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***793** PORNOGRAPHY AS DEFAMATION AND DISCRIMINATION [FNd]

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What matters for a legal system is what words do, not what they say .... [FN1]

A few years back, during a referendum campaign in Cambridge, Massachusetts, on the civil rights ordinance against pornography that Andrea Dworkin and I conceived, [FN2] a xeroxed leaflet was placed on cars and telephone phone poles in several neighborhoods late one night. Over a large scrawled black swastika, it said: "Help stop commie kike lezzie cunts from telling us what we can read." This little triumph of economy of abuse referred, of course, to the supposed politics, religious heritage, sexuality, and gender of the ordinance's proponents, and made the further quaint assumption that consuming pornography is reading.

While we absorbed this and pondered what to do, to our astonishment the police decided that a crime had been committed and confiscated most of the leaflets before morning. We had forgotten that Massachusetts has a law against group defamation. [FN3] Freedom of speech in Massachusetts seems to ***794** have survived the existence of this law and this instance of its enforcement. The Cambridge ordinance there did not survive its detractors, however, who defended pornography in the name of a freedom of speech that would also have precluded this law.

In discussing this tiny masterpiece of vilification, I have encountered widely differing responses to its elements. Part of the reason, I have come to think, is that real atrocities provide the vocabulary of experience that animates the concept of group defamation, and some of the situations referred to are real to people, and some are not. Some are seen as threatening as well as offensive; others are regarded as perhaps insulting but comparatively harmless. The comparatively more real situations are the Holocaust against the Jews under Germany's Third Reich, the genocide of Native Americans, the slavery and segregation of Blacks in the United States and South Africa, and the internment and atomic bombing of the Japanese during World War II. [FN4] The verbal and visual terms of vilification and denigration that mark these peak episodes, when reiterated, keep their specific traumas alive as well as reinscribe and revivify a prejudice that did not begin or end with them. These experiences are not mere examples for application of the doctrine of group defamation. They are its life, its blood; it exists because they happened.

Typically, from discussions of these epithets to international instruments resolving to eradicate their doctrines, [FN5] their role in systematically reducing, violating, and killing people because of who they are is recognized. Even when a law against group defamation is rejected as censorship, the defamatory words, and the ideas and attitudes they animate and actualize, are conceded to have justified, legitimated, and potentiated the devastation. The words are understood to construct social reality. The epithets from the leaflet which refer to race, religion, and politics, and sometimes even those which refer to sexual orientation, are often granted to be not only offensive but also dangerous; the prejudices they express, mobilize, propagate, and imprint are seen as false and are condemned.

In the same discussions, one encounters the sense that the reality these terms represent is not happening here and now, at least not the way it was "there" and "then." These events, it seems, are regarded as essentially over, ***795** lurking only in the isolated unpleasant or insensitive remark or in the occasional bizarre but largely impotent incident, like magic marker leaflets published at night by xerox. Nothing large or systematic or cumulative is happening. In the view of most of my interlocutors, the formative experiences of group libel live on in discourse principally as analogy or memory, at most casting a shadow across the future in a tenuous kind of causality. Yet always the question of explanation of the past is anguished over: how could these atrocities have been allowed to happen? What could people have been thinking? How could they have not known or have looked the other way? How could the law have become so perverted as to legalize them? Implicit here is that "we," here and now, would recognize these past outrages for what they were at the time. "We" would have seen through them, spoken out against them, stood up to them, done something to stop them.

Here and now, there is something virtually never included in the lexicon of group defamation. People are being callously dehumanized, horribly brutalized, and sometimes killed. Verbal, visual, and physical atrocities are committed, demeaning an entire group because of a condition of birth, targeting them for physical atrocities which are being done. This case is distinctive in a number of ways, including the fact that a lot of money is being made from the defamatory materials, and that the connections between the material and specific physical abuses are far better documented than in any other instance. [FN6] Yet the atrocity is not acknowledged but is widely denied. Its ideas are neither widely identified as false nor generally condemned. On the contrary, the materials are rather widely celebrated, alternately defended as freedom itself and as the price "we" must pay for freedom. Not only is this permitted to happen, it is defended by many as a measure of principle. I refer to the "cunts" of the leaflet: to pornography and the situation of women.

Part of the problem in this case is the lack of recognition, militant at times, that there is such a thing as the condition of women of which this body of materials could be a part. In reality, the status and treatment of women has certain regularities across time and space, making gender a group experience of inequality on the basis of sex. Traditionally, women have been disenfranchised, excluded from public life and denied an effective voice in public rules, denied even the use of their own names. Women are still commonly relegated to the least compensated and most degraded occupations. ***796** Their forced dependency is exploited and venerated as woman's role; their work is devalued because they are doing it, as women are devalued through devaluing the work they do. Women remain reproductively colonized, subjected to systematic physical and sexual insecurity and violation, and blamed for it. Women are commonly raped, battered, sexually harassed, sexually abused as children, forced into motherhood and prostitution, depersonalized, denigrated and objectified-and told this is just and equal by the left, and inevitable and natural by the right. Women's abilities and contributions continue to be suppressed, their achievements denied and marginalized and, when valued, appropriated, and their children stolen. Women are used, abused, bought, sold, and silenced. [FN7]

Little of this has changed to the present; some of it has gotten better, and some of it has gotten worse. The level of victimization of women varieswithin and across cultures; in the contemporary United States, for example, women of color are hardest hit. [FN8] But no woman is exempt from this condition from the moment of her birth to the moment of her death, in the eyes of the law, or in the memory of her children.

This condition is imposed by force. Some force comes in the more covert forms of socialization, pressure, and inculcation to passivity and femininity, some in the more overt forms of poverty and sexual violence. In the United States, the average woman does

not yet have an income that is two-thirds that of the average man. Forty-four percent of American women report rape or attempted rape at least once in their lives. Thirty-eight percent report having been sexually abused as children. Between a quarter and a third are battered in their homes. Eighty-five percent have been, or will be, sexually harassed in the workplace, thirty-five percent of them physically. Most prostitutes are female. [FN9] Although these facts are uncontested and incontestible, neither are they really acknowledged or faced. Mostly this reality is elided because neither women nor men like thinking about it, and because men like living it, or at least benefit from it. So its victims go under without a trace. Life and letters are unchanged. Law and politics go on as usual. Virtually nothing is done about any of it, by anyone, anywhere.

Pornography has a central role in actualizing this system of subordination in the contemporary West, beginning with the conditions of its production. Women in pornography are bound, battered, tortured, harassed, raped, and sometimes killed; or, in the glossy men's entertainment magazines, "merely" humiliated, molested, objectified, and used. In all pornography, women are prostituted. This is done because it means sexual pleasure to pornography's consumers and profits to its providers, largely organized crime. But to those who are exploited, it means being bound, battered, tortured, harassed, raped, ***797** and sometimes killed, or merely humiliated, molested, objectified, and used. It is done because someone who has more power than they do, someone who matters, someone with rights, a full human being and a full citizen, gets pleasure from seeing it, or doing it, or seeing it as a form of doing it. [FN10] In order to produce what the consumer wants to see, it must first be done to someone, usually a woman, a woman with few real choices. Because he wants to see it done, it is done to her.

To understand how pornography works, one must know what is there. In the hundreds and hundreds of magazines, pictures, films, videocassettes, and so- called books now available across America in outlets from adult stores to corner groceries, women's legs are splayed in postures of sexual submission, display, and access. We are named after men's insults to parts of our bodies and mated with animals. We are hung like meat. Children are presented as adult women; adult women are presented as children, fusing the vulnerability of a child with the sluttish eagerness to be fucked said to be natural to the female of every age. Racial hatred is sexualized; racial stereotypes are made into sexual fetishes. Asian women are presented so passive they cannot be said to be alive, bound so they are not recognizably human, hanging from trees and light fixtures and clothes hooks in closets. Black women are presented as animalistic bitches, bruised and bleeding, struggling against their bonds. Jewish women orgasm in reenactments of actual death camp tortures. In so- called lesbian pornography, women do what men imagine women do when men are not around, so men can watch. Pregnant women, nursing mothers, amputees, other disabled or ill women, and retarded girls, their conditions fetishized, are used for sexual excitement. In the pornography of sadism and masochism, better termed assault and battery, women are bound, burned, whipped, pierced, flayed, and tortured. In some pornography called "snuff," women or children are tortured to death, murdered to make a sex film. The material features incest, forced sex, sexual mutilation, humiliation, beatings, bondage, and sexual torture, in which the dominance and exploitation are directed primarily against women. [FN11]

Hearings held by the Minneapolis City Council when our pornography ordinance was introduced there documented the harms of pornography's ***798** making and use in proceedings a member of the city's Civil Rights Commission likened to the Nuremberg Trials. [FN12] The studies of researchers and clinicians documented the same reality women documented from life: pornography increases attitudes and behaviors of aggression and other discrimination by men against women. Women told how pornography was used to break their self-esteem, train them into sexual submission, season them to forced sex, intimidate them out of job opportunities, blackmail them into prostitution and keep them there, terrorize

and humiliate them into sexual compliance, and silence their dissent. They told of being used to make pornography under coercion, of the force that gave them no choice about viewing the pornography or performing the sex. They told how pornography stimulates and condones rape, battery, sexual harassment, sexual abuse of children, and forced prostitution. Those not expressly coerced into pornography were there for the same reasons prostitutes are in prostitution: poverty, sexual abuse as children, homelessness, hopelessness, drug addiction, and desperation. Those who say women are in pornography by choice should explain why it is women who have the fewest choices who are in it most.

In the Minneapolis Hearings, women and men spoke in public about the devastating impact of pornography on their lives. Women spoke of being coerced into sex so that pornography could be made of it. They spoke of being raped in a way that was patterned on specific pornography that was read and referred to during the rape, or repeated like a mantra throughout the rape, of being turned over as the pages were turned over. They spoke of living or working in neighborhoods or job sites saturated with pornography. A young man spoke of growing up gay, learning from heterosexual pornography that to be loved by a man meant to accept his violence, and as a result accepting the destructive brutality of his first male lover. Another young man spoke of his struggle to reject the thrill of sexual dominance he had learned from pornography, and to find a way of loving a woman that was not part of it. A young woman spoke of her father using pornography on her mother, and to silence her protest against her mother's screams, threatening to enact the scenes on the daughter if she told anyone. Another young woman spoke of the escalating use of pornography in her marriage, unraveling her self-respect and belief in her future, destroying any possibility of intimacy, violating her physical integrity. She spoke of finding the strength to leave. Another young woman spoke of being gang-raped by hunters who looked up from their pornography at her and said it all: "There's a live one." Former prostitutes spoke of being made to watch pornography and then duplicate the acts exactly, usually starting when they were children. Many spoke of the self-revulsion, the erosion of intimacy, the unbearable ***799** indignity, the shattered self, and the shame, anger, anguish, outrage, and despair they felt at living in a county where their torture is enjoyed, and their screams are heard only as the "speech" of their abusers. They spoke of the silence, and out of the silence, that pornography had imposed on them.

For those who could not speak for themselves, therapists told of battered women tied in front of video sets and forced to watch, and then participate in, acts of sexual brutality. Psychologists who worked with survivors of incestspoke of the role of pornography in sexual tortures involving sex with dogs and electric shocks. One study documented more rapes in which pornography was specifically implicated than the total number of rapes reported at the time in the city in which the study was done. Another study showed correlations between increases in the rate of reported rape and increases in the consumption figures of an index of major men's entertainment magazines. Laboratory experiments showed that pornography that portrays sexual aggression as pleasurable for the victim-as so much pornography does-increases the acceptance of the use of coercion in sexual relations. They showed that this acceptance of coercive sexuality appears related to sexual aggression, and that exposure to violent pornography increases men's punishing behavior towards women in the laboratory. [FN13] Pornography increases men's perception that women want rape and are not injured by rape, that women are worthless, trivial, non-human, object-like, and unequal to men.

The testimony, taken as a whole, revealed that the more pornography men see, the more abusive and violent they want it to be. The more abusive and violent it becomes, the more they enjoy it and the more aroused they get. The more abusive and violent it becomes, the less harm they see in what they are seeing or doing.

Over time, the evidence on the harm of pornography has only become stronger. When

explicit sex and express violence against women are combined, particularly when rape is portrayed as pleasurable or positive for the victim, the risk of violence against women increases as a result of exposure. It is uncontroversial that exposure to such materials increases aggression against women in laboratory settings, increases attitudes which are related to violence against women in the real world, and increases self-reported likelihood to rape. As a result of exposure, a significant percentage of men, many not otherwise predisposed, as well as the twenty-five to thirty-five percent who report some proclivity to rape a woman, come to believe that violence against women is acceptable. [FN14] Materials which combine sex with aggression ***800** also have perceptual effects which desensitize consumers to rape trauma and to sexual violence. In one study, simulated juries who had been exposed to such material were less able than real juries to perceive that an account of a rape was an account of a rape, through which the victim was harmed. [FN15]

The most advanced research in this area studied the effects of materials which degrade and dehumanize women without showing violence, as that term is defined in the research. [FN16] Such material has been shown to lower inhibitions on aggression by men against women, increase acceptance of women's sexual servitude, increase sexual callousness toward women, decrease the desire of both sexes to have female children, increase reported willingness to rape, and increase the belief in male dominance in intimate relationships. For high- frequency consumers, these materials also increase self-reported sexually aggressive behavior. [FN17]

Men who use pornography often believe that they do not think or do these ***801** things. But the evidence shows that the use of pornography makes it impossible for men to tell when sex is forced, that women are human, and that rape is rape. Pornography makes men hostile and aggressive toward women, and it makes women silent. [FN18] While these effects are not invariant or always immediate, and do not affect all men to the same degree, there is no reason to think they are not acted upon and every reason and overwhelming evidence to think that they are-if not right then, then sometime, if not violently, then through some other kind of discrimination.

On the basis of this evidence and analysis, Andrea Dworkin and I designed a law-the ordinance whose advocates were libeled in the leaflet mentioned at the outset-that recognizes pornography as a practice of sex discrimination. Our law defines pornography as graphic sexually explicit pictures or words that subordinate women and also include one or more of a number of specified scenarios which typify pornography. [FN19] Four practices are actionable: coercion into pornography, forcing pornography on a person, ***802** assault due to specific pornography, and trafficking in pornography. [FN20] We did not claim that these atrocities never happen without pornography. We said that sometimes they do, but when it is proven to have happened because of pornography, it should be possible to do something about it. We did not claim that these atrocities are the only things that happen because of pornography. We said that no matter what else happens, this does. Pornography is thus not a prognostication or representation of second class citizenship acted out elsewhere, but an integral dynamic in it, and hence a civil rights violation.

In this light, pornography, through its production, is revealed as a traffic in sexual slavery. Through its consumption, it further institutionalizes a subhuman, victimized, second class status for women by conditioning men's orgasm to sexual inequality. When men use pornography, they experience in their bodies, not just their minds, that one-sided sex-sex between a person (them) and a thing (it)-is sex, that sexual use is sex, sexual abuse is sex, sexual domination is sex. This is the sexuality that they then demand, practice, purchase, and live out in their everyday social relations with others. Pornography works by making sexism sexy. As a primal experience of gender hierarchy, pornography is a major way in which sexism is enjoyed and practiced, as well as learned.

It is one way that male supremacy is spread and made socially real. Through the use of pornography for masturbation-what the leaflet was pleased to call reading-power and powerlessness are experienced and inculcated as sexual excitement and release. Inequality between women and men is what is sexy about pornography-the more unequal the sexier. In other words, pornography makes sexuality into a key dynamic in gender inequality by viscerally defining gender through the experience of hierarchical sexuality. On the way, it exploits inequalities of race, class, age, religion, sexual identity, and disability by sexualizing them through gender.

Seen in this way, pornography is at once a concrete practice and an ideological statement. The concrete practices are discriminatory; the ideological statements are defamatory. Construed as defamation in the conventional sense, pornography says that women are a lower form of human life defined by their availability for sexual use. Women are dehumanized through the ***803** conditioning of male sexuality to their use and abuse, which sexualizes, hence lowers, women across the culture, not only in express sexual interactions. Pornography makes women a public sexual spectacle and common sexual property, works to lower the public standard of their perception and treatment, terrorizes and humiliates women, and also at times offends their sensibilities. Like group libel's historic atrocities, pornography's effects are known but denied or blinked at while being acted out. The abusive acts are presumptively illegal but pervasively permitted, decried in public and savored in private.

When pornography's reality is examined against the terms of group defamation as a legal theory, some of the theory fits, but much of it does not. Pornography does purvey an ideology about all women; too, pornography of women and men of color sexualizes racism. It is in this sense defamatory. But its ideological impact, theprejudice it engenders, while very real, is only one of its effects and is not the one on which the civil rights approach centrally focuses. The deepest injury of pornography is not what it says, but what it does.

It is possible to say what pornography says without doing what it does. For example, the paragraphs above say what it says but do not do what it does. Its damage neither begins nor ends in its mental content. Although all discriminatory damage says something as well as does something, coercion is not an idea; force is not an argument; assault is not advocacy, nor is trafficking in human beings a discourse. On a deeper level, pornography provides direct sexual stimulation, the experience of which is one of sex, not just the idea of sex. There is no adequate analogy to this, [FN21] and no reply in kind exists. Its pleasure is a specific reinforcer for bigotry itself, not an argument about why bigotry is right, nor even a base appeal to bigoted interests. If you think an orgasm is an argument, try arguing with one some time.

The conditions of the production of pornography distinguish it further from the rest of group defamation. Nobody has to violate or use anybody to make most anti-Semitic propaganda. Nobody has to pose for a lynching, i.e. be lynched, to create most Klan hate literature. Most cities do not offer businesses where one can go and pay to abuse a Jew or a Black, unless she is a woman and the abuse is sex. When a live human being is not used, and the materials are not sex, it makes some sense to discuss the materials as representations or images and to focus on their consequences as the effects of ideas. Their idea content is a substantial vehicle for the harm they do. But, except in a realm of abstraction totally divorced from reality (where most academics seem to prefer to reside), it covers up reality to discuss pornography in these terms. Both pornography and hate literatures are hateful; both propagate invidious group stereotypes; both promote and often instigate violence; both dehumanize. But pornography, because it is also an industry, ***804** because its dynamic is sexual, and because the camera requires live fodder, not only springs from abuse and leads to abuse; it is abuse. It is not merely the

groundwork or persuasive basis or impelling rationalization, however destructive or immediate, for consequent acts. It is an act.

This is the reason that pornography is most appropriately addressed as discrimination, not defamation. Defamation and discrimination emerge from distinct theoretical and political traditions. The idea of group defamation, like the idea of obscenity, is that group defamation is an idea about a group; discrimination, even when it expresses an attitude, as it always does, is always recognized as an act. Defamation is a tort addressing reputational harm to individuals; it is only derivatively applied to groups. Discrimination is first and always a group-based concept, even when applied to one person at a time. The law of defamation since New York Times v. Sullivan [FN22] has been explicitly circumscribed by First Amendment safeguards because state laws against individual libel, and with it group libel, have been thought potentially to compromise freedom of expression. But discrimination that takes a verbal form has never-not until pornography was challenged as sex discrimination-been regarded as protected by the First Amendment. [FN23]

Most common forms of discrimination are significantly accomplished through words: "you're fired," "it was essential that the understudy to my Administrative Assistant be a man," [FN24] "whites only," [FN25] " m ale help ***805** wanted," [FN26] "did you get any over the weekend?" [FN27] "sleep with me and I'll give you an 'A'," [FN28] and "walk more femininely, talk more femininely, dress more femininely, wear makeup, have your hair styled, and wear jewelry." [FN29] Nearly every time a refusal to hire or promote or accommodate is based on a prohibited group ground, some verbal act either constitutes the discrimination or proves it. When words are not the discriminatory act itself, like sexually harassing comments are, for example, [FN30] they prove that the treatment is based on a prohibited group ground. In the discrimination context, verbal expressions are actionable per se or are evidence of actionable practices, not protected speech; they are smoking guns, not political opinion. No sexual harassment defendant to my knowledge has ever claimed his sexually harassing remarks were protected expression. Not yet.

Not even clearly symbolic conduct such as cross burning has been considered protected by the First Amendment, [FN31] even though, unlike pornography, it is pure expression. Cross burning inflicts its harm through its meaning as an act which promotes racial inequality through its message and impact, engendering terror and effectuating segregation. [FN32] Its damages to equality ***806** rights is not symbolic but real. Cross burning does not so much harm a group's reputation as it effectuates terror, intimidation, and harassment on a group basis. The First Amendment frame on the issue, taken as exclusive, sees what is said but not what is done. When the traditions of defamation and discrimination confront each other, the First Amendment questions how equality can exist without free expression, and the Fourteenth Amendment questions how expression (or anything else) can ever be free without equality.

Defamation and discrimination imagine their harms differently. Defamation addresses harm to group reputation, discrimination to group status and treatment. But to the degree status is a matter of reputation, and reputation a matter of status, they overlap. [FN33] Whether the treatment is verbal, symbolic, or physical, being treated as a second class citizen certainly furthers the second class reputation of the group of which one is a member. Segregated lunch counters or toilets or water fountains were not challenged as defamatory symbolic expression, nor defended because of what they said-that is, as symbolic speech or as expressions of political opinion- although they were arguably both expressive and political. Racial segregation in education was not regarded as protected speech to the extent it required verbal forms, such as laws and directives, to create and sustain it. Nor was it regarded as actionable defamation against African-Americans, although a substantial part of its harm was the message of inferiority it conveyed, as

well as its negative impact on the self-concept of Black children. [FN34] Yet the harm of segregation and other racist practices is at least as much what it says as what it does. Just as with cross burning, what it says is indistinguishable from what it does. Considered this way, it can be said that pornography does substantial reputational damage to women, but the harm does not end ***807** there. The civil rights approach to pornography does not center on its defamatory aspects any more than the civil rights approach to segregation centered on its defamatory aspects, although they are there in both cases.

Pornography is propaganda, an expression of male ideology, a hate literature, an argument for sexual fascism. It conveys ideas like any systematic social practice does. It is also, like most group defamation, often immoral, tasteless, ugly, and boring. But none of this is what pornography distinctively is, how it works, or what is most harmful about it. Was the evil of the Holocaust what it said about Jews? If the tortures at Dachau had been required to make anti-Semitic propaganda, would its harm be considered ideological? Would it be subject to varying interpretation? If lampshades made of women's skin were sold beside the road, would the law examine the impact of this practice on women's self-image or public reputation? Perhaps this traffic would offend people, but would we reduce its harm to its offensiveness, as if that were all it was about?

The theory of group defamation does not adequately encompass the reality of pornography. One has to wonder whether it adequately encompasses the reality of group defamation either. For instance, building on the individual libel model, some laws of group defamation require that the statements be proven false or permit truth as a defense. [FN35] While much of what visual pornography says about women is a pack of lies, it actually has to happen to be made, and in that sense is empirically true. What it shows happened to the person it shows it happening to: what you see is what she got. Most group defamation contains a similar mix of lies with imposed realities. The stereotypes defamation presents begin false and remain largely false, but to the extent the stereotypes are imposed on a group, they will accurately describe at least some of its members sometimes. Success in forcing the world to correspond to a defamatory image, as in making the world a pornographic place, makes defamation both more true and arguably more damaging, not less, but it is, for the reason, legally regarded as less defamatory, or not illegal as defamation at all, where truth is a defense. [FN36] Also, do we really want hearings on comparative African-American penis size or whether Jews bathe?

As another example, the law of group libel generally restricts the promotion of hatred, or hatred and contempt. [FN37] Hatred is an extreme feeling of ***808** negative animus which can express itself verbally or physically. [FN38] Discrimination begins with an assumption of human status and focuses on deviations in treatment from that standard. If a man chains his dog in his backyard, most people probably will not say that the dog's civil rights are violated. If a man chains a woman in his basement, maybe they will. It does not matter if he loves her or hates her. What matters is how he treats her and what that treatment and its permissibility say about what a woman socially is. [FN39] Perhaps, in terms of human rights, such treatment can be considered hateful regardless of his subjectivity. But the bottom line of discrimination, I think, is less do they hate and more will they kill. Hatred rationalizes and impels genocide, certainly, but so do some things far colder, like self-interest, sense of superiority, or fun, and something far more banal, like indifference or system. In the case of women and men, love deals at least as much death, and so does something hotter, like pleasure. The fact that pornography so often presents itself as love, indeed resembles much of what passes for it under male dominance, makes its construction as hate literature a challenging exercise in demystification, to say the least. The concept of discrimination aims not at what it felt by perpetrator or victim or what is said as such, but at what is done, including through words.

A related issue in the contrast between defamation and discrimination is the mental element of "wilfulness" or a least knowledge of falsity required in many group defamation statutes. [FN40] Sincere sex bigots, which the consumption of pornography creates, would presumably be exempt. Discrimination, on the other hand, need not always be intended or meant to be discriminatory. [FN41] Indeed, after dealing with unconscious bigots, it can be an improvement ***809** to have one's humanity recognized enough to have it wilfully degraded. This is no less the case for the standard examples of group defamation than it is for pornography.

This analysis suggests that an equality theory may remedy some of the same inadequacies for group defamation that it has for pornography. A discrimination theory of defamation would center on its harm to subordinate groups. [FN42] Group libel is an equality issue when its promotion undermines the social equality of a target group that is traditionally and systematically disadvantaged. Group defamation promotes the disadvantage of disadvantaged groups. Group-based enmity, ill-will, intolerance, and prejudice are the attitudinal engines of the exclusion, denigration, and subordination that comprise social inequality. Without bigotry, social systems of enforced separation and apartheid would be unnecessary, impossible, and unthinkable. Stereotyping and stigmatization of historically disadvantaged groups through group hate propaganda shape their social image and reputation, arguably controlling the opportunities of individual members more powerfully than their individual abilities do. [FN43] It is impossible for an individual to receive equality of opportunity when surrounded by an atmosphere of group hatred or contempt.

In this light, group defamation can be seen as a specific kind of discriminatory practice, a verbal form inequality takes. Anti-Semitism promotes the inequality of Jews on the basis of religion and ethnicity. White supremacy promotes inequality on the basis of race, color, and sometimes ethnic origin. Group defamation in this sense is not the mere expression of anti-Semitic or white supremacist opinion but a practice of discrimination similar to sexual harassment and other discriminatory acts that take verbal form. It is arguably an integral link in systemic discrimination which keeps target groups in subordinated positions through the promotion of terror, intolerance, degradation, segregation, exclusion, vilification, violence, and genocide. The nature of the practice can be seen and proven from the damage it does, from ***810** immediate psychic wounding to consequent physical aggression. [FN44] Where advocacy of genocide is part of group defamation, [FN45] an equality approach to its regulation would observe that to be liquidated because of the group you belong to is the ultimate inequality.

Thus, any nation that has a constitutional guarantee of equality can potentially defend a group defamation statute that is challenged as a violation of freedom of expression on equality grounds. [FN46] A law against group defamation promotes equality and opposes inequality. It would violate any constitutional equality provision in existence for a legislature to pass a law authorizing the promotion of hatred on the basis of sex, race, religion, and national origin. It follows that governmental action against promoting group hate is protected under constitutional equality provisions. Just as governmental action to promote group hatred would violate a constitutional equality provision, governmental action to prohibit group hatred promotes constitution-based equality. [FN47]

Once laws against group defamation can be supported as well as challenged on a constitutional level, the tension between equality and speech would be resolved by whatever standards constitutional conflicts are accommodated. Typically, the courts would decide whether the group libel provision burdened expression significantly or at all, and whether its regulation promoted equality as unintrusively as possible, and in a way a legislature could have found effective. [FN48] The balancing would be done however balancing is done, but it would be two constitutional rights in the balance, not just one constitutional right against a nice idea or good manners or political sensitivity ***811** or

standards of civility. Considered as defamation, the harms are comparatively trivialized, and the state interest is obscured, disabling the constitutional defense of such laws against First Amendment attack. When the equality interest is recognized, focusing on lived consequences rather than message content, practices like lynching, cross burning, and pornography are revealed as expressive forms inequality takes, and the constitutional balance shifts.

Analyzing group defamation in equality terms recasts many well-worn issues in free expression debate. Perhaps the most startling concerns the dogma that there is no such thing as a false idea for purposes of constitutional analysis of speech. [FN49] When equality is recognized as a constitutional value and mandate, the idea that some people are inferior to others on the basis of group membership is authoritatively rejected as the basis for public policy. This does not mean that ideas to the contrary cannot be expressed. It should mean, however, that social inferiority cannot be imposed through any means, including expression. [FN50] Because society is made of language, distinguishing talk about inferiority from verbal imposition of inferiority may be complicated at the edges but is nonetheless very clear in most instances. [FN51] At the very least, such practices would not be constitutionally insulated from regulation on the ground that the ideas they express cannot be regarded as false. And attempts to address such practices should not be considered invalid ***812** because, in taking a position in favor of equality, they assume that the idea of human equality is true. There is no requirement that the state remain neutral when inequality is practiced-quite the contrary. Expressive means of practicing inequality have never been recognized as exceptions. [FN52]

In the United States, the receptivity of the law of free speech to an equality theory of group defamation can be partially assessed from courts' responses to the sex discrimination ordinance against pornography. The U.S. Court of Appeals for the Seventh Circuit in American Booksellers Association v. Hudnut found that the ordinance violated the First Amendment guarantee of freedom of speech. [FN53] The court reached this conclusion in spite of its agreement that pornography contributed materially to rape and other sexual violence, was a form of subordination in itself, and was partly responsible for second class citizenship in various forms, including economic ones. [FN54] In some passages, the court conceded that pornography is a practice. [FN55] Yet protecting the pornography was held to be more important than avoiding or remedying its harms. Indeed, the court held that pornography's importance as speech can be measured by its effectiveness in doing the harm that it does. [FN56]

The civil rights law against pornography was held to be a form of discrimination on the basis of "viewpoint" because it was not neutral on the subject of sex-based exploitation and abuse. [FN57] By this standard, every discriminatory practice and every anti-discriminatory law expresses a point of view. Acts express ideas, yet they are legally restricted and do not have to be proven expressionless first. Segregation expresses the view that Blacks are inferior to whites; rulings against segregation express the contrary view. Segregation is not therefore protected speech, nor are rulings against it considered "thought control." [FN58] Affirmative action plans and anti- discrimination policies are not regarded as discrimination on the basis of viewpoint, although they prohibit the view that Blacks are inferior to whites from being expressed by discriminating against them, including by telling them "you're fired" for the wrong reasons. This remains true even though deinstitutionalizing segregation does a great deal to undermine the point of view it ***813** expresses, just as making pornography actionable as sex discrimination would delegitimize the ideas the practice advances. Under the ordinance, misogynist attitudes toward women and sexuality can be expressed; they just cannot be practiced in certain ways, such as when verbal and visual subordination based on sex are trafficked. What the Hudnut court missed is both that acts speak and that speech acts. [FN59]

As an illustration of the convergence of expression with action, consider lynching. [FN60] Lynching has a vocabulary and a message. It is a vehicle for the communication of an ideology. It expresses a clear point of view about African-Americans, one that is difficult to express as effectively any other way. One point of lynching is that other Blacks see the body. The idea expressed by hanging the body in public is that all Blacks belong in a subordinate position and should stay there or they will be horribly brutalized, maimed, and murdered. Another point of lynching is that whites see the body. Its display teaches them that they are superior and deserve to live: this was done for them. Photographs have sometimes been taken of lynchings and made available for fifty cents apiece for those who missed seeing the real thing. [FN61] Compare such a photograph, or the photograph of Michael Donald hanging lynched from a tree sent out by Klanwatch in an envelope with a warning that the photograph within is highly disturbing, [FN62] with a 1984 Penthouse spread in which Asian women were bound, trussed, and hung from trees. [FN63] One cannot tell if they are dead or alive. In both cases, individuals are tied up and hung from trees, often with genitals displayed. In both cases, they are people of color. In both cases, sexual humiliation is involved. But when the victim is a man, the photograph is seen to document an atrocity against him and an entire people. I doubt many masturbate to it. Because the victim in Penthouse is a woman, the photograph is considered entertainment, experienced as sex, called speech, and protected as a constitutional right.

If Blacks were lynched in order to make photographs of lynchings on a ten-billion-dollar-a-year scale, would that make them protected speech? The issue here is not whether the acts of lynching are formally illegal or not. As with the acts surrounding pornography, on paper lynchings were illegal, while in reality they mostly were not, until a specific law-a civil rights law-was passed against them. The issue is also not whether lynchings or sexual atrocities can be visually documented, although it does matter how ***814** they are presented. The issue is, rather, given the fact that someone must be lynched to make a picture of a lynching, what is more important, the picture or the person? If it takes a lynching to show a lynching, what is the social difference, really, between seeing a lynching and seeing a picture of one? What would it say about the seriousness with which society regards lynching if lynching were illegal, but pictures of lynchings were affirmatively protected and constituted a highly profitable, visible, and pervasive industry, defended as a form of freedom and a constitutional right? What would it say about the seriousness and effectiveness of laws against lynching if people paid good money to see one, and the law looked the other way, so long as it was mass- produced? What would it say about one's status in the community that society permits one to be hanged from trees and calls it entertainment-that is, protects its for those who enjoy it, rather than prohibits it for those who it harms? What would it mean if the courts held that because lynching effectively expresses a point of view about African-Americans, it is an "idea" whose mass expression, over and over and over again, thousands every year, is protected speech?

Actually, Hudnut does not rule on the Indianapolis ordinance at all, but on some imaginary group defamation ordinance directed toward what pornography says. By turning harmful practices into bad thoughts and acts into ideas about acts, Hudnut does rule on hate speech regulation, which, unlike the Indianapolis ordinance, does turn on point of view. Under anti-hate laws, love is not racially defamatory; hate is. After reducing discriminatory acts to defamatory ideas, the Hudnut court held that no amount of harm from group-based speech can justify legal action by its victims. [FN64] This is simply legally wrong. Courts are supposed to measure value against harm, not by harm. A doctrinally correct approach to the ordinance would have balanced the harms of such materials against their value, if any, [FN65] or might even have considered the value of the materials irrelevant so long as they are proven to do injury which states can legitimately regulate. The harm of pornography as made actionable by the ordinance is not done through viewpoint,

or even through content as such. Pornography is identified in part ***815** through its content, but regulated through its acts, the acts the ordinance makes actionable. But it must be faced that the Hudnut approach is fatal for regulating racial defamation, no matter how much harm it does.

Just as courts have often protected the group defamation of the past, [FN66] when the Supreme Court summarily affirmed Hudnut, protecting and defending pornography became the official state position in the United States. An entire class of women can be discriminated against so that others can have what they call freedom of speech: freedom meaning free access to women's bodies, free use of women's lives; speech meaning women's bodies as a medium for expression. As African-Americans, men as well as women, once were white men's property under the Constitution, all women are now men's "speech" because our pain, humiliation, torture, use, and second class status is something they want to say. It does not matter that they cannot say it without doing it.

Now that the law has adopted the point of view of the pornographers on women's rights as its basis for state policy, holding that the pornography is more important than the women they know it harms, one might ask again the same questions that are asked of the classic experiences of group defamation. Why the silence? Why the complicity? How can "we" let this go on? How can it be officially permitted? How can the law be so twisted as to collaborate in it? What are people thinking? Don't they know? Don't they see? Don't they care? Perhaps the lack of explanation for the success of past campaigns of group defamation is connected with the lack of recognition of present ones. Why have most of you not heard all this before? Why have those who have seen the pornography not seen it in this way? Now that you know, why will most of you find satisfying reasons to do nothing about it?

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[FNa]. Professor, University of Michigan Law School. This lecture was given in the Boston University School of Law Distinguished Lecturer Series on February 16, 1990. It was delivered in a different form at the Hofstra University Conference on Group Defamation & Freedom of Speech, April, 1988. The comments of Owen Fiss and Burke Marshall were especially helpful, as was the valuable research assistance of Carmela Castellano. The contributions of Andrea Dworkin, as always, were formative.

[FN1] Edward J. Bloustein, Holmes: His First Amendment Theory and His Pragmatist Bent, 40 RUTGERS L. REV. 283, 299 (1988) (discussing Oliver Wendell Holmes's approach to freedom of speech).

[FN2] The ordinance received 42% of the vote. The Nation, L.A. TIMES, Nov. 12, 1985, at 2 (reporting that 9,419 people voted for the measure and 13,031 against it, while 1,931 voters abstained).

[FN3] Whoever publishes any false written or printed material with intent to maliciously promote hatred of any group of persons in the commonwealth because of race, color or religion shall be guilty of libel and shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both. The defendant may prove in defense that the publication was privileged or was not malicious. Prosecutions under this section shall be instituted only by the attorney general or by the district attorney for the district in which the alleged libel was published.
Mass. Gen. Laws Ann. ch. 272, § 98C (West 1990).

[FN4] These examples were discussed at the Hofstra University Conference on Group Defamation & Freedom of Speech, April, 1988. The proceedings of that conference will appear in a forthcoming book edited by Monroe Freedman.

[FN5] See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195, 218-20, reprinted in 5 I.L.M. 352 (1966)(entered into force Jan. 4, 1969) ("State parties ... shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred ...."); see also POSITIVE MEASURES DESIGNED TO ERADICATE ALL INCITEMENT TO, OR ACTS OF, RACIAL DISCRIMINATION, IMPLEMENTATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCCRIMINATION, 1986, U.N. DOC. CERD/2, U.N. SALES NO. E.85.XIV.2 (1986).

[FN6] Examples of its official documentation include FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY (1986) (U.S.); PORNOGRAPHY AND PROSTITUTION IN CANADA: REPORT OF THE SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION (1985) (Can.); REPORT OF THE JOINT SELECT COMMITTEE ON VIDEO MATERIAL (1988) (Austl.); SEXUAL OFFENSES AGAINST CHILDREN: REPORT OF THE COMMITTEE ON SEXUAL OFFENCES AGAINST CHILDREN AND YOUTHS ch. 55 (1984) (Can.). For further analysis, see Diana E.H. Russell, Pornography and Rape: A Causal Model, 9 POL. PSYCHOL. 41 (1988) (demonstrating that pornography causes rape by undermining inhibitions to raping and facilitating its social acceptance).

[FN7] For citations from which this description is drawn, see CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 276 n.2 (1989).

[FN8] For sources, see Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281, 1298 n.83, 1301 n.100 (1991).

[FN9] See MACKINNON, supra note 7, at 17.

[FN10] Andrea Dworkin and I discuss these issues, and those in the paragraphs following, in these terms in ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 25-26 (1988).

[FN11] See Gloria Cowan et al., Dominance and Inequality in X-Rated Videocassettes, 12 PSYCHOL. WOMEN Q. 299, 306-07 (1988) (finding that pornography contains abuse and violence that is directed primarily against women); Park E. Dietz & Alan E. Sears, Pornography and Obscenity Sold in Adult Bookstores: A Survey of 5132 Books, Magazines, and Films in Four American Cities, 21 U. MICH. J.L. REF. 7, 38-43 (1987-88) (documenting violence, bondage, sado-masochism, and gender differences in pornography); Neil M. Malamuth & Barry Spinner, A Longitudinal Content Analysis of Sexual Violence in the Best Selling Erotic Magazines, 16 J. SEX RES. 226, 226-27 (1980) (documenting increases in violent sex in pornography).

[FN12] All of the following accounts are contained in Public Hearings on Ordinances to Add Pornography as Discrimination Against Women, Minneapolis City Council, Government Operations Committee (Dec. 12 and 13, 1983) (on file with author). Andrea Dworkin and I discuss this in these terms at DWORKIN & MACKINNON, supra note 10, at 32-35.

[FN13] See MICHAEL J. MCMANUS, INTRODUCTION TO FINAL REPORT OF ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY xvi-xviii (1986) (discussing consensus among researchers).

[FN14] See James V.P. Check & Ted H. Guloien, Reported Proclivity for Coercive Sex Following Repeated Exposure to Sexually Violent Pornography, Nonviolent Dehumanizing Pornography and Erotica, in PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS 159, 171, 177 (Dolf Zillmann & Jennings Bryant eds., 1989); Edward Donnerstein, Pornography: Its Effect on Violence Against Women, in PORNOGRAPHY AND SEXUAL AGGRESSION 53, 78-79 (Neil M. Malamuth & Edward Donnerstein eds., 1984); Edward Donnerstein & Leonard Berkowitz, Victim Reactions in Aggressive Erotic Films as a Factor in Violence Against Women, 41 J. PERSONALITY & SOC. PSYCHOL. 710, 720-23 (1981); Neil M. Malamuth, Predictors of Naturalistic Sexual Aggression, 50 J. PERSONALITY & SOC. PSYCHOL. 953, 960 (1986); Neil M. Malamuth, Factors Associated with Rape as Predictors of Laboratory Aggression Against Women, 45 J. PERSONALITY & SOC. PSYCHOL. 432, 440-41 (1983); Neil M. Malamuth & James V.P. Check, The Effects of Aggressive Pornography on Beliefs in Rape Myths: Individual Differences, 19 J. RES. PERSONALITY 299, 313-14 (1985); Neil M. Malamuth & James V.P. Check, The Effects of Mass Media Exposure on Acceptance of Violence Against Women: A Field Experiment, 15 J. RES. PERSONALITY 436, 442-43 (1981).

[FN15] Daniel Linz et al., The Effects of Multiple Exposures to Filmed Violence Against Women, 34 J. COMM., Summer 1984, at 130, 142 (1984) (documenting that men exposed to filmed violence against women judged a rape victim to be less injured than did the control group); see also Neil M. Malamuth & James V.P. Check, Penile Tumescene and Perceptual Responses to Rape as a Function of the Victim's Perceived Reactions, 10 J. APPLIED SOC. PSYCHOL. 528, 542-43 (1980) (documenting that exposure to rape depictions affected future reactions to rape).

[FN16] Most of the researchers define sexual violence as requiring the appearance of the use of physical force. Pornography researchers commonly define the term to include rape when the materials expressly present sex they call rape, or when the women in the materials are shown to resist the sexual acts. See James V.P. Check & Neil M. Malamuth, Pornography and Sexual Aggression: A Social Learning Theory Analysis, 9 COMM. Y.B. 181, 189 (1986). The problem is that not all force is physical and that many women are coerced

offstage.

[FN17] Check & Malamuth, supra note 16; Russell, supra note 6; Dolf Zillmann & Jennings Bryant, Effects of Prolonged Consumption of Pornography on Family Values, 9 J. FAM. ISSUES 518 (1988); Dolf Zillmann & Jennings Bryant, Effects of Massive Exposure to Pornography, in PORNOGRAPHY AND SEXUAL AGGRESSION, supra note 14, at 115, 130-31; Dolf Zillmann & James B. Weaver, Pornography and Men's Sexual Callousness Toward Women, in PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS, supra note 14, at 95; James G. Buchman, Effects of Nonviolent Adult Erotica on Sexual Child Abuse Attitudes, Paper Presented at a Meeting of the American Psychological Association (Aug. 1990) (Boston, Mass.) (on file with author).

[FN18] The effect on women of consumption of pornography is just beginning to be studied systematically. The best work to date is Charlene Y. Senn, The Impact of Pornography in Women's Lives (1991) (unpublished Ph.D. dissertation, York University) (on file with author). Prior useful studies include Charlene Y. Senn and H. Lorraine Radtke, Women's Evaluations of and Affective Reactions to Mainstream Violent Pornography, Nonviolent Pornography, and Erotica, 5 VIOLENCE AND VICTIMS 143 (1990); Carol L. Krafka, Sexually Explicit, Sexually Violent, and Violent Media: Effects of Multiple Naturalistic Exposures and Debriefing on Female Viewers (1985) (unpublished Ph.D. dissertation, University of Wisconsin (Madison)) (on file with author); Charlene Y. Senn, Women's Reactions to Violent Pornography, Nonviolent Pornography and Erotica (1985) (unpublished Master's thesis, University of Calgary) (on file with author); Charlene Y. Senn and H. Lorraine Radtke, A Comparison of Women's Reactions to Violent Pornography, Nonviolent Pornography, and Erotica, Paper Presented at the Annual Convention of the Canadian Psychological Association (1986) (Toronto, Can.) (on file with author).

[FN19] The Model Ordinance defines "pornography" as

> the graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: a. women are presented dehumanized as sexual objects, things or commodities; or b. women are presented as sexual objects who enjoy humiliation or pain; or c. women are presented as sexual objects experiencing sexual pleasure in rape, incest, or other sexual assault; or d. women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or e. women are presented in postures or positions of sexual submission, servility, or display; or f. women's body parts-including but not limited to vaginas, breasts, or buttocks-are exhibited such that women are reduced to those parts; or g. women are presented being penetrated by objects or animals; or h. women are presented in scenarios of degradation, humiliation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual.

The use of "men, children, or transsexuals in the place of women" in this definition is also pornography. Model Ordinance, reprinted in DWORKIN & MACKINNON, supra note 10, at 138-39.

The Cambridge ordinance contained a very similar definition. Bill to Amend § E, ch. 25, "Human Rights" of City of Cambridge, Mass., reprinted in DWORKIN & MACKINNON, supra note 10, at 134.

[FN20] Model Ordinance, supra note 19. In the Indianapolis ordinance, by contrast, the scenarios were limited so that only victims of coercion or assault could sue for materials that did not show violence. Indianapolis and Marion County, Ind., Code ch. 16, § 16-3(g)(8) (1984). In the Bellingham version of the ordinance, defamation through pornography was also included as a cause of action. Dworkin & MacKinnon, supra note 10.

[FN21] It may be that much of the pleasure of dominance enjoyed in racial defamation is also sex, but considerably more evidence and analysis would be required to sustain such an argument.

[FN22] 376 U.S. 254 (1964).

[FN23] But cf. Doe v. University of Mich., 721 F. Supp. 852, 868 (E.D. Mich. 1989) (holding that the University of Michigan's policy against discriminatory harassment of students was invalid because it covered "verbal conduct" protected as speech under the First Amendment).

[FN24] Davis v. Passman, 442 U.S. 228, 230 (1971).

[FN25] Palmer v. Thompson, 403 U.S. 217 (1971) (holding that the closure by the city of Jackson, Mississippi, of public swimming pools formerly available to "whites only" did not violate Equal Protection Clause of the Fourteenth Amendment because both Blacks and whites were denied access); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (prohibiting discriminatory sale or rental of property to "whites only"); Blow v. North Carolina, 379 U.S. 684 (1965) (holding that restaurant serving "whites only" violated Civil Rights Act of 1964); Watson v. Memphis, 373 U.S. 526 (1963) (holding that city's operation of large percentage of publicly owned recreational facilities for "whites only" due to delays in implementing desegregation violated the Fourteenth Amendment); see also Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 302-05 (1977) (stating that, in employment discrimination claim against school district, plaintiffs alleged that district's newspaper advertisement for teacher applicants specified "white only"); Pierson v. Ray, 386 U.S. 547, 558 (1967) (holding that Black and white clergymen did not consent to their arrest by peacefully entering the "White Only" designated waiting area of bus terminal).

[FN26] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973) (holding that sex segregated job advertisements violate human rights laws and are not protected under the First Amendment).

[FN27] Morgan v. Hertz Corp., 542 F. Supp. 123, 128 (W.D. Tenn. 1981) (issuing injunction in sexual harassment case against making such statements), aff'd, 725 F.2d 1070 (6th Cir. 1984).

[FN28] In Alexander v. Yale University, 459 F. Supp. 1, 3-4 (D. Conn. 1977), aff'd, 631 F.2d 178 (2d Cir. 1980), "Plaintiff Pamela Price asserts that she received a poor grade ... not due to any 'fair evaluation of her academic work', but as a consequence of her rejecting a professor's outright proposition 'to give her a grade of "A" ... in exchange for her compliance with his sexual demands."' Allegations that the university lacked a grievance procedure for sexual harassment complaints were found to state a cause of action for sex discrimination under Title IX.

[FN29] Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (quoting statements as evidence of sex-discriminatory stereotyping in promotion evaluation).

[FN30] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (holding that unwelcome verbal conduct of a sexual nature constitutes sexual harassment creating a hostile working environment)

[FN31] Not until very recently was this possibility even raised. See In re R.A.V., 464 N.W.2d 507, 511 (Minn. 1991) (upholding conviction for burning cross under city ordinance which prohibits bias-motivated disorderly conduct on the ground that the ordinance could be interpreted to prohibit only expressive conduct which falls outside of First Amendment protection), cert. granted sub nom. R.A.V. v. St. Paul, 59 U.S.L.W. 3823 (U.S. June 10, 1991) (No. 90-7675); see also State v. Miller, 398 S.E.2d 547, 551-52 (Ga. 1990) (holding that wearing a Klan Hood is not protected expression).

[FN32] See United States v. Lee, 935 F.2d 952, 956 (8th Cir. 1991) (concluding that the

act of crossburning is an overt act of intimidation which, because of its historical context, is often considered a precursor to violence, and thus invades the victim's privacy interests). In our amicus curiae brief for the National Black Women's Health Project in R.A.V. v. St. Paul, Burke Marshall and I make this argument, offering an equality defense for a Minnesota statute prohibiting cross burning. Brief for the National Black Women's Health Project, R.A.V. v. St. Paul, 59 U.S.L.W. 3823 (U.S. June 10, 1991) (No. 90- 7675) (on file with author).

[FN33] Convergence is implicit in the design of international instruments for the regulation of racist speech, which casts group defamation as a practice of discrimination, International Convention on the Elimination of All Forms of Racial Discrimination, supra note 5, and the extensive national legislation that parallels this Convention. See, e.g., 1988 E.D.L.A. 114, leg. 23.592 (Arg.); Act of July 1, 1972, No. 72-546 (amending C. PEN. art. 24, ¶ 5) (Fr.); Laws of October 13, 1975, art. 654 (ratifying Convention), Gazz. Uff. art. 337, Dec. 23, 1975, Parte I, 1976 Lex, p. 6, Law No. 654 art. 3(b) (Italy).

[FN34] See Brown v. Board of Educ., 347 U.S. 483, 494 (1954) ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone."). Brown thus did not decide that these children were offended by segregation, and that the harm was therefore subjective, and hence irrelevant or nonexistent. Rather, it decided that the children were harmed by it in their feelings and self-concept, hence in their ability to learn. See also Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431, 438-40 (arguing that Brown may be read as regulating the content of racist speech).

[FN35] See, e.g., R.S.C., ch. C-46, § 319(3)(a) (1985) (Can.) (providing under the Canadian Criminal Code that no one who wilfully promotes hatred against any identifiable group shall be convicted "if he establishes that the statements communicated were true").

[FN36] Whether the onus should be on the speaker to prove truth or on the victim to prove falsity, or whether truth is not relevant, is subject to various legal treatments worldwide. The Belgian penal code, for example, punishes statement of a malicious fact which injures a person's honor or exposes them to contempt without producing legal proof. Les Codes Larcier § 443, Code Penal Edition 1985 (Belg.).

[FN37] See, e.g., Ill. Rev. Stat. ch. 38, ¶ 471 (1949) (repealed 1961) (statute litigated in Beauharnais v. Illinois, 343 U.S. 250, 251 (1952), which outlawed publications which expose "the citizens of any race, color, creed or religion to contempt"); R.S.C., ch. C-46, § 319(1) (1985) (Can.) (proscribing public communication which incites hatred against an identifiable group).

[FN38] The most illuminating discussion of the subject I have read is Patrick Lawlor, Group Defamation: Submissions to the Attorney General of Ontario (Mar. 1984) (on file with author).

[FN39] I recognize that some discussions of animal rights and defenses of sado-masochism would question this example, or use it to make other points.

[FN40] See, e.g., R.S.C., ch. C-46, § 319(2) (1985) (Can.) (creating under the Canadian Criminal Code an offense for the wilful promotion or incitement of hatred against an identifiable group through statements other than in private conversation); § 130-31 StGB (1987) (Ger.).

[FN41] In the United States, violations of the Equal Protection Clause and disparate treatment violations of Title VII must be intentional to be discriminatory. Personnel

Adm'r v. Feeney, 442 U.S. 256, 274 (1979); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 (1977); Washington v. Davis, 426 U.S. 229, 238-41 (1976). But disparate impact violations of Title VII need not be intentional. Griggs v. Duke Power, 401 U.S. 424, 431 (1971). Under international law, dissemination of ideas based on racial superiority and racial hatred is prohibited "despite lack of intention to commit an offense and irrespective of the consequences of the dissemination, whether they be grave or insignificant." POSITIVE MEASURES, supra note 5, ¶ 83.

[FN42] The Women's Legal Education and Action Fund (LEAF), with my participation, made the argument outlined in the following paragraphs of the text in defense of the constitutionality of the hate propaganda provision of the Criminal Code of Canada under which the defendant had been convicted in R. v. Keegstra, [1991] 2 W.W.R. (Supreme Court) 1, 6 (Can.). In response to the argument that criminalizing hatemongering violated the defendant's constitutionally protected freedom of expression, LEAF argued that the provisions were protected under the constitutional equality provisions. Although found to be violations of the freedom of expression, the provisions were upheld by the Supreme Court of Canada as justified in a free and democratic society largely on an equality rationale.

[FN43] The Supreme Court in Beauharnais v. Illinois saw this clearly, upholding Illinois's libel statute outlawing publications which denigrate a class of citizens by virtue of their race or religion: "[A] man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits." Beauharnais v. Illinois, 343 U.S. 250, 263 (1952).

[FN44] See THEY DON'T ALL WEAR SHEETS: A CHRONOLOGY OF RACIST AND FAR RIGHT VIOLENCE-1980-86 (C. Lutz comp. 1987) (compiling data on incidents of racial, religious, and homophobic violence); Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 HARV. C.R.-C.L. L. REV. 133, 143-49 (1982) (discussing the emotional and psychological harms of racial insults); Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320, 2335-41 (1989) (detailing negative effects of racist hate messages).

[FN45] For example, as defined in the Canadian Criminal Code, R.S.C., ch. C- 46, § 318(2)(a)-(b) (1985) (Can.).

[FN46] Of course, to succeed, this approach requires that constitutional equality mandates be interpreted properly. For an example of a standard conducive to protecting group libel laws, see the equality approach under the Canadian Charter of Rights and Freedoms in Andrews v. The Law Society, [1989] 1 S.C.R. 143, 171 (interpreting the purpose of § 15(1) of the Charter as ensuring equality in the formulation and application of the law, including promoting a society in which all of its members are recognized at law as equally deserving of concern, respect, and consideration), as applied in Keegstra, 2 W.W.R. 1.

[FN47] See Keegstra, 2 W.W.R. at 50 (quoting LEAF's factum to this effect).

[FN48] This generally describes the respective tests in the United States and Canada. In the United States, the two steps are collapsed into one: does the provision violate freedom of expression? See, e.g., Beauharnais, 343 U.S. at 266-67. In Canada, whether freedom of expression is violated is one step; whether it can be justified as a limit on expression in a free and democratic society is determined separately. See, e.g., Keegstra, 2 W.W.R. 1; Irwin Toy Ltd. v. Quebec [1989] 1 S.C.R. 927, 991-1001; R. v. Oakes, [1986] 1 S.C.R. 103, 139.

Germany also provides an instructive comparison. See Eric Stein, History Against Free Speech: German Law in European and American Perspective, in VERFASSUNGSRECHT UND

VOLKERRECHT: GEDACHTNISSCHRIFT FUR WILHELM KARL GECK, WILFRIED FIEDLER UND GEORG RESS 855-56 (Hrsg.) (Carl Heymanns Verlag K.G.) (1989).

[FN49] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) ("Under the First Amendment there is no such thing as a false idea.").

[FN50] Cf. International Convention on the Elimination of All Forms of Racial Discrimination, supra note 5 (requiring state parties to criminalize "all dissemination of ideas based on racial superiority or hatred").

[FN51] This seems to be what is at stake in the discussion about campus hate speech codes, most of which, in essence, extend sexual harassment prohibitions to racial and ethnic slurs and insults, and some to sexual orientation as well. Some of the literature in this area includes Kent Greenawalt, Insults and Epithets: Are They Protected Speech?, 42 RUTGERS L. REV. 287 (1990) (considering legal claims against those who engage in harmful speech); Rodney Smolla, Rethinking First Amendment Assumptions About Racist and Sexist Speech, 47 WASH. & LEE L. REV. 171 (1990) (advocating narrowly drawn restrictions on racist and sexist speech); and especially the insightful Lawrence, supra note 34. I do not think that the discrimination rationale on which sexual harassment law is based, and the sexual nature of the harassment which makes it so act-like, can be so simply transposed into the racial and ethnic defamation context. It is equally clear, however, that what is harassment in the gender context does not suddenly become pure idea in the racial context and that an equality theory can support such codes when properly drawn.

[FN52] See Norwood v. Harrison, 413 U.S. 455, 470 (1973) ("Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protection.").

[FN53] American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986).

[FN54] Hudnut, 771 F.2d at 328-29.

[FN55]. Id. at 329.

[FN56] Id.

[FN57] Id. at 328.

[FN58] In Hudnut, the court held that the ordinance prohibiting pornography, defined as "[s]peech that 'subordinates' women," "establishes an 'approved' view of women," and was thereby "thought control." Id. In so holding, the court missed that "subordinates" is a verb, an act, not a thought about an act.

[FN59] For a discussion of "the inseparability of the idea and the practice of racism," see Lawrence, supra note 34, at 443-44.

[FN60] Andrea Dworkin and I discuss this example in these terms in our book, see supra note 10, at 60-61.

[FN61] See, e.g., JAMES R. MCGOVERN, ANATOMY OF A LYNCHING 84 (1982) (stating that "disappointed late-comers were willing to pay fifty cents for a photograph" of Claude Neal's lynching).

[FN62] MORRIS DEES, A SEASON FOR JUSTICE, photograph reproduced at page facing 181 (1991).

[FN63] 16 PENTHOUSE 118 (Dec. 1984).

[FN64] Hudnut, 771 F.2d at 329. On February 27, 1992, the Supreme Court of Canada explicitly held to the contrary in Butler v. The Queen, No. 22191, 86 D.L.R. 4th - (1992), adopting LEAF's argument that pornography damages social equality. The court ruled unanimously that pornography's harm to women justifies its criminal prohibition as obscenity. The court recognized the substantial body of opinion holding that pornography "results in harm, particularly to women and therefore to society as a whole," in concluding that harm to women violated community standards. In addition to applying to violent materials, the court's opinion found that "degrading and dehumanizing" materials can be prohibited because they "place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings." Slip op. at 25 (Sopinka, J., majority opinion).

[FN65] See New York v. Ferber, 458 U.S. 747, 758 (1982) (holding that child pornography's harm outweighs its value as expression, if any).

[FN66] David Riesman, in Democracy and Defamation: Control of Group Libel, 42 COLUM. L. REV. 727 (1942), explains how German courts espoused a general doctrine that only an individual could be defamed, thereby protecting favored groups. Id. at 765-66. Riesman recounts the use of defamation and manipulation of the law against defamation as a major weapon in the Nazi rise to power, making it possible systematically to defame Jews in a way calculated to lower their public esteem and to lure them into ruinous lawsuits. Id. at 728-29. Also important, members of the government were exempt from legal responsibility for defamation. See also David Riesman, Democracy and Defamation: Fair Game and Fair Comment II, 42 COLUM. L. REV. 1282, 1310-11 (1942) (arguing that American courts of the period failed to use the law of defamation to "protect those weaker groups and weaker critics who cannot rely on wealth or power over public opinion as their safeguard").

The Hudnut court equates the role of Nazi propaganda in the Nazi rise to power with the role of pornography in the status of women as an argument for protecting pornography. Hudnut, 771 F.2d at 329.

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