender of those who get hurt should determine whether their civil rights are protected or not.

Id. at 86-87; see also ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 23 (1981) (“Fucking requires that the male act on one who has less power [so that]. . . the one who is fucked is stigmatized as feminine during the act even when not anatomically female.”).

170. DWORKIN & MACKINNON, *supra* note 3, at 49.

171. MACKINNON, FEMINIST THEORY, *supra* note 3, at 203.

172. DWORKIN & MACKINNON, *supra* note 3, at 49.

III

THE "UNDECIDABILITY" OF LANGUAGE: THE PROBLEM WITH LEFTIST THEORIES OF INTERPRETATION

Language is replete with words which taken in one sense are full of meaning and in another are colorless.

Sigmund Freud¹⁷³

A. *The Hermeneutics of Postmodern Political Art*

Any theory of censorship must have a theory of interpretation. My criticism of leftist censors so far has been this: they have failed to consider how a great deal of leftist speech actually works. They have failed to recognize that central to the contemporary activism emanating from their own communities are techniques that make leftist speech almost indistinguishable from the hate speech and pornography it questions.

An analysis of the new political art reveals yet another failure in the leftist censorship theories. This art is premised on a theory of interpretation that is directly at odds with the naive and simplistic hermeneutical assumptions that undergird the censorship proposals. Whereas leftist censors envision a world in which the "meaning" of a text or an image is readily discernible, postmodern art revels in its own interpretive ambiguity.

The indeterminacy of language—the way in which different spectators or even the same spectator may have contradictory readings of a single image—is at play here. Informing deconstructive practice is the notion that to be understandable, language must consist of a limited number of signs that any user can repeat and manipulate.¹⁷⁴ Yet this very quality of language that allows for its ability to communicate also creates its ability to *miscommunicate*. Because everyone must use the same system of language, words must be able to "break free from the author, and . . . mean other than what the author meant."¹⁷⁵ Thus, the very same words can create multiple and contradictory readings depending on a variety of factors—who speaks them, who hears them, and in what context.¹⁷⁶ As the critic Jonathan Culler puts it, "Meaning is

173. Sigmund Freud, *Wit and Its Relation to the Unconscious*, in *THE BASIC WRITINGS OF SIGMUND FREUD* 649 (A. A. Brill ed. & trans., 1938).

174. This capacity of language, called "iterability," is not an accident, but rather a condition that makes communication possible. See CULLER, *supra* note 77, at 120.

175. Balkin, *supra* note 77, at 780. Another critic writes, "Antagonistic efforts to fix . . . multiple connotations . . . demonstrate . . . a war of position whose outcome is never guaranteed in advance one way or the other." Kobena Mercer, *Skin Head Sex Thing: Racial Difference and the Homoerotic Imaginary*, in *How Do I LOOK?*, *supra* note 88, at 169, 192.

176. As Stanley Fish argues, "since the conditions of interpretation are themselves unstable—the possibility of seeing something in a 'new light,' and therefore of seeing a *new* something, is ever and unpredictably present—the shapes that seem perspicuous to us now may not seem so or may

context-bound, but context is boundless."¹⁷⁷ What these theories reveal is actually quite simple: today's "bad" speech may be tomorrow's "good" speech. Simply banning words or images alone will not suffice. Rather, a theory of political censorship must recognize that words and images are arbitrary and that the conditions of interpretation, themselves unpredictable, are all that gives words and images meaning.

Artists and activists steeped in postmodernism create work that defies easy categorization and that is often about its own elusiveness. In fact, for the sake of argument, I oversimplified my analysis of some of the postmodern political art in the previous Part of this Article. Here then, I return to those examples to reveal the greater complexity with which they function.

Reconsider my discussion of performance artist Karen Finley. I presented Finley as if her uses of pornography were unquestionably emancipatory, as if they clearly opposed sexism and violence against women. But the reality is more complex. Feminist critics have questioned whether Finley's work achieves or defeats the emancipatory goals that she avows, and that I attributed to her work. Indeed, what is interesting about her work is that it does not fall neatly into either feminist camp. At least one feminist critic has observed that "[t]he frightening conviction [Finley] brought to her invocation of a rapist hinted at a genuine, rather than simulated, hatred of women."¹⁷⁸

Reconsider as well the work of Robert Mapplethorpe in this context. As the controversy over NEA funding mounted, Mapplethorpe's work became a cause célèbre of the anti-censorship left. In view of the homophobia and bigotry that this work elicited, many associate his name with a gay rights agenda; certainly, this is how I have presented his work. Yet Mapplethorpe's photographs are not nearly so clear cut. Indeed, his work has become a source of controversy within the left on the subjects of race and homosexuality.

Critics have given a range of contradictory political readings of Mapplethorpe's work, arguing about whether it reaffirms or subverts stereotypes about race and sexual orientation. Not only can Mapplethorpe's images "elicit a homophobic reading as easily as they can confirm a homoerotic one,"¹⁷⁹ but his work has also been interpreted as racist by some, and anti-racist by others. One of

seem differently so tomorrow." Stanley Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, 97 *YALE L.J.* 777, 785 (1988).

177. CULLER, *supra* note 77, at 123; see JACQUES DERRIDA, *Living On, in DECONSTRUCTION AND CRITICISM* 75, 81 (1979) ("[N]o meaning can be determined out of context, but no context permits saturation.").

178. This critic suggests that some feminists have felt "ambivalence . . . about past performance works by Karen Finley." Mira Schor, *A Plague of Polemics*, *ART J.*, Winter 1991, at 36, 37.

179. Mercer, *supra* note 175, at 192.

Mapplethorpe's favorite subjects was nude black men, often pictured in eroticized, classical poses. Earlier, I suggested that this work be read as a demand that the viewer see black men as heroic, worthy subjects of classical art. But there is another reading of this work that is deeply troubling: many have suggested that it draws on racist stereotypes of black men as exotic sexual objects. Perhaps Mapplethorpe's work furthers the racism that MacKinnon and Dworkin argue is typical of pornography, where "Black men are reduced to the racist view of their sex: the outsized rapist penis, the color of the colonized and the chain gang. They are animalized, huge and promiscuous and amoral and out of control."¹⁸⁰

So was Mapplethorpe's work actually racist, or was he slyly deconstructing racial stereotypes? The question has become hotly debated. In fact, one of the central pieces in the 1993 Whitney Museum Biennial Exhibition¹⁸¹ consisted of a series of images appropriated from Mapplethorpe's book of black nudes, called *Black Book*.¹⁸² In the Whitney piece, these images were accompanied by textual commentaries from a variety of viewers, many of whom described the homophobia and especially the racism that they perceived in Mapplethorpe's work.¹⁸³ How powerful a message this artwork sends: none other than Robert Mapplethorpe, whose photography enshrined him as an untouchable symbol of leftist martyrdom, suddenly becomes suspect. Through nothing more than a different reading, the very same work that made Mapplethorpe a leftist cause célèbre may transform him into a man of questionable motivation, a racist, and, ironically, a homophobic homosexual.

Many critics still cannot decide how to read Mapplethorpe's work. The critic Kobena Mercer has gone back and forth on the question of race. At first, Mercer accused Mapplethorpe of racial fetishism.¹⁸⁴ Later, he revised his reading to see the photographs as activist works of deconstruction: "[I]t becomes possible to reverse the reading of racial fetishism in Mapplethorpe's work, not as a repetition of racist fantasies but as a deconstructive strategy that lays bare psychic and social relations of ambivalence in the representation of race and sexuality."¹⁸⁵ Mercer concludes that Mapplethorpe's photographs of black men serve

180. DWORKIN & MACKINNON, *supra* note 3, at 49.

181. The Whitney Museum of American Art's Biennial exhibitions attempt to take the pulse of the art world every two years by displaying what Whitney curators consider to be the most important artistic work currently being produced. See generally 1993 BIENNIAL EXHIBITION, *supra* note 13.

182. See ROBERT MAPPLETHORPE, *BLACK BOOK* (1986).

183. The piece, by Glenn Ligon, is entitled *Notes on the Margin of the Black Book* (1991-93). See 1993 BIENNIAL EXHIBITION, *supra* note 13, at 191 (reproducing artwork).

184. See Kobena Mercer, *Imagining the Black Man's Sex*, in *PHOTOGRAPHY/POLITICS: TWO* 61-69 (Pat Holland et al. eds, 1987).

185. Mercer, *supra* note 175, at 185, 187.

a potent anti-racist role. As he explains, this “subversive strategy . . . [f]ar from reinforcing the fixed beliefs of the white supremacist imaginary . . . begins to undermine the foundational myths of the pedestal itself.”¹⁸⁶ Yet Mercer does not believe that he has found the “correct” reading. Rather, he believes that it is the “undecidable” nature of Mapplethorpe’s work (typical of the deconstructive strategy) that ultimately gives it strength.¹⁸⁷

In the same way that Mapplethorpe’s work has been subject to conflicting political interpretations, so too have the photographs of Klansmen by Andres Serrano.¹⁸⁸ Some have questioned whether the work is hate speech or its opposite. Given the large scale and glorious color of the photographs, they could be promotional pictures for the Klan.¹⁸⁹ Yet given Serrano’s race and his previous role as a target of the right in the culture wars, one might assume that the artist intended the work to be a critique of the Klan, demonstrating its eerie, menacing power. When these photographs are seen in a gallery, however, there is no text, no commentary, no context that guides us in our interpretation. And as I shall describe below, Serrano’s statements about the work are ambiguous and only fuel the confusion.

Indeed, it seems that the point of many of these activist pieces is to make the viewer uncomfortable, to force her to question the meaning of the work and to confront other speech she may encounter with greater suspicion. And it is here that the deconstructive strategy of destabilizing language merges with the political agendas that inform many of these artworks. The viewer goes back and forth—what does the work “mean”? What did the artist intend? And as the viewer begins to question her ability to master and categorize the work, she may begin to doubt her assumptions about the stability of other cultural categories—such as race, gender, or sexual orientation. Ultimately this work defies the viewer to pin it down; it is about its own elusiveness. The new censorship schemes are not equipped to grapple with such subtlety.

B. Right-Wing Appropriation of Leftist Speech

[T]he vocabulary of . . . liberals . . . [has] been repackaged and put in the service of the very agenda they once fought.

Stanley Fish¹⁹⁰

186. *Id.* at 188.

187. *See id.* at 190.

188. *See supra* note 103 and accompanying text.

189. *See* Ken Johnson, *Andres Serrano at Stux* (Review of Exhibition), *ART AM.*, Mar. 1991, at 134 (noting that “romantically exalted images of such loaded subjects” expose Serrano to criticism for “dignifying the Klan”).

190. Stanley Fish, *How the Right Hijacked the Magic Words*, *N.Y. TIMES*, Aug. 13, 1995, § 1, at 15.

The failure of leftist censors to consider the shifting nature of language may lead to a nightmarish situation: they may end up silencing the David Wojnarowiczes of the world and not the David Dukes. Just as the political left often relies on far right-wing expressions of hatred as the source of its activist political critique, so the right-wing borrows the language of the left for its conservative agenda. For example, in the same way that David Wojnarowicz uses hate speech against homosexuals to make his gay activist point, conservative activists adopt the leftist rhetoric of discrimination and victimization and use it to fight *against* (traditionally leftist) anti-discrimination policies.¹⁹¹ David Duke speaks of “discrimination” suffered by “victim[ized]” white men as he campaigns against affirmative action.¹⁹² Reverend Don Wildmon, leader of the conservative anti-pornography, anti-homosexual American Family Association (“AFA”),¹⁹³ appropriates explicit homosexual images from David Wojnarowicz’s work and distributes them in an anti-NEA, anti-homosexual pamphlet.¹⁹⁴ Stanley Fish has commented that “[l]iberals and progressives have been slow to realize that their preferred vocabulary has been hijacked.”¹⁹⁵

How ironic that the left’s rhetoric of censorship has itself been adopted by none other than Senator Helms in his tireless campaign to ban federal funding for sexual or “offensive” images in art. Helms’ proposed funding legislation sounded as if it had sprung from the pages of Mari Matsuda. He sought to eliminate federal funding for artwork that “denigrates, debases or reviles a person, group or class of citizens on the basis of race, creed, sex, handicap, age or national origin.”¹⁹⁶ As one critic has noted, “the discourse of liberal . . . antidiscrimination legislation is being appropriated and re-articulated into a right-wing position that promotes a discriminatory politics of cultural censorship and ideological coercion.”¹⁹⁷

Does this not give leftist censors pause? Must not a politically motivated theory of speech-banning account for the way in which the same words or text can work both for or against any political goal? The very

191. Cf. Lawrence, *supra* note 11, at 477 n.160 (“Increasingly, conservative white males have appropriated the rhetoric of ‘silencing’ from the feminist and other outsider groups.”) (citations omitted).

192. See Steven Watsky, *Legislator Suggests Drug Testing for Welfare Recipients*, UPI, Apr. 17, 1989.

193. See, e.g., J. AM. FAM. ASS’N, 1990-92 (chronicling Association’s censorship and anti-gay activities); Bruce Selcraig, *Reverend Wildmon’s War on the Arts*, N.Y. TIMES, Sept. 2, 1990, § 6 (Magazine), at 22.

194. See *Wojnarowicz v. American Family Ass’n*, 745 F. Supp. 130 (S.D.N.Y. 1990) (finding pamphlet violated Wojnarowicz’s rights under the New York Artists’ Authorship Rights Act).

195. Fish, *supra* note 190.

196. Michael Oreskes, *Senate Votes to Bar U.S. Support of ‘Obscene or Indecent’ Artwork*, N.Y. TIMES, July 27, 1989, §1, at 1.

197. Mercer, *supra* note 175, at 192.

method by which the rhetoric of the left has been so quickly co-opted by the political right demonstrates that there is an unstable and manipulable quality to language. It is as if language's infidelity were before the left's very eyes.

C. *Leftist Censorship Theories of Language*

How do leftist censors deal with these problems? In the case of anti-pornography feminists, they largely deny them. In the case of anti-hate speech theorists, they offer failed attempts to solve them.

1. *MacKinnon's Theory of Language*

A fear of language, of representation, haunts Catharine MacKinnon's work. She states that the enemy is pornography, sexism, or the victimization of women, but what she fears as well is language itself, the way in which an image or a word wields power. Hence she criticizes pornography, an attack that strikes some as overly literal, but to MacKinnon is deadly real: texts and images harm actual women. It is as if her horror at the wrongs wrought by words and images in pornography leads her to wish to repress not only the actual images, but also what she knows about images—their power and doubleness, the subtle and often terrifying ways in which they function. And in doing so, MacKinnon's work returns us to a world in which language means one thing and one thing only.¹⁹⁸

2. *Matsuda's Theory of Language*

Unlike MacKinnon, Mari Matsuda, in her theories of hate speech, has acknowledged that interpretation is a tricky business. Matsuda even proffers a theory that purports to solve the problem: we must always consider the "victim's story" when interpreting questionable speech.¹⁹⁹ Yet there are two major flaws in her theory. First, she fails to recognize how common the "hard cases" are to leftist speech—how central the interpretation-defying techniques of postmodernism are. Second, her proffered solution to the problematic nature of language is no solution at all. I shall explain this conclusion further when I consider below the

198. MacKinnon's denial of the doubleness of language may be related to another movement in feminism: a rebellion against traditional images of women as duplicitous. One feminist scholar suggests that feminism's historical refusal to acknowledge the doubleness of language may explain the lack of an ironic feminist discourse:

To the extent that the ethos (character, disposition) of feminism historically has refused the doubleness of "saying one thing while it tries to do another" (the mark of classical femininity, one might argue), it may be that an ironic feminist discourse finds itself at odds both with itself (its identity to itself) and with the expectations its audience has of its position.

Nancy K. Miller, *Changing the Subject: Authorship, Writing, and the Reader*, in *FEMINIST STUDIES/CRITICAL STUDIES* 102, 119 n.18 (Teresa de Lauretis ed., 1986).

199. See *supra* notes 66-68 and accompanying text.

possibility of devising a better definition of "hate speech" or "pornography."

IV HOW TO DISTINGUISH BETWEEN THE SUBVERSIVE AND THE OPPRESSIVE

The word "queer" shouted at a gay man on a dark street in the dead of night by a gang wielding weapons is different from the word "queer" spoken with pride at a "Queer Nation" gay rights rally. Traditional First Amendment standards, such as the fighting words doctrine, might offer some rudimentary, albeit flawed, method to distinguish between these two uses of speech.²⁰⁰ Many anti-hate speech scholars, however, reject these traditional First Amendment standards, just as anti-pornography feminists reject the law of obscenity. Members of both new censorship schools regard accepted First Amendment doctrines as insufficient to protect victims and society from the harms of speech. Indeed, they offer compelling arguments that such standards are themselves racist and sexist. For example, scholars argue that the fighting words doctrine, which hinges on whether words might "incite an immediate breach of the peace,"²⁰¹ evidences a white male point of view. Because only an already empowered person would "fight" when faced with an insult, the doctrine assumes that the victim has power equal to the perpetrator's.²⁰² A black woman who sees Klansmen burning a cross on her lawn would be unlikely to fight back when faced with such a threat. In a similar vein, leftist anti-pornography censors view the law of obscenity as inherently sexist. In their view, obscenity law is concerned with "the male point of view, meaning the standpoint of male dominance,"²⁰³ and is therefore inadequate to protect women against the harms of pornography.

Many leftist censors wish to go much further than existing First Amendment standards would allow. But once they leave these standards behind, how would they prevent banning activist uses of racist or sexist

200. This traditional First Amendment method is flawed in my view because there are interpretive difficulties present even in face-to-face incidents due to the nature of language. See *supra* note 55, and *infra* Parts IV.B-D. Furthermore, the Supreme Court's decision in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), has complicated the task of drafting statutes to criminalize racist fighting words. See *supra* note 56.

201. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (citation omitted).

202. For criticism of the *Chaplinsky* standard from this perspective, see Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 560-61 (1993); Greenawalt, *supra* note 48, at 296-97; Lawrence, *supra* note 11, at 453-55; Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 42 (1992); Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Interment*, 106 HARV. L. REV. 1129, 1133-34 (1993).

203. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 3, at 147.

images? Is there a way to limit the proliferation of images of cross-burning, such as those produced by the Klan for propaganda, while saving images of cross-burning used by anti-Klan activists? Is there a way to silence homophobic graffiti writers who scrawl messages like "Fight AIDS Kill a Quere" on public walls while guaranteeing a voice for the David Wojnarowicz of the world? Is there a way to ban *Hustler* and protect Karen Finley? In short, can we distinguish the activist from the oppressor?

In this Section, I will examine four criteria that may bear on the inquiry: (1) artistic status, (2) context, (3) effect, or victim's assessment of harm, and (4) speaker's intention. These latter two criteria present enormous difficulties. When dealing with activist speech, it is extremely hard to determine a speaker's intent or whether speech has a harmful effect. Even if we were able to overcome these barriers, however, and proclaim with confidence that courts would be able to discern the true intent and the true effect of a particular example of questionable speech, a problem remains: these two criteria—effect and intent—lie in a state of irreconcilable conflict for the purposes of leftist censorship.

This conflict arises because to protect well-meaning activist speech, it is necessary to inquire into the speaker's *intention*, to determine what he hoped to accomplish through the speech. However, to protect victim groups against harm—which is, after all, the point of all leftist censorship—it is necessary to determine the *effects* of speech, to find out whether speech, no matter how well-intentioned, does damage. As we shall see, intention and effect often bear no relation to one another. As a result, I believe it is impossible to offer full protection to activism while banning harmful hate speech and pornography.

A. *Artistic Status*

Is it possible to preserve activist speech while banning sexist or oppressive hate speech by making a blanket exception in a censorship theory for speech that may be classified as "art"? At first, this possibility may appear promising. Because I have drawn most of my examples of threatened activist speech from the realm of political art, an exception for "art" might solve many of the problems I have raised. Furthermore, such an approach could draw on the already existing doctrine that has grown up around the definition of obscenity under *Miller v. California*, which protects works of "serious . . . artistic . . . value."²⁰⁴

The problems with this approach, however, are manifold. First, a great deal of contemporary political art challenges its own categoriza-

204. 413 U.S. 15, 24 (1973).

tion as “art.”²⁰⁵ For example, should we characterize activist artist Gregg Bordowitz’s “safe sex porn” videos, displayed in x-rated movie theaters and in art and academic settings, as “art”? What about AIDS activist posters that grace the sides of buses, but are also displayed in museums?²⁰⁶ What about Karen Finley, who performs in both nightclubs and galleries? Works such as these challenge traditional notions of the definition of art.²⁰⁷ Introducing the complex philosophical question “What is art?” into the definition of hate speech or pornography would complicate rather than clarify the debate.²⁰⁸ Moreover, an exception for art would fail to save subversive work that didn’t come in the form of art; it would therefore protect only a narrow and, some would say, rarefied sector of political speech.

Most importantly, distinguishing works on this basis would serve none of the goals that motivate leftist censors in the first place. Whether speech is “art” is irrelevant to leftist censors, who care not about the value of a work, but instead question why any such value should override the harm that speech does to real victims. As Catharine MacKinnon has stated, “Existing standards of literature [and] art . . . are, in feminist light, remarkably consonant with pornography’s mode, meaning, and message.”²⁰⁹ Just because a work is art does not guarantee its political priority; a work of art can be as racist and sexist as non-art. Thus, even though many of the examples of activist speech we have examined have been deemed art, their status as art is irrelevant to whether they should merit protection under a system of political censorship.²¹⁰

205. See *supra* note 28 (discussing problem of defining “art”).

206. A poster made by the AIDS activist art collective Gran Fury was included in an exhibition at the Whitney Museum of American Art and also displayed as a public service announcement on the sides of New York City buses. See *supra* note 142. In December 1996, the Andrea Rosen Gallery in New York sold copies of *Cheri* (an “adult magazine”) at the gallery as part of an art project. Press Release for *Femalian* exhibit, Andrea Rosen Gallery (Nov.-Dec. 1996).

207. Even relying on an “institutional” theory of art that defines “art” as whatever the “art world” says is art would be underinclusive. See GEORGE DICKIE, *ART AND THE AESTHETIC: AN INSTITUTIONAL ANALYSIS* 34 (1974) (defining as art anything viewed as a “candidate for appreciation” by the art world). The Supreme Court noted in *Hannegan v. Esquire, Inc.*, “What is good literature, . . . what is good art, varies with individuals as it does from one generation to another.” 327 U.S. 146, 157 (1946). Relying solely on critical acceptance or opinions to define art will inevitably chill the work of unpopular and unrecognized artists, the very people who may be most likely to change the course of art. As the Court has observed in its First Amendment decisions, it is essential to protect speech from the “prevailing climate of opinion.” *Roth v. United States*, 354 U.S. 476, 484 (1957). Courts could not achieve that goal if they were to rely on the prevailing climate of the art world as the sole indicator of whether a work were art. See also B.R. TILGHMAN, *BUT IS IT ART?* (1984) (discussing the search for a theory and definition of “art”).

208. See *Pope v. Illinois*, 481 U.S. 497, 505 (1987) (Scalia, J., concurring) (“For the law courts to decide ‘What is Beauty’ is a novelty even by today’s standards.”).

209. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 3, at 153.

210. For a broader discussion of the political relevance of art and its status as protected speech under the First Amendment, see Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 *SUP. CT. REV.* 245, 262 (arguing that literature and the arts merit protection because they inform the

A blanket exception for art therefore proves to be both underinclusive and overinclusive. It is underinclusive because it would omit from the definition of "art" the kind of activist work leftists might wish to save, and overinclusive because it would protect work that leftist censors would wish to ban.

B. Context

Throughout this Article, I have examined situations in which context proves to be an inadequate guide to interpretation of speech. Indeed, this is a recurrent theme in deconstructive practice—we cannot rely on context to interpret speech because context fluctuates and changes interpretation as it does so. Mari Matsuda recognizes that context is not always a sufficient guide to interpreting questionable speech when she writes of the special problems presented by wordless symbols, such as the Nazi swastika, that proliferate without a static context to guide our interpretation.²¹¹

And yet there are certain occasions when we are tempted to believe that context tells all. This temptation is especially strong when hateful or denigrating imagery occurs in an overall context that appears to proclaim explicitly an aim to remedy discrimination. In such circumstances, a viewer may feel confident that the speech is not "actual" hate speech but merely an activist re-appropriation of it. For example, David Wojnarowicz's *Fight AIDS Kill a Queer* was exhibited at an expressly AIDS activist art show in New York called *Witnesses: Against Our Vanishing*.²¹² Given such a setting, a viewer would be likely to assume that David Wojnarowicz meant to criticize the anti-gay hate speech he portrayed. In this case, context seems to be a telling guide for interpretation.

But there are problems with this analysis if it is to be expanded into a general theory. First, context does not often speak so clearly. What if David Wojnarowicz's photograph were seen in a non-political, non-AIDS activist context? What if it were in a random show of photographs, or made into a poster and put on subway walls? A great deal of AIDS activist work appears not in formal art settings, but rather in the street, or in situations where no explicit context exists. ACT UP relies almost exclusively on T-shirts, buttons, fliers, posters, and stickers to

political process by imparting sensitivity to human values). For an argument that art lacks political significance and therefore should not merit First Amendment protection, see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-29 (1971) (finding "no [principled] basis" for protecting artistic expression). For a recent argument that art is central to First Amendment values, see Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73 (1996).

211. See Matsuda, *supra* note 10, at 2367.

212. See WITNESSES, *supra* note 151, at 31.

convey its messages.²¹³ A button with a pink triangle has no “context”; its meaning is freely manipulable.

Furthermore, context is inconstant; consequently, a work’s “meaning” is continually subject to change. Examples abound of activist works that have been taken up by conservative groups and used to expose and criticize the original leftist producers of the work. Indeed, as described earlier, David Wojnarowicz’s work was appropriated by Reverend Don Wildmon’s right-wing, anti-homosexual group, the AFA, in its campaign to stop NEA funding of “offensive” art.²¹⁴

A dramatic reversal of this sort occurred in 1992 with a gay black activist film called *Tongues Untied* by Marlon Riggs. Anti-gay groups rushed to oppose the airing of Riggs’ film on public television.²¹⁵ Patrick Buchanan’s presidential campaign produced a television commercial in the Republican primary attacking Bush and the NEA for “investing” taxpayer money in “pornography.” The commercial, which set the text of the advertisement against an excerpt from Riggs’ film showing black gay men dancing shirtless in leather, seemed designed to strike fear in the hearts of voters much the way that the face of the black murderer Willie Horton played on racist anxiety in the 1988 presidential campaign.²¹⁶ Buchanan’s advertisement revealed that Riggs’ film could be taken up by conservatives and, with a change of context, used to attack leftist causes.

Although context may not suffice on its own, it can be a powerful indicator of a speaker’s intent. The context of Riggs’ film—Riggs’ stated AIDS activist agenda and the opposition the film garnered from anti-gay groups—may quell concerns about his use of racist and homophobic slurs. The context of Buchanan’s reappropriation—Buchanan’s other anti-gay statements—suggests that he co-opted Riggs’ work in pursuit of an anti-gay agenda. In certain cases, therefore, context may provide some indication of a speaker’s intent and therefore may be a helpful factor in interpreting speech. Yet as we shall see, using the speaker’s intent as a method of interpreting speech is itself a deeply flawed approach. Context, to the extent it serves as an indicator of intent, is therefore flawed as well.

213. See Meyer, *AIDS and Postmodernism*, *supra* note 22, at 64.

214. *Wojnarowicz v. American Family Ass’n.*, 745 F. Supp. 130, 133-34 (S.D.N.Y. 1990) (noting AFA pamphlet contained photocopied fragments of artist’s copyrighted works).

215. See Marc Gunther, “*Tongues*” *Could Touch Off New Protests*, ORLANDO SENTINEL, July 19, 1991, at E6 (noting that Riggs’ film could trigger “[a]nother big battle over art, government money and censorship”); Dick Williams, *PBS Fare Tonight Shatters Bounds of Taste, Morality*, ATLANTA J. & CONST., July 16, 1991, at A17 (stating that Riggs’ film is “without doubt the most explicit, profane program ever broadcast by a television network”).

216. See Marlon T. Riggs, *Meet the New Willie Horton*, N.Y. TIMES, Mar. 6, 1992, at A33 (“Willie Horton . . . will continue his metamorphosis into a militant, Jesus-blaspheming, psychopathic homosexual. What kind of monster will he become next?”).

C. *Can Victims Be the Judge?*

Perhaps we could distinguish “good” speech from “bad” by relying on victim groups to distinguish the two. In her hate speech work, Mari Matsuda has suggested that we could decide hard cases by “look[ing] to the victim-group members to tell us whether the harm is real harm to real people.”²¹⁷ Yet this recipient-based theory of harm is also flawed: victims often disagree on whether a particular example of speech is harmful. Such a problem may not be so difficult to resolve in cases where the victims of speech are discrete and identifiable—victims, for example, of a face-to-face incident. But what about the cases Matsuda hopes to regulate, such as publicly displayed speech, in which the victims are an entire, widespread group? A theory that charges a coalition of victim group members with distinguishing acceptable from unacceptable speech assumes that all members of a victim group “know” hate speech when they see it. Such an assumption denies not only the nature of language, but also the diverse reactions to such language within outsider communities.

Matsuda’s theory evidences the influence of “essentialism,” the belief that all members of a minority community share a certain essential nature. Essentialism has been the subject of heated criticism by a growing number of scholars.²¹⁸ These critics, the anti-essentialists, have

217. Matsuda, *supra* note 10, at 2368; *see also* Thomas W. Simon, *Fighting Racism: Hate Speech Detours*, 26 IND. L. REV. 411, 425 (1993) (“The victims, and not their self-proclaimed advocates, . . . need to determine the social meanings [of hate speech].”). One scholar who has called for a tort remedy for face-to-face racist insults proposes that such speech be judged according to a “reasonable person of the disparaged group standard.” Brian Owsley, *Racist Speech and “Reasonable People”: A Proposal for a Tort Remedy*, 24 COLUM. HUM. RTS. L. REV. 323, 326 (1992-93). But this proposal, because it applies only to face-to-face insults, does not address the problems of interpretation that arise with publicly disseminated speech, when victims and perpetrators are not readily identifiable and not limited in number.

218. *See* BUTLER, *supra* note 79, at 14 (arguing that “the insistence upon the coherence and unity of the category of women has effectively refused the multiplicity of cultural, social, and political intersections in which the concrete array of ‘women’ are constructed.”); 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, 139 (criticizing “tendency to treat race and gender as mutually exclusive categories of experience and analysis”); Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741, 742 (1993) (describing the move toward anti-essentialism, and its focus on “internal differentiation within the insurgent groups”); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (arguing that gender essentialism fails to recognize differences among women based on racial identity); Bell Hooks, *Reflections on Homophobia & Black Communities*, 1 OUT/LOOK 22, 22 (1988) (“[I]t is precisely the notion that there is a monolithic black community that must be challenged.”); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2010 (1991) (advocating an approach that “categorizes variations of the voice of color and embodies multiple consciousness”). *But see* Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990) (arguing that anti-essentialism movement challenges leftist unity).

argued that there are multiple viewpoints based on class, gender, sexual orientation, and race within any one outsider group and that the failure to account for differences within minority communities results in silencing those who are at the margin of any group.

The anti-essentialist theory is borne out by numerous practical examples in which members of the same victim group disagree about whether speech is hate speech. This is particularly true where there is no identifiable set of victims to whom we can turn, or in cases that are subtler than the most painful examples of hate speech. Beyond certain extreme situations, some of which may be possible to address through traditional First Amendment means,²¹⁹ there is no easy consensus about what is "persecutorial, hateful, and degrading,"²²⁰ particularly because as we have seen, members of outsider groups themselves often reappropriate degrading speech.²²¹

For example, there has been a major disagreement within the black community over Mark Twain's *The Adventures of Huckleberry Finn*.²²² Although most critics interpret it as a novel that subverts racism by lampooning Southern anti-black sentiment, others see the book as damaging to blacks because it might be read by some as a celebration of racist speech.²²³ Even for those who believe that Twain wished to criticize racism, the pain of reading the book, which repeatedly uses the word "nigger," may be too great a price to pay. Many blacks have described the harm and humiliation they have suffered on reading the book; of particular concern is the exposure of the book to children who may be too young to understand its subtleties.²²⁴

Blacks also debate the resurgent appropriation of the word "nigger" within their community. While some maintain that the cooption of this term can be empowering, others mourn the reemergence of the word and its hateful connotation.²²⁵

Activist work by black artists and curators has sometimes met with hostile reactions from black audiences. Black artist David Hammons

The critique of essentialism has also been central to contemporary feminist and race-related artwork. It is particularly evident in the artwork of Cindy Sherman, Victor Burgin, Mary Kelly, and Barbara Kruger, to name a few. See Meyer, *AIDS and Postmodernism*, *supra* note 22, at 63.

219. See *supra* note 56.

220. Matsuda, *supra* note 10, at 2357.

221. This lack of consensus and the diverse reactions to speech within outsider communities suggest that any attempt to refine hate speech proposals by creating a "reasonable outsider person" standard would be flawed.

222. MARK TWAIN, *ADVENTURES OF HUCKLEBERRY FINN* (Random House 1996) (1885).

223. See, e.g., DUBIN, *supra* note 15, at 50 (describing battle over the book in a Chicago suburb in 1984, where a school board voted to remove the book from a required reading list because of its use of the word "nigger").

224. See NAT HENTOFF, *FREE SPEECH FOR ME—BUT NOT FOR THEE* 18-41 (1992) (describing conflicts over *Huckleberry Finn*).

225. See Marriott, *supra* note 90, at 1.

created a fourteen by sixteen-foot portrait of Jesse Jackson with white skin, blonde hair and blue eyes for an exhibition in Washington D.C. called *Blues Aesthetic: Black Culture and Modernism*. On Jackson's chest were the words, "How Ya Like Me Now?" The artist reportedly "inten[ded] . . . to address the fact that Jackson's race has been an obstacle to his electoral success."²²⁶ Despite Hammons' apparent desire to criticize racism, a group of about ten black men, enraged by the piece, destroyed it with sledgehammers.²²⁷

Another such disagreement within a victim community erupted over a controversial 1990 art exhibition called "Facing History: The Black Image in American Art 1710-1940."²²⁸ Many of the works in the show were portraits of blacks done by white artists that revealed negative racist stereotypes.²²⁹ Guy McElroy, the black curator of the show, said he organized the exhibition to make "a statement about the politics of black life in American society."²³⁰ But in spite of the stated activist intention of the curator, other blacks criticized the exhibition for its racist imagery and its potential to reinforce rather than subvert racist stereotypes.²³¹ Whose interpretation should be dispositive here? Who determines harm?

D. *Intentionality: Is the Speaker a Victim?*

Can we successfully distinguish between "good" activist speech and "bad" hate speech or pornography by determining the intention of the speaker or presenter of speech? Such a method would aim to protect only speech intended to advance an activist cause while prohibiting speech intended to perpetuate discrimination.

I believe such an approach would ultimately fail. As I shall explain below, there are three problems with relying on intent to interpret speech under a system of leftist censorship. The first two reasons arise from the difficulty of discerning the intent behind speech. The third has to do with the underlying rationale for banning hate speech or pornography in the first place.

226. DUBIN, *supra* note 15, at 56.

227. *See id.*

228. *See* Grace Glueck, *Images of Blacks Refracted in a White Mirror*, N.Y. TIMES, Jan. 7, 1990, §2, at 1.

229. *See* Hank Burchard, *Black Images Face to Face*, WASH. POST, Jan. 19, 1990, at N49; *see also* Golden, *supra* note 12, at 20.

230. Glueck, *supra* note 228, at 1.

231. *See id.* A writer in the conservative *Washington Times* wrote: "The irony is that . . . it ends up fostering—albeit from a different perspective—the very attitudes it criticizes." Eric Gibson, "Black Image" Lets Political Labels Speak for Works, WASH. TIMES, Jan. 15, 1990, at E1.

1. *The Impossibility of Discerning Intent*

In deconstructive practice, intent, long considered a guide to interpretation of texts, becomes not only impossible to discover, but also irrelevant to what a text may “mean.”²³² Therefore, deconstructive interpretations, recognizing the instability of language, have simultaneously dismantled the traditional deference given to the author and posited a more powerful role for the interpreter of speech. Yet rather than simply reversing the traditional hierarchy that privileges the author over the reader, deconstruction allows both forces to exist in tension. Roland Barthes, the first critic to let out what was later to become the deconstructive battlecry of the “death of the author,” wrote, “[The author’s] signature is no longer privileged and paternal, the locus of genuine truth His life is no longer the origin of his fables, but a fable that runs concurrently with his work.”²³³

The deconstructive manifesto of the “death of the author” had a specific target: it derided the notion that an author’s “intent” was either ascertainable or relevant to the interpretation of a text.²³⁴ Because contemporary political speakers directly exploit this aspect of deconstruction, an inquiry into their intentions proves troublesome: subjecting recent activist speech to an intentionality inquiry would evaluate this speech according to one of the very criteria that it resists and criticizes.²³⁵

This theory—that an author’s intention is an unreliable guide to discerning the “meaning” of speech—is borne out in actual examples of activist speech. Take, for instance, the glorified photographs of Klansmen by the black-Hispanic artist Andres Serrano discussed above in Part III. We might assume that simply by inquiring into Serrano’s intent—his motives in taking these photographs of Klan grand wizards—we would quickly solve the problem of whether his work

232. As a legal scholar writes, “Our words seem to perform tricks that we had not intended, establish connections that we had not considered, lead to conclusions that were not present to our minds when we spoke or wrote.” Balkin, *supra* note 77, at 777.

233. Roland Barthes, *From Work to Text*, in *TEXTUAL STRATEGIES* 73, 78 (Josué V. Harari ed. & trans., 1979). Barthes is a complex figure whose work cuts across both structuralism and post-structuralism. His writings anticipated and helped to produce the emergence of post-structuralist thinking.

234. For critical rejections of the claim that the meaning of a text resides in the author’s intent, see ROLAND BARTHES, *The Death of the Author*, in *IMAGE, MUSIC, TEXT* 142 (Stephen Heath ed. & trans., 1977); Michel Foucault, *What Is an Author?*, in *TEXTUAL STRATEGIES*, *supra* note 233, at 141; see also DERRIDA, *supra* note 81. Freud was obviously a central influence on these theories. At the risk of oversimplifying: Freudian notions of the unconscious lead inevitably to the idea that even an artist himself may be unaware of his “true” intentions.

235. Whether lawyers and legal scholars should always consider deconstructive readings regardless of the nature of the texts before them is a question that is beyond the scope of this Article. But at least for the works at issue here, which explicitly draw on postmodern theory, I believe that it is appropriate to interpret them in light of this theory.

should be preserved under a political censorship theory. But Serrano's photographs thwart us. In their stunning ambiguity—the way they present Klansmen in regal, heroic poses—they challenge our prejudices and our tendency to rely on the artist's intention as a guidepost. Serrano's statements about his intent are as ambiguous as his pictures. He has said of the Klansmen he photographed, "The ones who were nice to me were genuinely nice . . . I can't make judgments about these people."²³⁶

Would an inquiry into intent be helpful in evaluating David Wojnarowicz's photograph of graffiti that read "Fight AIDS Kill a Quere?"²³⁷ At first, intent may seem to be an obvious criterion to employ in distinguishing Wojnarowicz's artwork from the hate speech he co-opted. Wojnarowicz was a homosexual AIDS activist who was HIV-positive when he made the photograph. Can't we assume that he intended to subvert the hateful message he quotes?

Certain problems with this simple analysis become apparent. For one, the author of the graffiti that David Wojnarowicz photographed is anonymous. How do we know that his intent was not exactly the same as David Wojnarowicz's? Perhaps, rather than a person who wished death for homosexuals, he or she may have been a person who believed that the best way to invite AIDS activism was to write a vicious statement on a wall to elicit anger and response in those who viewed it. Perhaps the graffiti author was a lot like David Wojnarowicz. Perhaps the graffiti author *was* David Wojnarowicz. Using intent as a means of distinguishing between the graffiti and the artwork to censor the former and preserve the latter falls apart under this analysis.

Mari Matsuda has suggested an answer to this problem by proposing that as a general rule (albeit with some exceptions) we save speech when it is the "victim's story."²³⁸ In other words, when encountering a problematic example of speech such as Serrano's Klan photographs, we should ask if the speaker or presenter of the speech is a member of a historically victimized group.²³⁹ If he is a victim, and if his speech is not directed against another historically victimized group (raising a

236. Carr, *supra* note 103, at 108 (emphasis omitted) (noting the compassion with which Serrano treated Klan members in his photographs). A further problem with using intent as a criterion in interpretation is the tendency of recent activist art groups to work in collectives rather than as individual artists. This strategy reflects their critique of the modernist notion of the author as romantic genius. See Meyer, *AIDS and Postmodernism*, *supra* note 22, at 64.

237. See *supra* note 104 and accompanying text.

238. See Matsuda, *supra* note 10, at 2368.

239. Matsuda's approach would run counter to the notion expressed in *Loving v. Virginia* that it "is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." 388 U.S. 1, 13 (1967) (Stewart, J., concurring) (quoting *McLaughlin v. Florida*, 379 U.S. 184, 198 (1964) (Stewart, J., concurring)). See also Massaro, *supra* note 53, at 242.

different set of problems), then Matsuda's proposed formula would tend to preserve his speech.²⁴⁰

And indeed, Matsuda's theory appears to hold promise. For example, in Marlon Riggs' film *Tongues Untied*, if we know that the filmmaker is a black gay man, such information may alter our interpretation of the work. When part way through the film, the narrator recites a disturbing litany of hateful epithets—"homo faggot motherfucking coon Uncle Tom"²⁴¹—we may instinctively believe that the filmmaker wishes to criticize rather than to perpetuate this language. Furthermore, under Matsuda's theory, we could protect Riggs' film while banning Pat Buchanan's reappropriation of it in his anti-homosexual television commercial, because Riggs is a member of the victim group that the language is attacking whereas Buchanan is not.

As demonstrated in the previous example, Matsuda's system *appears* to allow us to confront the general problem of speech that is appropriated by someone other than the original author. In such cases, we could consider the identity of the presenter of language rather than the original author to determine whether speech is good or bad: if Jews rather than neo-Nazis presented Nazi imagery,²⁴² a problem Matsuda considers,²⁴³ or if feminists rather than *Penthouse* presented pornography, then such work would probably be protected.

But in fact, the victim status of the speaker or presenter may be irrelevant to his or her intent, and to assume otherwise is to give way to stereotyping and, again, essentialism. As a critic writes,

[B]lack gay and lesbian artists are producing exciting and important work not because they happen to be black lesbians and gay men but because they have made cultural and political choices out of their experiences of marginality that situate them at the interface between different traditions. Insofar as they speak *from* the specificity of such experiences, they overturn the assumption that minority artists speak *for* the entire community from which they come. . . . [M]inoritized subjects are charged with an impossible "burden of representation."

It is logically impossible for any one individual to bear such a burden, not only because it denies variety and heterogeneity within minority communities, but also because it demands an intolerable submission to the iron law of the stereotype, namely

240. See Matsuda, *supra* note 10, at 2361-73.

241. TONGUES UNTIED, *supra* note 84.

242. Cf. McCalden v. California Library Ass'n, 955 F.2d 1214 (9th Cir. 1992) (civil rights suit brought by Holocaust revisionists who wished to display material purporting to demonstrate that the Holocaust was a hoax).

243. See Matsuda, *supra* note 10, at 2368.

the view from the majority culture that every minority subject is "the same."²⁴⁴

In fact, it is often true that a speaker's membership in a group may be misleading or irrelevant to his intent. The speaker may not be aware of his true intent. Or the speaker may have no group identity that would be relevant in a specific case.

Furthermore, hatred does not come only from insiders. Just because the speaker is a victim does not mean he is telling the victim's story Matsuda wishes to hear. A victim might just be telling an oppressor's story. As Justice Marshall once warned in the context of a jury selection case, we must not assume that "all members of all minority groups, have an 'inclination to assure fairness' to other members of their group."²⁴⁵ Marshall argued that such an assumption would "fly in the face of a great deal of social science theory and research. . . . [M]embers of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority."²⁴⁶

How would Matsuda's theory account for the anti-Semitic Jew, the homophobic homosexual, the racist black,²⁴⁷ or the sexist woman? For example, Matsuda's theory would not begin to resolve the recent controversy within the black community over rap music. Many blacks are calling for changes in rap because they say that, despite its black authorship, it perpetuates racist stereotypes of blacks.²⁴⁸ According to Catharine MacKinnon, this kind of self-betrayal happens all the time: she reserves perhaps her greatest contempt for pornography-defending "so-called feminist[]" women who, through their work, "keep[] all women, including them, an inferior class on the basis of sex."²⁴⁹

Of course, in the realm of pornography, speaker identity has never been proposed as a guide to interpretation. A general protection for pornography when the speaker is a member of the victim group—in this case women—would satisfy neither side of the pornography debate: anti-pornography feminists like MacKinnon have implicitly disavowed the possibility of a feminist pornography, and most anti-

244. Mercer, *supra* note 175, at 204-05.

245. *Castaneda v. Partida*, 430 U.S. 482, 503 (1977) (Marshall, J., concurring).

246. *Id.*

247. Professor Charles Lawrence has stated that "[w]e are all racists." Lawrence, *supra* note 11, at 468.

248. See Michel Marriott, *Hard-Core Rap Lyrics Stir Black Backlash*, N.Y. TIMES, Aug. 15, 1993, § 1, at 1.

249. MACKINNON, FEMINISM UNMODIFIED, *supra* note 3, at 205; see also DWORKIN & MACKINNON, *supra* note 3, at 80 (criticizing "feminist lawyers" who do not "want to do anything real about pornography").

ensorship feminists support the right to make and see pornography regardless of whether it is produced by men or women.²⁵⁰

2. *Does Insider Status Reveal Intent?: Activism by Non-Victims*

If we used victim identity as a step in determining the protection afforded to speech, we would endanger activism by non-victims on behalf of victims. The value of such speech should not be underestimated. Because insider groups, by definition, have greater power in the culture, they accordingly tend to have greater access to resources that allow their speech to be heard. And yet Matsuda's suggestion that the identity of the speaker as a member of a victim group should protect certain speech that would otherwise be at risk ignores the importance of a benevolent insider who uses hate speech in a subversive manner, a non-victim who wishes to engage in political activism on a victim's behalf.²⁵¹ If a heterosexual HIV-negative white man had produced David Wojnarowicz's art, should his speech no longer be protected?²⁵²

In short, a system that protected questionable speech only when it is presented by outsider speakers would be both overinclusive and under-

250. Indeed, women have become producers and distributors of pornography. Candida Royale, for example, makes pornography by and for women through her company, "Femme Distribution, Inc." See FEMME DISTRIBUTION, INC. (catalogue on file with author).

251. Matsuda is not alone in discounting this possibility. Many scholars argue that insiders cannot speak authentically on behalf of outsiders and that to do so is presumptuous, imperialistic, and insulting. See DUNCAN KENNEDY, *SEXY DRESSING ETC.* ch. 2 (1993) (discussing question); Linda Alcoff, *The Problem of Speaking For Others*, 20 CULTURAL CRITIQUE 5, 7 (Winter 1991-92) (arguing that a speaker's social identity "can serve either to authorize or disauthorize one's speech"); Naomi Mezey, Book Note, *Legal Radicals in Madonna's Closet: The Influence of Identity Politics, Popular Culture, and a New Generation on Critical Legal Studies*, 46 STAN. L. REV. 1835 (1994) (analyzing debate). For works debating the closely related question of whether there exists a distinctive outsider voice, see Johnson, *supra* note 218, at 2009-10 (asserting that "status as a scholar of color imbues [an] author with a unique perspective" that allows her to speak with "the voice of color"); Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1746 (1989) (challenging notion that people of color speak in a distinctive voice); Colloquy, *Responses to Randall Kennedy's Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844, 1844-86 (1990) (various authors). Much of the work arguing that outsiders speak in a distinctive voice builds on the groundbreaking theories developed in feminist "voice scholarship." See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

252. On May 27, 1996, the Institute of Contemporary Art ("ICA") in Philadelphia canceled a planned exhibition of the work of a white artist, David Levinthal, who took photographs of blackface racist memorabilia—Mammies, Sambos, etc. Levinthal, who describes these objects as "vicious stereotype[s]," commented, "I was not glorifying racism. I wanted to present these things in a complex way that was beautiful and horrifying at the same time." Richard B. Woodward, *Color Blind: White Artist + Black Memorabilia = No Show*, VILLAGE VOICE, June 25, 1996, at 78. After the ICA decided to cancel the show, Levinthal recounts that he asked a curator, "This really wouldn't be a problem if I were black, would it?" And she admitted it wouldn't." Cf. *supra* note 101 (describing black artist Fred Wilson's exhibition of blackface memorabilia). Mike Kelley and the collaborative artists Rob Pruitt and Jack Early provide other examples of white artists whose work has commented on black themes.

inclusive, protecting offensive speech directed by outsiders at their own groups, and silencing activist speech by insiders on behalf of outsiders.

E. The Irrelevance of Intent to Harm

Either pornography does harm or it does not. If it does, it does not stop doing so because the pornographers do not know that it is pornography or that it does harm.

Andrea Dworkin & Catherine A. MacKinnon²⁵³

The most important reason why intent is not a useful guide for distinguishing between "good" speech and "bad" addresses the underlying rationale for banning hate speech and pornography: the harm that they allegedly cause. Why do we wish to preserve speech that is well-intentioned but that is subject to different interpretations and that can lead to precisely the same harms as the hate speech or pornography it attempts to subvert?²⁵⁴ As a critic has asked in the anti-discrimination context, does a victim of discrimination not "experience . . . humiliation because the [perpetrator] did not consciously set out to harm her?"²⁵⁵

1. Inadvertent Harms of Activist Speech

An activist work may have the same effect on viewers as the actual hate speech it opposes.²⁵⁶ For example, David Wojnarowicz presumably intended "*Fight AIDS Kill a Queer*" to arouse political anger at

253. DWORKIN & MACKINNON, *supra* note 3, at 52-53.

254. A similar argument exists in the equal protection context, where minorities and civil rights advocates have attacked the doctrine, established in *Washington v. Davis*, 426 U.S. 229 (1976), that requires a showing of improper intent rather than just racially discriminatory effect to challenge the constitutionality of a law. See, e.g., Lawrence, *The Id, the Ego*, *supra* note 48. Lawrence criticizes the equal protection doctrine for requiring plaintiffs who are challenging a facially neutral law to prove that the law was enacted or administered with a racially discriminatory purpose. Noting the extremely heavy burden this doctrine places on the plaintiff in a civil rights suit, Lawrence argues that "most of us are unaware of our racism," *id.* at 322, and that a focus on intent or purpose is inadequate and misleading given the pervasiveness of "unconscious racism," *id.* at 323.

255. *Id.* at 319. Judge Posner has noted the irrelevance of intent in the context of obscenity law, stating "the effect of a work of literature on the reader may be different from the intention with which it was written." RICHARD A. POSNER, *LAW AND LITERATURE* 333-34 (1988).

The tension between effect and intent is also present in the debate over whether insiders can speak authentically on behalf of outsiders. In the feminist debate, Linda Alcoff argues that in evaluating this type of speech, we must look at the effect of the words, not the intent of the speaker. Alcoff, *supra* note 251, at 26. Others argue the opposite, that intent, not effect, should govern such an evaluation. See Maria C. Lugones & Elizabeth V. Spelman, *Have We Got a Theory for You! Feminist Theory, Cultural Imperialism and the Demand for "The Woman's Voice,"* 6 *WOMEN'S STUD. INT'L F.* 573, 576-78 (1983).

256. This is the double-bind of employing deconstruction or subversion as a polemical strategy. Deconstructive speech, "uses the conceptual apparatus of the very thing that it wishes to subvert." Balkin, *supra* note 77, at 760. In so doing, such speech may perpetuate rather than displace what it critiques.

discrimination against homosexuals and people with AIDS. But a viewer might feel threatened by the work regardless of Wojnarowicz's intent, especially if that viewer is gay, or has AIDS, or is sympathetic to such groups.²⁵⁷ In contrast, and again regardless of Wojnarowicz's intent, another viewer might take it as incitement to discriminate or even to commit violence. He may think to himself, "That's right—if homosexuals all died, then we wouldn't have to worry so much about AIDS."

In the same way, a feminist work of art that explores pornography to subvert the pornographic objectification of women might have the same effect on some viewers as the very pornography that the activist work seeks to question. Some women may feel insulted and degraded by the work. A sexist might find that the work confirms his sexist view. Perhaps another person might find that the work awakens a previously unrecognized sexual desire or suggests a new sexist insight that will incite him to discrimination, hatred, or violence.

A recent exhibition dealing with race demonstrates that well-intentioned speech can still cause harm. In 1995, the Library of Congress abruptly dismantled a show only hours after it had been mounted, called *Back of the Big House: The Cultural Landscape of the Plantation*.²⁵⁸ Although the exhibition was apparently intended to highlight the creativity and dignity of slave culture, black staff members of the library complained that they were offended by having to confront photographs of slaves and slave quarters in their workplace.²⁵⁹ In a similar incident in early 1996, the Library of Congress, reportedly fearful of offending blacks, removed four anti-lynching cartoons from an exhibition called *New Growth: Recent Acquisitions in Caricature, Cartoon and Illustration*.²⁶⁰ It appears that the good intentions of a curator or speaker who presents controversial speech are often irrelevant to the harm experienced by victim group members.

It should come as no surprise, therefore, that of the two primary texts said to have motivated the suspects to commit the 1995 bombing of the federal building in Oklahoma City, only one was a work of white supremacist hate literature.²⁶¹ The other was a non-fiction work

257. Even if the viewer were convinced that Wojnarowicz intended the work to fight homophobia, that viewer might still be psychically harmed by the work because it could remind him of those people—including, presumably, the graffiti writer himself—who advocate violence against homosexuals.

258. See Karen De Witt, *After Protests, Library of Congress Closes Exhibition on Slavery*, N.Y. TIMES, Dec. 21, 1995, § 1, at 21.

259. See Paul Goldberger, *Historical Shows on Trial: Who Judges?*, N.Y. TIMES, Feb. 11, 1996, §2, at 1.

260. See *id.*

261. See John Kifner, *Oklahoma Blast, A Tale in Two Books?*, N.Y. TIMES, Aug. 21, 1995, at A12.

documenting the dangers posed by the white supremacist movement.²⁶² This second work, a book called *Armed and Dangerous: The Rise of the Survivalist Right*, was written “to sound an alarm over the growth of violent far-right fringe groups.”²⁶³ Despite the author’s stated intention, the book apparently served as inspiration to Timothy McVeigh, the accused Oklahoma City bomber, who reportedly “reveled in the details” of the non-fiction work and even used it to “reinspire faith in the plot” to attack the federal building.²⁶⁴ If both a white supremacist book and a journalistic work critical of white supremacy can contribute to an act of terror, then the question becomes, should we ban literature *about* hate speech as well as hate speech itself?²⁶⁵ This incident suggests that if we use harm alone as a measure, then the answer is yes.²⁶⁶

2. *Activist Effects of Hate Speech*

Conversely, hate speech or pornography in its original form, even when it is not appropriated by a subversive speaker, might itself have the same effect on the viewer as does activist subversive speech. For example, if I walked down the street and saw the graffiti “Fight AIDS Kill a Quere” written on a wall, I might have the same reaction to it that I do to the artwork that appropriated it, regardless of the fact that the two speakers presumably intended entirely different effects, or that the two contexts are different.

In other words, if I were walking down the street and saw the original graffiti from which David Wojnarowicz took his photograph, I

262. *See id.*

263. *Id.*

264. *Id.*

265. A bizarre example of the unintended consequences of activist speech comes from the history of the 1967 book, *Report from Iron Mountain*. The book purported to be a secret government report which concluded that it was desirable to maintain the United States in a constant state of war. Shortly after it was published, *Report from Iron Mountain* was revealed to be a satirical hoax, conceived and launched by peace movement intellectuals such as Victor Navasky, E.L. Doctorow, and John Kenneth Galbraith. Yet in the 1990s, long after the book was out of print, bootleg editions began to appear in the hands of right wing militia groups. *Report from Iron Mountain*, published as a peace movement left-wing parody, has become a “bible” of the far right. *See* Victor Navasky, *Introduction*, in LEONARD C. LEWIN, *REPORT FROM IRON MOUNTAIN* v-xvi (Free Press 1996) (1966).

266. In a similar example, the *Sacramento Bee* ran a cartoon reportedly intending to criticize white supremacists, in which a white supremacist uttered the word “nigger.” Jonathan Rauch, *In Defense of Prejudice: Why Incendiary Speech Must Be Protected*, HARPER’S, May 1995, at 37, 42. Even though the word was “plainly being invoked against racists, not against blacks,” the cartoon led to howls of protest and 1,400 canceled subscriptions. *Id.* at 43. *See also* Valerie Burgher, *Black Isn’t Beautiful: When Is an Antiracist Comic Book Racist? When Its Sponsor Says So*, VILLAGE VOICE, Nov. 28, 1995, at 31 (describing controversy over “well-intentioned,” “[a]nti-racist comic book” that some blacks perceived as perpetuating racist stereotypes); Russell Gold, *Black Students in Bristol Twp. Protest an Editorial Cartoon*, PHILA. INQUIRER, Feb. 22, 1995, at B4 (reporting students’ complaints about school newspaper cartoon that some interpreted as racist, even though cartoonist claimed she intended to satirize racism, not endorse it).

would probably be horrified by its homophobic sentiment. Both instances of speech—the graffito and the Wojnarowicz appropriation—might remind me of the grave threat of discrimination. They might frighten me, incite me to action or cause me to feel guilt at my inaction, just as they *both* might confirm or invite prejudice in another viewer, or invoke terror in yet another.

Similarly, how does the effect of a Karen Finley critique of the language of pornography differ from the effect of viewing actual pornography? In either case, a viewer opposed to pornography might take the experience as an incentive to redouble her anti-pornography efforts; a viewer sexually excited by pornography may be excited by Karen Finley.

The possibility of harm from both hate speech and subversive or critical speech suggests two alternative arguments. One is the traditional First Amendment absolutist approach: by airing hate speech we invite thoughtful argument, robust public debate, and ultimately opposition. Leftist censors, however, have contested this theory by asserting that hate speech and pornography lead not to oppositional counter-speech, but rather to the silencing of their respective victims. In view of this claim, a second argument arises from the observation that hate speech and activist speech can often have similar effects: ban both kinds of speech regardless of intent—activist as well as hateful.

These opposite conclusions both rely on a single, coherent theory of meaning—the very same speech may give rise to entirely opposite and mutually exclusive effects. Or, in deconstructive parlance, texts are radically indeterminate; they contain within them multiple contradictory and mutually exclusive readings; texts sow the seeds of their own counter-arguments. But should leftist censors really be so quick to sacrifice activist speech?

3. *Leftist Censors' Theories of Intent*

Whereas Mari Matsuda tries to accommodate the intent of the speaker in her definition of hate speech, protecting well-meaning speakers from the harm they may inadvertently cause, Catharine MacKinnon utterly dismisses intent. In doing so, she denies the traditional First Amendment absolutist position that viewing horrible images may breed an activist response (or, in deconstructive terms, that horrible images contain within them their own undoing). MacKinnon recognizes that even activist work may unintentionally participate in the very practice that it seeks to subvert. Because horrible images may breed horror and an occasional activist response, and because subversive images may breed not only activism but also more of the horror that they attempt to displace, MacKinnon's theories suggest that we must always choose the

elimination of horror. In both cases, we must err on the side of censorship and silence. To her, the possibility of harm is dispositive.

This is why I believe that MacKinnon would wish to ignore intention altogether, just as she chooses to ignore traditional notions of "value" that First Amendment jurisprudence normally considers in evaluating sexually explicit speech. In traditional obscenity law, speech that is otherwise obscene may nonetheless be protected if it demonstrates serious artistic value. MacKinnon's response to traditional obscenity law is this: "[I]f a woman is subjected, why should it matter that the work has other value?"²⁶⁷ And I pose a similar question here: If a woman is subjected, who cares what the speaker's intent was?

In this sense, MacKinnon's anti-pornography theory is internally consistent, which is more than can be said for Matsuda's anti-hate speech theory. Indeed, the speaker's intent plays a muddled and twisting role in Matsuda's theory. One of the central contradictions that riddles her theory is her wavering emphasis on a purported hate speaker's intent as a guide to determining whether or not questionable speech is truly hate speech. At times, Matsuda seems to endorse the incorporation of an intentionality test into her definition of actionable hate speech. She asserts that "[t]he language used in . . . racist speech [that should be actionable] is language that is, and is *intended* as, persecutorial, hateful, and degrading."²⁶⁸ This emphasis on the speaker's state of mind recurs in her argument that "[i]f the historical message, *known* to both victim *and* perpetrator, is racist persecution, then the sign is properly treated as actionable racist speech."²⁶⁹

Yet at other times, Matsuda appears to endorse a standard that completely disregards a speaker's intent and focuses exclusively on the effect speech might have on the listener. Early on, she writes that "[r]acism includes conscious as well as unconscious acts of subordination; thus no claim of intentionality is made in this Article."²⁷⁰ She continually stresses the need to "focus on *effects*" of hate speech, "[t]he need to attack the effects of racism and patriarchy."²⁷¹ Thus she writes, "[t]he appropriate standard in determining whether language is persecutorial, hateful, and degrading is the recipient's community

267. MACKINNON, FEMINIST THEORY, *supra* note 3, at 202.

268. Matsuda, *supra* note 10, at 2358 (emphasis added); *see also id.* at 2358 n.200 (discussing intent test). Other scholars have also endorsed intent tests. *See, e.g.,* Delgado, *supra* note 57, at 179 (proposing tort for language that was "intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult"); Lawrence, *supra* note 11, at 452 (arguing that face-to-face racial insults should not receive First Amendment protection because "perpetrator's intention is not to discover truth or initiate dialogue but to injure the victim").

269. Matsuda, *supra* note 10, at 2366 (emphasis added).

270. *Id.* at 2332 n.67.

271. *Id.* at 2325 (emphasis added).

standard."²⁷² From this statement, it seems that to Matsuda, the speaker's intent, or the way in which he understood the speech, is beside the point. For instance, in discussing Mark Twain, an "anti-racist" who "used racist dialogue to portray a racist land," Matsuda attributes the best of intentions to Twain.²⁷³ She notes, though, that "[t]here is a danger of some of [Twain's readers] missing entirely . . . the ironic message"; she recognizes that "Twain's realism, in some schools, will cause the kind of harm Twain himself would have abhorred."²⁷⁴ With this example, Matsuda implicitly acknowledges that a victim's pain and a speaker's intent may be utterly unrelated.

Yet Matsuda cannot abandon intent altogether. Another example of her ambivalence about intent arises when she discusses the problem of whether and how to differentiate Nazi symbols proffered by the Anti-Defamation League ("ADL") of B'nai Brith (for educational purposes) from those used to perpetuate Naziism. She describes her own unease when viewing even well-intentioned uses of hate speech: "When I viewed an ADL display of Nazi propaganda, I felt a familiar, queasy revulsion."²⁷⁵ Yet Matsuda notes that on an "intellectual level," her understanding of the ADL's intention softened the impact of the speech.²⁷⁶ Even here, however, Matsuda seems to acknowledge the power of images to harm in spite of the supposed intent of the presenters. Thus she writes, "we should look to the victim-group members to tell us whether the harm is real harm to real people," turning to a recipient-based theory of interpretation rather than a speaker-based theory.²⁷⁷

Matsuda does not settle the issue of which should matter: a speaker's intent or a victim's pain. As we have seen, her failure to do so has dramatic implications because the rivalry between these two concerns strikes at the heart of the debate over contemporary activist speech. Matsuda cannot have it both ways: she cannot both protect well-intentioned speakers and ban harmful speech.

F. A Multi-Factored Approach

I have argued that none of the factors analyzed above—artistic status, context, victim group judgment, or intention/identity of the speaker—is adequate to distinguish activist, deconstructive uses of hate speech and pornography from harmful uses. But perhaps it would be

272. *Id.* at 2364.

273. *Id.* at 2369.

274. *Id.*

275. *Id.* at 2368.

276. *See id.* ("Knowing the intent of the Anti-Defamation League [in presenting the Nazi symbols] made the presentation less intrusive.")

277. *Id.*

possible to balance these factors, creating a multi-pronged method of inquiry that would allow for a more precise system of distinguishing good speech from bad. In a sense, this is what Matsuda has informally attempted. The problem with a multi-factored approach, however, is the problem that underlies Matsuda's work: the factors I have described above are fundamentally contradictory. The tension I have portrayed between a harm-based model of censorship—which is in fact what motivates both MacKinnon and Matsuda—and a speaker-protective, intent-based model, would ultimately defeat a multi-factored, balancing approach. There is an irresolvable conflict between what victims feel and what speakers intend.

A multi-factored approach would satisfy no one. On the one hand, in an attempt to save activist speech through an inquiry into intentionality, it would end up saving well-intentioned work that does great harm; it would not be adequate to protect victims from pain. On the other hand, in an attempt to consider harm, victim group arbiters of speech would inevitably silence a great deal of well-intentioned speech because of its inadvertent damage. Given the unpredictable nature of interpretation, activist speakers would have no way of knowing whether their speech would cause harm; a chilling effect would be unavoidable.²⁷⁸

What if rather than balancing, Matsuda banned speech only when it was *both* ill-intentioned *and* harmful? Even presuming for the sake of argument that we could ever definitively determine intention or harm—a presumption that I have argued is illusory—this approach is still problematic. It fails to solve the problem that Matsuda advances as the justification for censoring hate speech: the psychic harm it causes. Such an approach would do nothing to protect victims from harm that well-intentioned speech can cause, a harm that, as we have seen, recurs frequently throughout recent controversies.²⁷⁹

278. In spite of these flaws, it seems possible that Matsuda would still prefer this system to the traditional First Amendment approach because her proposal would protect more outsiders from harm than existing law does. But I have set out the deep flaws of such an approach: Not only would it fail to protect many victims from harm; it would also chill activist speech.

279. In effect this approach would protect a great deal of harmful speech. The Supreme Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), illustrates the limitations of such an approach for a theorist like Matsuda. *Brandenburg* adopted a somewhat similar test to the one I have proposed above in that it required both bad intent and likely harmful effect before banning speech. In *Brandenburg*, the Court invalidated the conviction of a Ku Klux Klan member under an Ohio statute. The Klansman had participated in a rally in which Klan members uttered phrases such as, "Bury the niggers." *Id.* at 446 n.1. The Court held that the First Amendment protects comments such as these advocating violence. It is only when such advocacy was "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action" that it no longer merits constitutional protection. *Id.* at 447 (emphasis added).

Matsuda, of course, criticizes the traditional First Amendment approach embodied in decisions like *Brandenburg*. She rejects the traditional approach not only because of its value neutral analysis

CONCLUSION

A. *The Case for Sacrificing Activist Speech*

Measuring a victim's anguish is an impossible task. If the cost of activism is the proliferation of hate speech and pornography, then is activism really worth it, even if it is calculated to remedy many of the conditions that caused victims to be outsiders? The very notion that activist speech can be an agent of social change has been rejected by some outsiders, weary of their struggle.²⁸⁰ Charles Lawrence notes that, after all, the First Amendment co-existed with slavery. "Most blacks," he writes, "do not have faith in free speech as the most important vehicle for liberation."²⁸¹

Catharine MacKinnon has made the choice, *sub silentio*, to sacrifice some sector of activist speech. Her implicit stance—that intention is irrelevant—and its inevitable result—that some well-intentioned speech might be lost—are a testament to her unflinching emphasis on the harm that she believes pornography causes. The justifications for such a decision are formidable: (1) the damage done by hate speech and pornography is too great, (2) subversive speech does not necessarily accomplish its goals and indeed may perpetuate rather than subvert the racism or sexism it takes on, and (3) banning harmful speech may be the first step toward a world of equality for outsiders in which activist, subversive speech is no longer necessary. Why would we need activism to fight racism and sexism when we no longer have hate speech and pornography?

of speech—its refusal to consider race—but also because of its inefficacy at protecting victims. *Brandenburg* considers only the harm of lawless action, not the psychic pain of outsiders. Furthermore, because it requires *both* bad intent and likely harmful effect before it permits censorship, *Brandenburg* protects a great deal of offensive speech.

Cass Sunstein's definition of pornography further illustrates the limitations of a censorship scheme that bans speech only when it has both bad intent and bad effect. See Sunstein, *Pornography*, *supra* note 31, at 592. To qualify as pornography under Sunstein's definition, material must be sexually explicit, it must depict women as enjoying or deserving physical abuse, and it must have *both the purpose and the effect* of producing sexual arousal. See *id.*

A recent test of the Sunstein model suggests that it would be highly ineffective as a censorship tool. James Lindgren found that when subjects attempted to apply Sunstein's definition of pornography to actual examples of speech, they classified nothing as pornographic, even material that Sunstein assumed would fit squarely within his definition. Lindgren, *supra* note 31, at 1213-14. I would argue that this underinclusiveness results from Sunstein's combination of an intent and an effect requirement.

280. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1259 (1992) (arguing that free speech is helpful in small, clearly bounded disputes, but less able "to deal with systemic social ills, such as racism or sexism, that are widespread and deeply woven into the fabric of society"). Delgado and Stefancic use the term "empathic fallacy" to refer to what they regard as the false belief that we can enlarge our empathies through language alone. *Id.* at 1261 (emphasis omitted).

281. Lawrence, *supra* note 11, at 466.

B. *The Case for Preserving Activist Speech*

Perhaps one might argue that if enacted, leftist censorship proposals would endanger only postmodern art, a passing trend in outsider speech and therefore a relatively insignificant loss. It is true that since postmodernism has come to the fore in recent years, the subversive, deconstructive mode has become a predominant form of activist and artistic speech.²⁸² The technique of subversion, however, is not new. Indeed, there is a long history of outsider speakers relying on appropriation and subversion in their political speech.²⁸³ This long history helps in part to explain why postmodernism has been so widely embraced by contemporary outsider political and artistic activists.

The subversive mode lies at the heart of the leftist activist tradition for two reasons. First, it represents the mode of discourse most readily available to outsiders. Second, it is often the most effective form of outsider speech. Therefore, the danger to activist speech, and the amount of activist speech that is threatened under leftist censorship theories, is much greater than leftist censors might imagine.

Ironically, the same theorists who lead the anti-hate speech movement have, in other contexts, acknowledged the centrality of the subversive mode to outsider politics. These same opponents of hate speech are often leading proponents of the move towards "storytelling," the infusion of the personal into legal doctrine. As Richard Delgado, one of the scholars who wears both hats, has written, "The dominant group creates its own stories . . . in which its own superior position is seen as natural. The stories of outgroups aim to subvert that ingroup reality."²⁸⁴ Delgado argues that to succeed, these "counterstories" must proceed subtly. They must "challenge the received wisdom"²⁸⁵ while appearing to reinforce it. "Stories and counterstories, to be effective, must be or must appear to be noncoercive. . . . They are insinulative,

282. See Meyer, *AIDS and Postmodernism*, *supra* note 22, at 63.

283. Indeed, a recent article by Geoffrey Miller suggests that a similar linguistic technique, what he calls verbal "riposte," may be found in stories in the Hebrew Bible. Miller offers an interesting strategic rationale for this technique:

If an insult story [by a rival group] attained such widespread currency that simply ignoring or denying the insult would not be effective, the insulted party would then need to respond with a story which took the insult and threw it back on the originating group. Riposte stories . . . implicitly accept as partially true the substance of the original insult, but they turn the insult back on the opponent by claiming that the bad qualities attributed to the insulted group are, in fact, good, and that the party making the insult is the one legitimately to be criticized for the shortcoming involved.

Geoffrey P. Miller, *Verbal Feud in the Hebrew Bible: Judges 3:12-30 and 19-21*, 55 *J. NEAR E. STUD.* no.2, at 105, 108 (1996) (citations omitted).

284. Delgado, *supra* note 48, at 2412-13; see also Delgado & Stefancic, *supra* note 51, at 866 (1994) (describing the importance both of turning "rhetorical strategies against the dominators" and of storytelling).

285. Delgado, *supra* note 48, at 2414.

not frontal"²⁸⁶ Delgado implicitly recognizes that outsiders rely on such techniques because they do not have the power to speak directly. His analysis reveals that the subtle modes of subversion or deconstruction are particularly well-suited to powerless voices because their insinuating, rather than confrontational, method can be a means of self-protection. Thus, at issue here is a central form of political speech for disempowered groups.

Leftist activists have always known this. Charles Chesnut, who in the late 1880s became the first African-American novelist to achieve recognition in this country, wrote:

The subtle almost indefinable feeling of repulsion toward the Negro, which is common to most Americans—cannot be stormed and taken by assault; the garrison will not capitulate, so their position must be mined, and we will find ourselves in their midst before they think it.²⁸⁷

Subversive speech, which attacks stereotypes while appearing to reinforce them, thus protects the outsider speaker from the danger of dissent: insiders may not realize that the speaker is subtly criticizing the very language he quotes. As a critic wrote of outsider artistic expression, “[R]esistance within a colonial context is rarely direct, overt or literal; rather, it articulates itself through semantic reversals, and through the process of infusing icons, objects, and symbols with different meanings.”²⁸⁸

Subversive speech suits disempowered speakers for another reason as well. Because outsider speakers tend to have fewer resources than insiders, this mode of appropriating insider speech is both more available to them and more easily accessible to a large audience. As a contemporary outsider artist explained, “In a war in which you have no weapons, you must take those of your enemy and use them for something better—like throwing them back at him.”²⁸⁹ A cultural critic explains it this way: “[T]he only resources from which the subordinate

286. *Id.* at 2415.

287. Charles Chesnut, quoted in HENRY LOUIS GATES, JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRO-AMERICAN LITERARY CRITICISM* 116 (1988) (citing Helen M. Chesnut, *CHARLES WADDELL CHESNUTT: PIONEER OF THE COLOR LINE* 21 (1952)).

288. Fusco, *supra* note 13, at 84; see also MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* 18 (Steven F. Rendall trans., 1984) (“Innumerable ways of playing and foiling the other’s game . . . characterize the subtle, and stubborn resistant activity of groups which, since they lack their own space, have to get along in a network of already established forces and representations. People have to make do with what they have.”); FISKE, *supra* note 19, at 19 (“Guerrilla tactics are the art of the weak: they never challenge the powerful in open warfare, for that would be to invite defeat, but maintain their own opposition within and against the social order dominated by the powerful.”).

289. Fusco, *supra* note 13, at 83 (quoting New York-based Palestinian filmmaker Elia Suleiman). Fusco adds, “These artists . . . look at Western history and art history not to excise its racism but to excavate and play with symptomatic absences and stereotypes, creating a counter-history by bouncing off negative images and teasing out hidden stories.” *Id.*

can make their own subcultures are those provided by the system that subordinates them."²⁹⁰ There may be no choice for outsider speakers other than to work within the language imposed on them by the very insider culture they seek to resist. Some critics insist that it would be *impossible* for outsiders to create their own language, and that to believe otherwise would be a naive denial of the way in which language and power intertwine.²⁹¹

It should come as no surprise, therefore, that others have argued that subversion is at the heart of the African-American literary and vernacular traditions. In his landmark book, *The Signifying Monkey*,²⁹² Professor Henry Louis Gates, Jr. offers a richly complex theory of these traditions, using as a metaphor the eponymous story of the signifying monkey, a black oral tale that has its origins in slavery and persists throughout contemporary African-American literature, vernacular, and art.²⁹³ Gates' theory offers an astonishing challenge to leftist censors because it asserts that the interpretation-defying techniques that I have examined—subversion and reversal—are *the central mode* of this outsider group's discourse.

For Gates, the African-American literary, vernacular, and artistic traditions operate by "the obscuring of apparent meaning."²⁹⁴ He writes of the "undecidability within the discourse, such that it must be interpreted or decoded by careful attention to its play of differences. *Never can this interpretation be definitive*, given the ambiguity at work in its rhetorical structures."²⁹⁵ Gates explains that misinterpretation frequently arises because non-blacks do not realize that black speakers reverse the apparent meanings of their words "as a mode of encoding for self-preservation."²⁹⁶ The outsider speaker, by virtue of his very

290. FISKE, *supra* note 19, at 15.

291. See BUTLER, *supra* note 79, at 5 ("Obviously the political task is not to refuse representational politics—as if we could. The juridical structures of language and politics constitute the contemporary field of power; hence there is no position outside this field").

292. GATES, *supra* note 287.

293. The tale of the signifying monkey that recurs throughout this tradition and on which Gates grounds his work always involves a particular theme: it recounts an exchange between a lion, the King of the Jungle (a metaphor for whites), a monkey (a metaphor for the black speaker of the tale), and an elephant who acts as a third party. The monkey, although less powerful than the ruling lion, triumphs in the tale because of his ability to "signify"—to encode his speech in a way that allows him to attack the lion without the lion's knowing it. The monkey derives power from his ability "to convince the hapless Lion that he has spoken literally, when all along he has spoken figuratively." *Id.* at 57.

294. *Id.* at 53.

295. *Id.* (emphasis added).

296. *Id.* at 67. Another example illustrates this point. Gates recounts Frederick Douglass' observation that fellow slaves "would sing the most pathetic sentiment in the most rapturous tone, and the most rapturous sentiment in the most pathetic tone," which led to the songs being misread by non-slaves. *Id.* (quoting FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS 13

position as outsider, cannot afford to speak literally. Rather, he must proceed subtly, by reversal and subversion; he must speak in code, if his message is to prevail.²⁹⁷

This lesson has ramifications for all outsider speakers. It explains why we have seen such a prevalence of this technique in the activist work that I have examined, why the reversals of pornography and hate speech by activist speakers recur with such frequency: outsider groups necessarily depend on subversive language. The theory of the signifying monkey becomes a parable of the grave danger of misreading outsider speech, of the failure to recognize that interpretation of this rhetoric can "[n]ever . . . be definitive."²⁹⁸ It is a parable that leftist censors must heed.

C. Choice and Indeterminacy

Any theory that purports to regulate speech must make certain assumptions about how speech works. The theory must grapple with language's complexities. It must recognize that a large and beautiful portrait of a Klansman may fight racism, a violent picture of a rape may oppose sexual violence, and a call to kill "queers" may be a call to save lives. So far though, leftist censors have devised only a rudimentary theory of interpretation. Ignoring the indeterminacy of language, they imagine a world where all victims know a victimizing statement from a non-victimizing statement, where victimizing speech never has its opposite effect, and where words have only one meaning. If they acknowledge at all that speech may have multiple meanings, then leftist censors assume those meanings are easily discerned by investigating the identities or mindsets of speaker and listener. Denying the complexity of

(Doubleday 1963) (1845)). As Gates explains, "This great mistake of interpretation occurred because the blacks were using antiphonal structures to reverse their apparent meaning . . ." *Id.*

297. Gates terms this mode of speech "signifyin(g)." See generally *id.* at 44-124. Essentially, he views signifyin(g) as a trope for African-American rhetoric, representing "the figurative difference between the literal and the metaphorical, between surface and latent meaning." *Id.* at 82. His decision to use the spelling "signifyin(g)" refers to Jacques Derrida's use of the term "différance," suggesting in French "to differ" and "to defer." *Id.* at 46 (emphasis omitted). This spelling represents Derrida's slight alteration of a French word to symbolize graphically the play of language and the dependence of hierarchical oppositions. See DERRIDA, *supra* note 79, at 1-27. Gates uses the alteration to distinguish the term "signifyin(g)"—connoting the black rhetorical mode—from the "white" use of the term "signifying." See GATES, *supra* note 287, at 46. To Gates, signifyin(g) relies on techniques strikingly similar to those that I have argued are central to contemporary activist art. These techniques include, for example, "repetition and revision," *id.* at 94, and the use of the "double-voiced word[]," *id.* at 50. "The audience of a double-voiced word is therefore meant to hear both a version of the original utterance as the embodiment of its speaker's point of view . . . and the second speaker's evaluation of that utterance from a different point of view." GARY SAUL MORSON, *THE BOUNDARIES OF GENRE* 108 (1981) (discussing the literary theory of Mikhail Bakhtin).

298. GATES, *supra* note 287, at 53.

language, these theorists go on to draft definitions of speech that ignore the reality of the very speech most precious to their causes.

Because of the indeterminate nature of language itself—the way in which, for example, well-intentioned activist speech and oppressive hate speech can have similar effects—there is no possibility of devising a system of leftist political censorship that could protect the subversive, activist use of hate speech and pornography. Intention and effect are ultimately disjointed. “Misinterpretation” is inevitable. Speech functions in multiple and contradictory ways. Leftists must therefore make a choice: they can adopt a system of censorship, or they can offer full protection to activism. They can’t do both.