

***American Booksellers Association v Hudnut:***  
**“The Government Must Leave to the People the**  
**Evaluation of Ideas”**

*Geoffrey R. Stone*†

INTRODUCTION

In early 1985, President Ronald Reagan appointed then-Professor Frank Easterbrook to the United States Court of Appeals for the Seventh Circuit. A few months later, the freshly robed Judge Easterbrook confronted one of the most controversial constitutional issues of the day. In his opinion in *American Booksellers Association, Inc v Hudnut*,<sup>1</sup> one of the most celebrated and oft-cited opinions of his illustrious career, Easterbrook single-handedly put that issue to rest.

The case began in 1983 when Andrea Dworkin and Catharine MacKinnon drafted an antipornography ordinance for the City of Minneapolis. The ordinance, as it eventually came before the court of appeals in *Hudnut*, defined “pornography” as

the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (1) Women are presented as sexual objects who enjoy pain or humiliation; or (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or (4) Women are presented as being penetrated by objects or animals; or (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.<sup>2</sup>

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† Edward H. Levi Distinguished Service Professor of Law, The University of Chicago Law School.

<sup>1</sup> 771 F2d 323 (7th Cir 1985), *affd*, 475 US 1001 (1986).

<sup>2</sup> *Id* at 324, quoting Indianapolis Code § 16-3(q) (1984).

Rather than criminalize the sale, exhibition, or dissemination of pornography, the ordinance declared the distribution of such material a civil rights violation against women and created a civil remedy to enable women who had been harmed by pornography to sue the producers, distributors, exhibitors, and sellers for damages. In Dworkin's words, the goal of the ordinance was to empower "women whose lives have been savaged by pornography."<sup>3</sup> The ordinance was designed to provide a remedy for "women who had been raped and beaten and prostituted in and because of pornography."<sup>4</sup> The ordinance would enable these women to say, "I am someone who has endured, I have survived, I matter."<sup>5</sup>

In response to the objection that pornography "is really about ideas" and that the ordinance therefore violated the First Amendment, Dworkin replied:

Well, a rectum doesn't have an idea, and a vagina doesn't have an idea, and the mouths of women in pornography do not express ideas; and when a woman has a penis thrust down to the bottom of her throat, . . . that throat is not part of a human being who is involved in discussing ideas.<sup>6</sup>

MacKinnon added that "no First Amendment doctrine, correctly applied," could possibly invalidate the ordinance.<sup>7</sup> This was so, she argued, because pornography, as defined by the ordinance, is not expression protected by the First Amendment, but "masturbation material. It is used as sex; therefore it is sex."<sup>8</sup> The purpose of pornography, she insisted, is to enable men to "masturbate to women being exposed, humiliated, violated, degraded, mutilated, dismembered, bound, gagged, tortured, and killed."<sup>9</sup> The effect of such material, she maintained, is to harm women, and it is therefore not protected by the First Amendment.

When Dworkin and MacKinnon first proposed the ordinance, it excited widespread debate throughout the nation. It was applauded by some feminists and deplored by others; attacked by some liberals and celebrated by others; defended by conservative moralists and criti-

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<sup>3</sup> Andrea Dworkin, *Pornography Happens to Women*, in Laura J. Lederer and Richard Delgado, eds, *The Price We Pay: The Case against Racist Speech, Hate Propaganda, and Pornography* 181, 189 (Hill & Wang 1995) (describing the women who came in front of the Minneapolis City Council to testify in support of the ordinance).

<sup>4</sup> *Id.* at 190.

<sup>5</sup> *Id.* at 189.

<sup>6</sup> *Id.* at 183.

<sup>7</sup> Catharine A. MacKinnon, *Speech, Equality, and Harm: The Case against Pornography*, in Lederer and Delgado, eds, *The Price We Pay* 301, 303 (cited in note 3).

<sup>8</sup> *Id.* at 304.

<sup>9</sup> *Id.*

cized by conservative libertarians. It was excoriated as a tool of both right-wing fundamentalism and left-wing political correctness. Within academia, both professors and students divided sharply on the wisdom, logic, and constitutionality of the ordinance. The proposal touched a raw nerve, and emotions ran high.

The Minneapolis City Council adopted the proposed ordinance in 1983, but it was promptly vetoed by Mayor Donald M. Fraser, who characterized it as unconstitutional.<sup>10</sup> The City Council of Indianapolis then invited Dworkin and MacKinnon to draft an antipornography ordinance for Indianapolis. The following year, the ordinance was passed by the Indianapolis City Council and signed into law by Mayor William Hudnut.<sup>11</sup> Immediately thereafter, the American Booksellers Association, the American Publishers Association, and a host of other plaintiffs filed suit challenging the constitutionality of the ordinance as violative of the First Amendment. Into this cauldron stepped a thirty-seven-year-old rookie judge.

#### I. "ONE OF THE THINGS THAT SEPARATES OUR SOCIETY"

Judge Easterbrook held the Indianapolis ordinance unconstitutional. At the outset, he sharply distinguished the new concept of pornography from the traditional concept of obscenity, which the Supreme Court has long held not to be protected by the First Amendment.<sup>12</sup> Easterbrook reasoned that because the Indianapolis ordinance did not require that the restricted material appeal to the prurient interest in sex, patently offend contemporary community values, lack serious artistic, literary, political, or scientific value, or be judged as a whole, it failed to satisfy the critical criteria that had led the Court to treat obscenity as only low-value expression.<sup>13</sup> The ordinance therefore could not be upheld as a mere variant of the law of obscenity or as even a logical extension of that doctrine.

MacKinnon agreed with this assessment. As she put the point, obscenity "is concerned with morality, specifically morals from the male point of view," whereas the "feminist critique of pornography is a politics, specifically politics from women's point of view, meaning the standpoint of the subordination of women to men."<sup>14</sup> "The two con-

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<sup>10</sup> See *Minneapolis Mayor Vetoes Plan Defining Pornography as Sex Bias*, NY Times A11 (Jan 6, 1984) ("Mr. Fraser, who is a lawyer, said he felt the bill raised constitutional issues he could not ignore.").

<sup>11</sup> See *Curb on Pornography Enacted in Indianapolis*, NY Times A16 (May 2, 1984).

<sup>12</sup> *Hudnut*, 771 F2d at 324-25.

<sup>13</sup> See *id.*, citing *Miller v California*, 413 US 15 (1973).

<sup>14</sup> Catharine A. MacKinnon, *Not a Moral Issue*, 2 Yale L & Pol Rev 321, 322-23 (1984).

cepts,” she added, “represent two entirely different things.”<sup>15</sup> Obscenity is concerned with nudity, explicitness of sexual depiction, and offensiveness. Pornography is concerned with “women’s bodies trussed and maimed and raped and made into things to be hurt and obtained and accessed” and then “presented as the nature of women.”<sup>16</sup> Obscenity, she argued, “probably does little harm; pornography causes attitudes and behaviors of violence and discrimination which define the treatment and status of half of the population.”<sup>17</sup>

Unlike many judges, lawyers, and scholars who defend free speech by denying that speech is harmful, Easterbrook accepted “the premises” underlying the ordinance. He conceded that people “who see women depicted as subordinate are more likely to treat them so,” that exposure to pornography “does not persuade people so much as change them,” that pornography “works by socializing, by establishing the expected and the permissible,” that it often acts “at the level of the subconscious,” that portrayals “of subordination tend to perpetuate subordination,” and that 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.”<sup>18</sup> In short, and to his credit, Easterbrook did not try to evade the argument from harm. He addressed it head-on.

Easterbrook then turned to what, for him, was the heart of the matter: under the ordinance, material “treating women in the approved way—in sexual encounters ‘premised on equality’—is lawful,” whereas expression “treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful.”<sup>19</sup> Easterbrook then declared that the government “may not ordain preferred viewpoints in this way. The Constitution forbids [government] to declare one perspective right and silence opponents.”<sup>20</sup> This principle, he explained, is at the very core of the First Amendment:

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .” Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious—the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may

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<sup>15</sup> *Id.* at 323.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 323–24.

<sup>18</sup> *Hudnut*, 771 F.2d at 328–29.

<sup>19</sup> *Id.* at 325 (citation omitted).

<sup>20</sup> *Id.*

prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful.

The ideas of the Klan may be propagated. Communists may speak freely and run for office. The Nazi Party may march through a city with a large Jewish population. . . . People may seek to repeal laws guaranteeing equal opportunity in employment or to revoke the constitutional amendments granting the vote to blacks and women. They may do this because “above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas.”<sup>21</sup>

For these reasons, Easterbrook explained, the communication of a point of view, however odious, cannot be suppressed unless, at the very least, “the danger is not only grave but also imminent.”<sup>22</sup> Although pornography as defined by the ordinance might contribute to the harms the ordinance was designed to prevent, it does not cause those harms in a way that satisfies the clear and present danger test. Rather, the harms identified by Dworkin and MacKinnon, even if real and substantial, are remote, attenuated, and the consequence of many factors in addition to speech. To allow the government to restrict such expression on the plea that it has harmful consequences would be similar to holding a movie producer liable for showing a scene of a murder that was later replicated in the real world by a copycat or to punishing an individual for seditious libel because speech promoting “disrespect for the government leads to social collapse and revolution.”<sup>23</sup>

The proponents of the ordinance argued, however, that pornography is different. First, they claimed that, unlike the responses to other speech, “[s]exual responses are often unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect” by working through the unconscious.<sup>24</sup> Easterbrook conceded that there might be something to this argument, but nonetheless concluded that it proves too much, because “almost all cultural stimuli provoke unconscious responses,” including political expression, religious ceremonies, commercial advertising,

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<sup>21</sup> Id at 327–28 (citations omitted), quoting *West Virginia State Board of Education v Barnette*, 319 US 624, 642 (1943) (“fixed star”); *Police Department of Chicago v Mosley*, 408 US 92, 95 (1972) (“above all else”).

<sup>22</sup> *Hudnut*, 771 F2d at 329.

<sup>23</sup> Id.

<sup>24</sup> Id at 330.

humor, poetry, frightening movies, and so on.<sup>25</sup> In all of these circumstances, “the implicit message . . . may be more powerful than the messages for which they present rational argument.” If “the fact that speech plays a role in conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.”<sup>26</sup> Indeed, any other answer would leave “the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.”<sup>27</sup>

Second, the proponents of the ordinance maintained that although the “marketplace of ideas” metaphor “might be an adequate theory of the social preconditions for knowledge in a nonhierarchical society,” it fails completely “in a society of gender inequality,” in which “the speech of the powerful impresses its view upon the world, concealing the truth of powerlessness.”<sup>28</sup> Or, as applied more specifically to pornography, if those who oppose pornography were able to present their position “as fully as pornographers present theirs, the pornography industry would be in a precarious position.”<sup>29</sup> But pornography is so profitable that those who oppose it are effectively denied meaningful “access to the public” through the mass media.<sup>30</sup>

Once again, Easterbrook acknowledged the problem, but held that limiting free speech is not the solution. He described the proponents’ argument as resting “on the belief that when speech is ‘unanswerable,’” and the assumption that there is a well-functioning “‘marketplace of ideas’ does not apply, the First Amendment does not apply either.”<sup>31</sup> But although the First Amendment is premised on the hope that, in the long run, “the truth will prevail,” it does not make the triumph of “truth a necessary condition of freedom of speech.”<sup>32</sup> Indeed, “[t]o say that it does would be to confuse an outcome of free speech with a necessary condition for the application of the amendment.”<sup>33</sup> More fundamentally, he reasoned, the “power to limit speech on the ground that truth . . . is not likely to prevail implies the power to de-

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<sup>25</sup> Id.

<sup>26</sup> *Hudnut*, 771 F2d at 330.

<sup>27</sup> Id.

<sup>28</sup> Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 155 (Harvard 1987).

<sup>29</sup> Judith Baat-Ada (Reisman), *Freedom of Speech as Mythology, or “Quill Pen and Parchment Thinking” in an Electronic Environment*, 8 NYU Rev L & Soc Change 271, 278 (1979) (arguing that pornographers—and not their opponents—should be attacked as censors because they “forc[e] us to experience their environment . . . and shape[e] our attitudes with their own warped portrayals”).

<sup>30</sup> Id at 279.

<sup>31</sup> *Hudnut*, 771 F2d at 330.

<sup>32</sup> Id.

<sup>33</sup> Id.

clare truth.”<sup>34</sup> But under the First Amendment, he insisted, echoing the Supreme Court, “there is no such thing as a false idea.”<sup>35</sup> The “marketplace of ideas” is not perfect and speech need not be “effectively answerable” to be protected by the First Amendment. To the contrary, “[a]t any time, some speech is ahead in the game; the more numerous speakers” may prevail regardless of the merits of their position.<sup>36</sup> Some speakers with good ideas fail because “few people believe their positions.”<sup>37</sup> But “[t]his does not mean that freedom of speech has failed” or that the government may intervene to “fix” the market by deciding that some ideas are better than others.<sup>38</sup>

Finally, the proponents of the Indianapolis ordinance argued that pornography is “low value” speech, analogous to obscenity, fighting words, express incitement of unlawful conduct, threats, and false statements of fact. Easterbrook dismissed this argument out of hand: “Indianapolis seeks to prohibit certain speech because it believes this speech influences social relations and politics,” and it does so by creating “an approved point of view.”<sup>39</sup> This, in itself, he concluded, “precludes a characterization of the speech as low value.”<sup>40</sup> Even within recognized categories of low-value speech, Easterbrook explained, the First Amendment does not permit the government to restrict speech because of its point of view. For example, although the Supreme Court had held that the FCC can constitutionally keep profanity off the airwaves during certain hours in order to protect children, it “would not have sustained a regulation prohibiting scatological descriptions of Republicans but not scatological descriptions of Democrats, or any other form of selection among viewpoints.”<sup>41</sup>

In the end, Easterbrook observed, the basic theory of the Indianapolis ordinance posed a greater danger to those who would bring about social change than to those who would defend the status quo. “Any rationale we could imagine in support of this ordinance,” he warned, “could not be limited to sex discrimination.”<sup>42</sup> It would inevitably open a door through which others, less friendly to the well-meaning proponents of the Indianapolis ordinance, would rush, for in

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<sup>34</sup> *Id.*

<sup>35</sup> *Hudnut*, 771 F2d at 331 (arguing that because there is no such thing as a false idea, the government may not regulate on the grounds that the truth is not yet dominant), citing *Gertz v Robert Welch, Inc.*, 418 US 323, 339 (1974) (arguing that there is no such thing as a false idea).

<sup>36</sup> *Hudnut*, 771 F2d at 331.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 331–32.

<sup>40</sup> *Hudnut*, 771 F2d at 331.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 332.

the long run the powerful are more likely than the powerless to be able to exploit effectively an exception to the principle of free expression. Indeed, throughout history the freedom of speech “has been on balance an ally of those seeking change.”<sup>43</sup> Those who “want stasis start by restricting speech.”<sup>44</sup> The lesson of experience is therefore that change “ultimately depends on the ability of outsiders to challenge accepted views,” and in the absence of a robust “guarantee of freedom of speech, there is no effective right to challenge what is.”<sup>45</sup>

The United States Supreme Court summarily affirmed Judge Easterbrook’s decision in *Hudnut*, essentially putting to rest the Dworkin and MacKinnon argument for laws prohibiting “pornography.”<sup>46</sup> According to Catharine MacKinnon, writing a decade after *Hudnut*, “the ordinance has not been passed again anywhere. It is not now actively under consideration anywhere.”<sup>47</sup> This remains the case today, twenty-five years after Easterbrook’s opinion. In MacKinnon’s view, other communities have failed to take up the cause of the anti-pornography ordinance because of “the power of the pornographers and their front people, including press, lawyers, and academics.”<sup>48</sup> But, she adds, the single, most potent “barrier to the ordinance becoming law is, in a word, *Hudnut*.”<sup>49</sup>

## II. “THE ONLY MEANING OF FREE SPEECH IS THAT THEY SHOULD BE GIVEN THEIR CHANCE AND HAVE THEIR WAY”

MacKinnon has criticized the decision in *Hudnut* as “simply wrong as a matter of law.”<sup>50</sup> Though I have great respect and admiration for Catharine MacKinnon, in this she is “wrong.” Not only is *Hudnut* not “wrong,” but it stands alongside the decisions on such issues as the Pentagon Papers,<sup>51</sup> the Skokie controversy,<sup>52</sup> and flag burn-

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

<sup>44</sup> *Hudnut*, 771 F2d at 332.

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

<sup>46</sup> *Hudnut v American Booksellers Association, Inc.*, 475 US 1001, 1001 (1986).

<sup>47</sup> MacKinnon, *Speech, Equality, and Harm* at 303 (cited in note 7). But see *Regina v Butler*, 1 SCR 452 (Can 1992) (upholding a Canadian statute similar to the Indianapolis ordinance).

<sup>48</sup> MacKinnon, *Speech, Equality, and Harm* at 303 (cited in note 7).

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

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

<sup>51</sup> See *New York Times Co v United States*, 403 US 713, 714 (1971) (affirming a lower court judgment denying the United States an injunction that would have prevented newspapers from publishing the Pentagon Papers).

<sup>52</sup> See *Village of Skokie v National Socialist Party of America*, 373 NE2d 21, 25–26 (Ill 1978) (holding that displaying a swastika during a demonstration in a public park is symbolic political speech protected by the First Amendment).

ing<sup>53</sup> as one of the most dramatic and defining First Amendment moments of the past forty years.

It is easy to see why those who anathematize *Hudnut* do so. It invokes a seemingly vague principle of free speech in order to shield from regulation speech that many reasonable people regard as nothing short of hateful. In this, it is analogous to the controversies over the Nazis marching in Skokie, the burning of American flags, and the publication of stolen, top-secret government documents in wartime. How, one might ask, could any sensible person not see that the benefits of suppressing such speech outweigh the costs? Wouldn't this be a better society if we had less discrimination against women, less sexual abuse of women, less rape of women? And what would we really lose if we banned the sort of expression governed by the Indianapolis ordinance? Does such speech enhance public discourse in any meaningful way? Isn't it, as MacKinnon observed, merely a masturbatory aid?

The answer to these questions can be found deep within the heart of our First Amendment jurisprudence. The answer can be traced in three steps. The first step was taken by Justice Oliver Wendell Holmes in his dissenting opinion in *Gitlow v New York*,<sup>54</sup> where he proclaimed that if odious views "are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."<sup>55</sup> This is a central insight about the First Amendment. What it means, in effect, is that in no case may the majority conscript the power of government to suppress the advocacy of an idea because the majority believes the idea to be false or unwise or wrongheaded or dangerous and does not trust other citizens to make the "right" decisions about such views in the political process. This is the prime directive of the First Amendment.

As Judge Easterbrook noted in *Hudnut*, the point is not that the majority will always make the "right" decisions. It is, rather, that in the long run we are better off allowing citizens to continue to debate and deliberate about the wisdom of competing ideas, even if they might sometimes reach bad or unwise decisions, than we are allowing a momentary majority to freeze debate and deliberation by declaring unchallengeable its own conception of what should be irrevocably "right" ideas.<sup>56</sup> The government, in other words, is constitutionally disabled

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<sup>53</sup> *United States v Eichman*, 496 US 310, 312 (1990) (striking down on First Amendment grounds a federal statute criminalizing the burning of the American flag).

<sup>54</sup> 268 US 652 (1925).

<sup>55</sup> *Id.* at 673 (Holmes dissenting).

<sup>56</sup> Easterbrook has made the same point about judicial noninterference with academic debate in the university setting. See Aziz Huq, *Easterbrook on Academic Freedom*, 77 U Chi L Rev 1055, 1069 (2010).

from suppressing an idea because it fears the People might come to accept the idea as sound and act upon it in the political process.

Although this prime directive is a bedrock principle of our First Amendment jurisprudence, it is rarely called directly into question. Indeed, to the best of my knowledge, in the entire history of the United States, the government has never expressly argued that individuals must be forbidden to advance an idea because the idea is false or wrongheaded or dangerous, and the government must step in to suppress it because the People are too foolish or gullible or ignorant to be trusted to hear it. Public officials have always known intuitively that such an argument must fail in any society dedicated to self-governance. But this does not mean that the principle is not central to the structure and purpose of First Amendment doctrine.

The second step is the recognition that people in general, and public officials in particular, will often act in violation of this principle, even if they do not defy it openly. Human nature being what it is, people naturally want to stifle criticism of their actions, their beliefs, and their “fighting faiths.”<sup>57</sup> Thus, although government officials know that they cannot expressly justify the suppression of ideas they find odious on the grounds that the People should not be allowed to consider them, this does not eliminate the temptation to suppress these ideas by indirection. To circumvent the prime directive, the government naturally does the obvious: it offers justifications for suppressing the ideas it fears and despises that do not openly flaunt the prime directive.

This tactic is evident throughout American history. The Sedition Act of 1798,<sup>58</sup> for example, was defended as an effort to maintain respect for government and government officials and to prevent the spread of disloyalty, but was clearly motivated by the desire of the Federalists to suppress criticism of the Adams administration in order to ensure the defeat of Thomas Jefferson in the election of 1800.<sup>59</sup> Similarly, during World War I, the government aggressively punished criticism of the war and the draft, not on the ground that the war and the draft were beyond criticism, but on the premise that such expression might cause others to commit unlawful acts in order to obstruct the

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<sup>57</sup> *Abrams v United States*, 250 US 616, 630 (1919) (Holmes dissenting) (arguing that, although the impulse to persecute those who express differing opinions is understandable, the “best test of truth is the power of the thought to get itself accepted” in the marketplace of ideas).

<sup>58</sup> An Act in Addition to the Act, Entitled “An Act for the Punishment of Certain Crimes against the United States,” 1 Stat 596 (1798).

<sup>59</sup> See Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* 15–78 (Norton 2004) (characterizing the Sedition Act as “perhaps the most grievous assault on free speech in the history of the United States”).

war and the draft and strengthen the resolve of the enemy.<sup>60</sup> And during the McCarthy era, the government investigated, blacklisted, and imprisoned individuals who had been affiliated with the Communist Party, not on the ground that the advocacy of Communist beliefs might persuade people to enact unwise policies in the political process, but on the premise that such individuals might themselves engage in unlawful acts of espionage or sabotage or that such advocacy might cause others to resort to violence in an effort to overthrow the government.<sup>61</sup>

These and many similar experiences throughout American history led to the third step. As the Supreme Court came over time to comprehend the danger of this means of circumvention, it gradually recognized that allowing the government to suppress particular views on the claim that they might cause harm to individuals or to society would seriously underprotect free speech and enable the government to achieve by indirection what it could not constitutionally achieve directly. The point is not that speech cannot cause harm. It is, rather, that it is too easy for the government to show that disfavored ideas cause harm and thus effectively evade the prime directive. To address this concern, the Court eventually came to the view that the government cannot constitutionally punish the expression of particular ideas or viewpoints unless it can prove, at the very least, that the speech would cause imminent and grave harm that could not be prevented by means other than by suppressing free expression.<sup>62</sup>

Viewed in this light, Judge Easterbrook's opinion in *Hudnut* can be seen as an eloquent application of the central insight of our First Amendment jurisprudence. The arguments offered by the proponents of the Indianapolis ordinance ran head-on into this principle. The claim that pornography, as defined by the ordinance, causes harm might be true, but so was the claim that criticism of World War I might cause people to refuse induction or blow up troop trains. The claim that pornography, as defined by the ordinance, is insidious might be true, but seditious libel and Communist propaganda were similarly condemned as insidious.

As Judge Easterbrook observed, the government is barred by the First Amendment from restricting speech because of its ideas or viewpoints, except in the most extraordinary of circumstances. A "reasona-

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<sup>60</sup> See *id.* at 135–233 (surveying actions taken by the government against persons opposed to World War I, including convictions under the Espionage and Sedition Acts).

<sup>61</sup> See *id.* at 311–426 (exploring efforts by the government to uncover subversion during the Cold War, including abusive loyalty programs, legislative investigations, and criminal prosecutions).

<sup>62</sup> See Geoffrey R. Stone, *Free Speech in the Twenty-first Century: Ten Lessons from the Twentieth Century*, 36 *Pepperdine L Rev* 273, 280–83 (2009) (describing the Supreme Court's adoption of a presumption against content-based restrictions).

ble” approach to the First Amendment might balance the benefits of particular viewpoints against their costs on a case-by-case basis, but such an approach would open the door to precisely the sorts of abuses of authority that the First Amendment was designed to foreclose. Judge Easterbrook’s opinion in *Hudnut* exemplifies this fundamental feature of our First Amendment jurisprudence.

### III. “NO ESSENTIAL PART OF ANY EXPOSITION OF IDEAS”

The proponents of the Indianapolis ordinance offered one final argument in support of the law. They maintained that even if the expression addressed by the ordinance could not constitutionally be restricted if it is fully protected by the First Amendment, the ordinance was directed at only low-value speech. In *Chaplinsky v New Hampshire*,<sup>63</sup> the Supreme Court noted that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”<sup>64</sup> In order to fall within this doctrine, speech must fall within a category of expression that has traditionally been understood to be “no essential part of any exposition of ideas” and has only “slight social value as a step to truth.”<sup>65</sup>

There are several well-recognized categories of speech that have historically fallen within *Chaplinsky*, including false statements of fact,<sup>66</sup> express incitement of unlawful action,<sup>67</sup> obscenity,<sup>68</sup> fighting words,<sup>69</sup> commercial advertising,<sup>70</sup> and threats.<sup>71</sup> These categories of expression can be regulated more readily than other speech, in part because they do not appreciably further the core values of the First Amendment.<sup>72</sup>

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<sup>63</sup> 315 US 568 (1942).

<sup>64</sup> *Id.* at 571–72.

<sup>65</sup> *Id.* at 572.

<sup>66</sup> See *New York Times Co v Sullivan*, 376 US 254, 268 (1964).

<sup>67</sup> See *Brandenburg v Ohio*, 395 US 444, 448–49 (1969).

<sup>68</sup> See *Miller v California*, 413 US 15, 23 (1973).

<sup>69</sup> See *Texas v Johnson*, 491 US 397, 409–10 (1989).

<sup>70</sup> See *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc.*, 425 US 748, 757–58 (1976).

<sup>71</sup> See *Watts v United States*, 394 US 705, 707–08 (1969).

<sup>72</sup> Express incitement of unlawful action is of low First Amendment value in part because, as Judge Learned Hand observed, “direct incitement” to lawless action “cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.” *Masses Publishing Co v Patten*, 244 F 535, 540 (SDNY 1917), *revd.*, 246 F 24 (2d Cir 1917). False statements of fact have only low First Amendment value in part because they distort the functioning of public discourse. Fighting words have low First Amendment value in part because they are more akin to a slap in the face than to expression. Threats have low First Amendment value in part because they affect their victims by coercion rather than persuasion. Obscenity has low First Amendment value in part because its primary effect is to stimulate a physiological response, much like a sex aid or a stroke on the thigh.

As Judge Easterbrook concluded in *Hudnut*, the speech restricted by the Indianapolis antipornography ordinance stands outside these traditional categories of low-value expression.<sup>73</sup> The proponents of the ordinance insisted, however, that the ordinance recognized and defined a new category of low-value speech. But they offered no convincing argument for that conclusion. They argued, in short, that the message conveyed by such speech is hateful and that such expression is not intended to communicate ideas. But these are hardly persuasive reasons for creating a new category of low-value speech. The *Chaplinsky* doctrine is not an open-ended invitation to relegate to low-value status speech that some or even most people find odious; rather, it is a carefully limited doctrine rooted in longstanding traditions of regulating discrete categories of expression on the basis of well-established conceptions of First Amendment value.

The Indianapolis ordinance clearly failed *Chaplinsky*'s requirement that regulations of specific categories of low-value expression must "never [have] been thought to raise any Constitutional problem."<sup>74</sup> A long tradition of regulating a particular category of low-value speech creates a historical understanding of the contours and definition of the category and demonstrates from experience that the category can be regulated without doing undue damage to the First Amendment. Virtually every recognized category of low-value speech has long been subject to legal regulation, and most categories of low-value speech were regulated at common law even before the adoption of the First Amendment. But until the Dworkin and MacKinnon ordinance was first proposed in Minneapolis in 1983, no court or legislature had ever seriously suggested that such expression could be regulated as a form of low-value speech. Although a longstanding history of regulation may not be an absolute requirement for the recognition of new categories of low-value speech, tradition clearly and quite appropriately has played a critical role in the Court's application of *Chaplinsky*.

The proponents of the Indianapolis ordinance insisted, however, that the speech at issue had minimal, if any, First Amendment value. As Andrea Dworkin argued, "when a woman has a penis thrust down to the bottom of her throat, . . . that throat is not . . . discussing ideas."<sup>75</sup> And as Catharine MacKinnon charged, because the material regulated by the ordinance is used primarily for sex, "it is sex" rather than speech.<sup>76</sup> Although there is surely some merit in these observations, they

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<sup>73</sup> See *Hudnut*, 771 F2d at 331–32 (arguing that pornography is not "low value" precisely because it "influences social relations and politics on a grand scale").

<sup>74</sup> *Chaplinsky*, 315 US at 572.

<sup>75</sup> Dworkin, *Pornography Happens to Women* at 183 (cited in note 3).

<sup>76</sup> MacKinnon, *Speech, Equality, and Harm* at 304 (cited in note 7).

prove too much to be helpful. The plain and simple fact is that the expression covered by the Indianapolis ordinance advances messages—most obviously, according to MacKinnon and Dworkin—that women, or some women, enjoy sexual humiliation. To be sure, MacKinnon and Dworkin despise this message, but that is not a sufficient reason to deem speech of low First Amendment value. Moreover, as Judge Easterbrook noted in *Hudnut*, the ordinance reached even material with serious artistic, literary, scientific, and social value, making it even more difficult to sustain the claim it regulated only low-value speech.<sup>77</sup>

But beyond all this, the most fundamental contribution of Judge Easterbrook's *Hudnut* opinion was his insight about the relationship between viewpoint discrimination and low-value speech. Recognizing that the Indianapolis ordinance proscribed a particular point of view, Easterbrook offered two novel and critical observations. First, he noted that no category of low-value speech had ever been or should ever be defined specifically in terms of a prohibited idea or viewpoint. That is, the presumption against viewpoint discrimination must trump the idea of low-value speech.<sup>78</sup>

Second, he reasoned that a viewpoint-based distinction within a low-value category is presumptively unconstitutional.<sup>79</sup> In other words, even though the government can restrict all obscenity, or all threats, or all express incitements, or all libels that fall within the constitutional definition of those categories, it cannot constitutionally restrict only some obscenity or threats or incitements or libels if the line is drawn in terms of viewpoint. For example, the government cannot ban obscenity only if it depicts specified sexual acts in a positive light; it cannot prohibit public threats only if they are directed at pro-choice advocates; it cannot forbid incitements to unlawful conduct only if they are uttered by Communists; and it cannot proscribe libel of public officials only if the victim is a Republican. No one had ever made this point before Judge Easterbrook's opinion in *Hudnut*, but it came to play a central role seven years later in the Supreme Court's decision in *R.A.V. v City of St. Paul*,<sup>80</sup> in which the Court held unconstitutional

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<sup>77</sup> See *Hudnut*, 771 F2d at 325 (observing that Joyce's *Ulysses* and Homer's *Iliad* might violate the ordinance, since both portray women as "submissive objects for conquest and domination").

<sup>78</sup> *Id.* at 325, 331 (arguing that the low-value speech cases cannot sustain measures that select among viewpoints because the Constitution always "forbids the state to declare one perspective right and silence opponents").

<sup>79</sup> *Id.* at 331–32 ("The Court sometimes balances the value of speech against the costs of its restriction, but it does this by category of speech and not by the content of particular works.").

<sup>80</sup> 505 US 377 (1992).

an ordinance prohibiting fighting words only if they insult a person's race, religion, or gender.<sup>81</sup>

#### IV. "THROUGH THE LENS OF THEIR OWN ORTHODOXIES"

Because Judge Easterbrook was a professor at The University of Chicago Law School until only a few months before his decision in *Hudnut*, and because he continues to be an active member of The University of Chicago Law School community as a Senior Lecturer in Law, it may be interesting to conclude this Essay by exploring how ideas percolate in an academic environment and eventually work their way into the law.

Central to the power and influence of Easterbrook's opinion in *Hudnut* is the First Amendment doctrine governing viewpoint-based restrictions. Although we today take pretty much for granted the notion that viewpoint-based regulations are the most dangerous type of restriction of speech, this was not always so. Indeed, throughout most of the evolution of First Amendment jurisprudence, the Supreme Court was largely oblivious to distinctions between content-based and non-content-based restrictions or between viewpoint-based and other forms of content-based restrictions. Although there were a few glancing references to such concepts,<sup>82</sup> for the most part the Court sought a unitary standard—clear and present danger, reasonableness, balancing—for all First Amendment restrictions.

This began to change in the early 1970s, with the Court's opinion in *Schacht v United States*,<sup>83</sup> in which the Court invalidated a law forbidding soldiers to wear their military uniforms in theatrical productions that "bring the military into discredit and disrepute."<sup>84</sup> The Court held that a law that "leaves Americans free to praise the war in Vietnam but can send persons . . . to prison for opposing it, cannot survive in a country which has the First Amendment."<sup>85</sup> Two years later, in *Po-*

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<sup>81</sup> *Id.* at 391 ("[T]he ordinance applies only to 'fighting words' that insult . . . 'on the basis of race, color, creed, religion, or gender.' . . . Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered.").

<sup>82</sup> See *Fowler v Rhode Island*, 345 US 67, 70 (1953) (holding that a restriction on religious services in public parks that was designed to affect only Jehovah's Witnesses was "merely an indirect way of preferring one religion over another"); *Niemotko v Maryland*, 340 US 268, 272 (1951) (holding that Jehovah's Witnesses could not be arrested for using public parks without a permit if the only reason the permit was refused was because of the city council's "dislike for or disagreement with the Witnesses or their views").

<sup>83</sup> 398 US 58 (1970).

<sup>84</sup> *Id.* at 63 (noting that the statute was one-sided, prohibiting criticism but allowing praise of the Vietnam War).

<sup>85</sup> *Id.*

lice *Department of Chicago v Mosley*,<sup>86</sup> the Court elaborated on this theme, holding that there “is an ‘equality of status in the field of ideas,’ and government must afford all points of view an equal opportunity to be heard.”<sup>87</sup> The government may not treat “people whose views it finds acceptable” differently from “those wishing to express less favored or more controversial views.”<sup>88</sup>

This question of viewpoint discrimination captured my own interest soon after *Schacht* and *Mosley*. As a first-year law professor, I observed in an article in the 1974 *Supreme Court Review* that the most serious type of restriction of speech is one that discriminates “among different viewpoints on particular issues.”<sup>89</sup> Four years later, I published an article in *The University of Chicago Law Review* that elaborated on this point,<sup>90</sup> and several years after that I wrote an even more extended analysis of the doctrine, trying both to explain and defend it.<sup>91</sup> Looking back on this article, I see that in the author acknowledgments I thanked my then-colleague Frank Easterbrook for his “helpful comments on earlier drafts of this Article.”<sup>92</sup>

Indeed, during most of this time, Easterbrook and I were colleagues on the faculty, and partly because of my fascination (one might say obsession) with this development in First Amendment jurisprudence, the question was often a subject of debate and deliberation. Like many other ideas at the Law School at the time, the issue of viewpoint discrimination was very much in the air at Chicago—more

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<sup>86</sup> 408 US 92 (1972).

<sup>87</sup> *Id.* at 96 (striking down Chicago’s school-picketing ordinance because it “described permissible picketing in terms of its subject matter”).

<sup>88</sup> *Id.* (holding the Chicago ordinance’s proscription of all nonlabor picketing unconstitutional).

<sup>89</sup> Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 S Ct Rev 233, 277 (comparing blanket prohibitions to viewpoint-specific prohibitions and concluding that the latter are the more dangerous).

<sup>90</sup> See Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U Chi L Rev 81, 108 (1978) (comparing Supreme Court cases involving “subject-matter” prohibitions on free speech to cases involving “viewpoint” prohibitions and arguing that the latter should be scrutinized more closely).

<sup>91</sup> See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189, 197–200 (1983) (arguing that the difference between a content-neutral and content-based law is that the latter distorts public debate by prohibiting a particular viewpoint). See also Paul B. Stephan, III, *The First Amendment and Content Discrimination*, 68 Va L Rev 203, 203–05 (1982) (arguing that while the First Amendment should protect against prohibitions of speech based on particular messages or ideas, it was not meant to protect against prohibitions based on subject matter); Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 Georgetown L J 727, 729–30 (1980) (proposing a framework for determining when content-based prohibitions are constitutional, based on equal protection analysis and a balancing test between the interests served by the regulation and its impact on free speech).

<sup>92</sup> Stone, 25 Wm & Mary L Rev at 189 n \*\* (cited in note 91).

so, I suspect, than at any other law school in the nation. Judge Easterbrook generously cited two of my early articles in *Hudnut*.<sup>93</sup>

The conversation at the Law School about both this issue and Judge Easterbrook's opinion in *Hudnut* continued to engage the faculty, not only over coffee and at lunch, but also in print. Shortly after the decision came down, Cass Sunstein, Mary Becker, Elena Kagan, and I all published articles about the case. I supported the opinion and tried to further explicate the rationale for the prohibition of viewpoint discrimination.<sup>94</sup>

Professor Sunstein then published an article in the *Duke Law Journal* taking issue with both Judge Easterbrook and me. Sunstein argued that the Indianapolis ordinance was "directed at harm rather than at viewpoint" and that its purpose was "not to suppress expression of a point of view" but "to prevent sexual violence and discrimination."<sup>95</sup> He therefore argued that because the antipornography ordinance was focused on the harm caused by the speech, it did "not pose the dangers associated with viewpoint-based restrictions."<sup>96</sup>

This argument continued a conversation Sunstein and I had been having privately. Indeed, citing that ongoing conversation, I responded to this argument even before Sunstein's article made it into print. In short, my anticipatory response was that the government always defends viewpoint-based laws on the ground that the disfavored ideas cause harm, and that this argument therefore does not distinguish the antipornography ordinance from any other viewpoint-based restriction. Because the legislation was "*expressly* directed at a particular viewpoint," it cannot credibly "be defended on the ground that it is 'merely' harm-based."<sup>97</sup>

Several years later, Professor Becker published an article in the *University of Colorado Law Review* sharply criticizing the decision in *Hudnut*.<sup>98</sup> Becker observed that in *Hudnut* the court had used the First Amendment, which on its face has "nothing to do with gender," to "perpetuate the second class status of a majority of the population," even though "a commitment to equality between the sexes supposedly

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<sup>93</sup> See 771 F2d at 328, citing Stone, 25 Wm & Mary L Rev 189 (cited in note 91); 771 F2d at 332, citing Stone, 46 U Chi L Rev 81 (cited in note 90).

<sup>94</sup> See Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 Harv J L & Pub Pol 461, 462-63 (1986) (refuting five arguments that might be made against *Hudnut* and concluding that the antipornography ordinance was indeed "unconstitutional viewpoint discrimination").

<sup>95</sup> Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L J 589, 612.

<sup>96</sup> *Id.* (arguing that since the ordinance focused on pornography specifically, not sexist material in general, the city had concrete data to support its legitimate purpose).

<sup>97</sup> Stone, 9 Harv J L & Pub Pol at 467 (cited in note 94).

<sup>98</sup> See Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U Colo L Rev 975, 989 (1993) (criticizing *Hudnut* for failing to balance adequately the Fourteenth Amendment's commitment to equality against First Amendment concerns).

exists elsewhere in the Constitution” (that is, in the Equal Protection Clause).<sup>99</sup> Becker argued that “the commitment to free speech generally reflects the bias of judges who, as members of a professional elite with an unusually high commitment to civil liberties, have a greater commitment to free speech in questionable contexts than does the population as a whole.”<sup>100</sup> Becker added that “those most likely to regard the harms caused by pornography . . . as the price of a free society ‘are not the ones that pay very much of the price.’”<sup>101</sup>

Becker then asserted that, “to the extent that the First Amendment protects pornographic ‘speech,’ it shields from democratic reform speech which contributes to the subordinate status of [women].”<sup>102</sup> She then addressed Judge Easterbrook’s argument in *Hudnut* that, “but for the First Amendment guarantee of free speech, women would likely be worse off, because government would be free to censor feminist speech.”<sup>103</sup> Becker expressed skepticism that judicial review actually protects “outsider groups from the tyranny of the ‘majority.’”<sup>104</sup> Indeed, she argued, the proposition that “judicial review promotes greater tolerance of feminist speech would be difficult to prove,” because a “variety of social factors are likely to be far more important to governmental tolerance of feminist speech than the presence or absence” of judicial review.<sup>105</sup> Thus, for Becker, *Hudnut* was not only a bad First Amendment decision, but it also raised serious questions about the value and legitimacy of judicial review itself.

That same year, Professor Elena Kagan published a piece in *The University of Chicago Law Review* that, among other things, endorsed much of my view, challenged Sunstein’s, and responded to Becker’s critique of *Hudnut*.<sup>106</sup> With respect to Becker, Kagan pointedly observed that “the very critique of the Court’s viewpoint discrimination doctrine exposes the need for a viewpoint neutrality principle.”<sup>107</sup> What Becker’s critique “highlights is the tendency of governmental actors

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*, quoting Frederick Schauer, *Uncoupling Free Speech*, 92 *Colum L Rev* 1321, 1355 (1992).

<sup>102</sup> Becker, 64 *U Colo L Rev* at 1001 (cited in note 98) (arguing that pornography represents an “extreme example” of the tendency in capitalistic societies to focus on women’s youth, physical appearance, and attractiveness to men).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (pointing to the counterexample of England, where there is less regulation of feminist speech despite the absence of a written constitution and thus no “binding judicial review” of free speech).

<sup>105</sup> *Id.*

<sup>106</sup> See generally Elena Kagan, *Regulation of Hate Speech and Pornography after R.A.V.*, 60 *U Chi L Rev* 873 (1993).

<sup>107</sup> *Id.* at 882.

(of all kinds) to see speech regulation through the lens of their own orthodoxies.”<sup>108</sup> But that judges, in applying the doctrine, might sometimes “succumb to the views they hold hardly argues in favor of granting carte blanche to legislative decisionmakers to bow to theirs.”<sup>109</sup> Embracing Easterbrook’s view rather than Becker’s, Kagan concluded that “[i]t is difficult to see how women and minorities, who have the most to lose from the establishment of political orthodoxy, would gain by jettisoning the First Amendment doctrine that most protects against this prospect.”<sup>110</sup>

It is worth noting, to close the loop, that the opinion in which the Supreme Court ultimately adopted Judge Easterbrook’s reasoning in *Hudnut* about the relationship between viewpoint discrimination and low-value speech, *R.A.V.*,<sup>111</sup> was authored by Justice Antonin Scalia, who was also a member of the faculty of The University of Chicago Law School—and a teacher of constitutional law—when many of the debates and discussions of this issue took place in the years leading up to *Hudnut*. All of this came together in March 1993 when the Law School hosted a major conference on “Speech, Equality and Harm,” which included a broad range of speakers, including Andrea Dworkin, then–Visiting Professor Catharine MacKinnon, Cass Sunstein, Elena Kagan, Mary Becker, and me, among many others.<sup>112</sup>

The point of all this is merely to illustrate how ideas are generated, percolate, evolve, and come to be tested and refined over time in a robust academic community, and how ideas nurtured in the academy can eventually work their way into the law. This process is of a piece with Judge Easterbrook’s opinion in *Hudnut*. It is testament to the proposition, which he stated so clearly, that “an idea is as powerful as the audience allows it to be.”<sup>113</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Kagan, 60 U Chi L Rev at 882–83 (cited in note 106).

<sup>111</sup> 505 US at 383–84.

<sup>112</sup> The papers from the conference were later published. See generally Lederer and Delgado, eds, *The Price We Pay* (cited in note 3) (collecting the essays presented at the conference, as well as other essays relevant to the topic).

<sup>113</sup> *Hudnut*, 771 F2d at 327–28.