

Why is Censorship Funny?  
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**ABSTRACT**

For those steeped in American law and culture, the notion that any speech restriction might inspire a positive contribution to society may seem heretical. But the notion deserves exploring, particularly given the prevalence and variety of speech regulations in the United States and elsewhere in the world. Happily, a context exists for exploring this issue that is less threatening and more entertaining than totalitarian thought control—or troublesome topics such as hate speech and pornography. The context is humor: jokes, cartoons, vignettes, and other expressions that make us laugh. Comedians know from experience, and research supports the proposition, that an audience will predictably laugh at a censored statement (specifically a *<bleeped>* statement) that the audience believes is censored – at least where the audience has been primed by the context to interpret as comedic.

This article probes the mainstream condemnation of censorship—observing that individuals, law, and society all benefit from line drawing—even in the context of something as special as freedom of communication. Through the lens of interdisciplinary humor studies as well as First Amendment doctrine, the article explores the notion that the laughter emerging from comedy featuring censorship might be a “tell” that exposes this truth. Many censorship jokes simply ridicule the censor. But others are more nuanced, suggesting that censorship humor might provide unique emotional rewards ranging from a spark emitted from the benign danger of a censored joke, the creative enterprise of imagining what message was *<bleeped>*, to the comfort of mapping the line between the proper and improper.

Audience laughter at censorship humor often appears to derive primarily from pleasure. It might also include a measure of anxiety, fear, and anger. That complexity, however, does not mitigate the possibility that humans occasionally see and enjoy some inherent value of censorship as separating “right” from “wrong.”

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## INTRODUCTION

Can a speech restriction ever be an inherently good? Can we ever justify censorship as intrinsically beneficial, and not simply a justifiable means of protecting something precious?

For those steeped in American law and culture, these questions may seem almost heretical. But they deserve exploring, particularly given the prevalence and variety of censorship in the United States and elsewhere in the world.<sup>1</sup> Happily, a context exists for exploring the questions that is less threatening and more entertaining than totalitarian thought control. The context is humor: jokes, cartoons, vignettes, and other expressions that make us laugh. Comedians know from experience, and research supports the proposition, that an audience will predictably laugh at a censored statement (specifically a <bleeped> statement) that the audience

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<sup>1</sup> I use the term censorship in this work to encompass all instances where the state uses legal or official means to restrict expression. This can include specific/obvious censorship, censorship that is flagged generally, and secret censorship. An example of specific/obvious censorship would be the blackening of individual words in a public text. Generally flagged censorship would occur where a news article possesses the byline “cleared by military censors,” but does not specifically identify what has been omitted from the communication. Secret censorship would include instances where communication is suppressed without any notice of suppression: the audience not only knows nothing of what is omitted, but is wholly ignorant that the communication has been censored.

Censorship can also be direct or indirect. This article focuses largely on direct censorship, where government power works on an extant expression. Indirect censorship occurs by chilling effect, where a speaker censors herself to avoid punishment or retribution of some kind.

Recent scholarship has identified a form a “new school” censorship in the digital world that is indirect and often works by stealth. This censorship works by forms of digital prior restraint, public/private cooperation, and collateral control. See Jack Balkin, *Old School/New School Speech Regulation* 3 (2014), available at SSRN-id2377526.pdf ; Derek Bambauer, *Orwell’s Armchair*, 79 U. CHICAGO L. REV. 863, 871 (2012).

believes is censored. Does this “comedic truth” have deep significance for free speech theory?

U.S. social norms, folklore, and custom generally take the position that censorship is bad.<sup>2</sup> In fact, some may reflexively--and others may thoughtfully-- say that any censorship is inherently evil. “[T]o praise an act of censorship is to verge on committing a linguistic mistake.”<sup>3</sup> First Amendment doctrine is more moderated—but generally agrees. This article will probe that position—exploring the proposition that individuals, law, and society all benefit from line drawing—even in the context of something as special as freedom of communication. The article explores the notion that the laughter emerging from comedy featuring censorship might be a “tell” that exposes this truth.

A couple of caveats. First: I am an admirer of the First Amendment, not an admirer of censorship. I do not aim to advocate more censorship. I do, however, advocate a closer look at the effect of censorship – or at least perceived censorship – on the human psyche. Understanding competing dynamics in responding to censorship can help us ensure that whatever censorship must exist takes a socially (and individually) beneficial form. With that goal, I proceed – hoping not to risk empowering unprincipled or overzealous censors with analytical justification.

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<sup>2</sup> Within the legal academy and intelligentsia, the matter is more nuanced. While the traditional analysis of censorship focused on repression and oppression by tyrannical government actors, more recent scholarship focused more on private power and has been more open to censorship that controls hate speech, pornography, and the speech of the wealthy (that has the effect of overshadowing the speech of the poor. ROBERT C. POST, *CENSORSHIP AND SILENCE* 2, 4-5 (1998).

<sup>3</sup> Frederick Schauer, *The Ontology of Censorship*, ROBERT C. POST, *CENSORSHIP AND SILENCE* 147 (1998). See, e.g., Derek Bambauer, *Orwell’s Armchair*, 79 U. CHICAGO L. REV. 863, 871 (2012) (“...the term “censorship” carries a pejorative connotation. It is particularly loaded in American and scholarly discourse, where censorship is seen as anathema to deeply-held beliefs about the importance of unfettered discourse and free expression.”)

My second caveat: I appreciate that analysing why anything is funny is risky. Humor analysis is riddled with problems of subjectivity. One person's light-hearted joke is another person's deep insult. Humor analysis can also be humor-destroying. I treasure comedy and the joy that a joke can bring. I nonetheless am willing to sacrifice a few specimens in service of the greater understanding of censorship's effect on individuals and society.

Knowledgeable of the risks in this enterprise, I submit the hypothesis that the impulse to laugh at censorship sometimes derives from something inherently amusing about the censorship. I further suggest that the amusing quality of censorship humor derives from factors more complex than the inclination to ridicule the censor's role in society.

This project begins for with a cross section of censorship humor examples, illustrating the diverse art forms through which censorship evokes laughter. I then look at these examples through the work of an array of interdisciplinary humor scholars about laughter in general and laughter in the context of censorship. Next the project reckons with the law: Are there soft spots in First Amendment doctrine that actually dovetail with these observations and accommodate censorship? The project ends by exploring whether explanation for the comedic value of censorship might be found in human desires for boundaries, our love of structure, as well as the comfort and benefits that rules provide for human society.

## **I. Raw Material: Examples of Laughter-Evoking Censorship**

Alan Funt, the creator of the radio production *Candid Microphone* as well as the television production, *Candid Camera*, long observed that laughs are more hardy

where an audience observes a bleep out—than when an unedited clip includes a “forbidden” word or phrase. So, when a victim of Candid Camera was taped seemingly saying something taboo-- and the taboo language is removed or obscured-- Funt observed that laughs magnified.<sup>4</sup> In fact, the laugh differential between censored and uncensored tracks was so marked that Funt bleeped out language that was completely innocent ... or relatively tame (such as “Oh God!”)<sup>5</sup>

This observation is reflected in the following traditional (corny) joke:

There once was a man who DELETED  
whose DELETED was so DELETED it DELETED  
DELETED DELETED  
DELETED DELETED  
And now he's DELETED DELETED <sup>6</sup>

You may not find the joke hilarious, but if anything about it inspires a smile, it’s the censorship part. No?

Alan Funt was onto something. And whatever that “something” is hasn’t been lost on contemporary mirth makers. There was even a TV comedy entitled “\$#! My Dad Says.”<sup>7</sup> (Those in-the-know were aware that the \$#! part of the title derived from a Twitter feed—not censored—written by a man named Justin Halpern about his cursing-a-blue-streak father.)<sup>8</sup> By way of further example, one can now see that “WTF”—a seemingly censored version of “What the Fuck”-- has made its way into

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<sup>4</sup> Peter Funt, “Too Funny for Words, NEW YORK TIMES, at A19, October 2, 2010, available at [http://www.nytimes.com/2010/10/02/opinion/02funt.html?\\_r=0](http://www.nytimes.com/2010/10/02/opinion/02funt.html?_r=0)

<sup>5</sup> Peter Funt, “Too Funny for Words, NEW YORK TIMES, at A19, October 2, 2010, available at [http://www.nytimes.com/2010/10/02/opinion/02funt.html?\\_r=0](http://www.nytimes.com/2010/10/02/opinion/02funt.html?_r=0)

<sup>6</sup> Author: unknown; source: Professor Professor Desmond MacHale, Department of Mathematics, University College Cork

<sup>7</sup> For a review, see <http://www.nytimes.com/2010/09/23/arts/television/23father.html>

<sup>8</sup> [http://www.nytimes.com/2010/05/19/arts/television/19shatner.html?\\_r=0](http://www.nytimes.com/2010/05/19/arts/television/19shatner.html?_r=0)

mainstream TV comedy.<sup>9</sup> Of course, one really can't quantify whether WTF is funnier than "What the Fuck" or whether \$#! is funnier than the apparently forbidden words it replaces. The point is, however, that the censored forms have become part of our language and carry with them unique comic content.<sup>10</sup>

Consider also the following NEW YORKER cartoon by Charles Barsotti:<sup>11</sup>

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<sup>9</sup> By one report, CBS executives viewed the acronym "WTF"—a seemingly censored version of "What the F\*\*k"—to actually stand for "Wow that's Funny." Peter Funt, "Too Funny for Words, NEW YORK TIMES, at A19, October 2, 2010, *available at* N.Y. TIMES, SR3 (Nov. 30, 2013) (discussing debates about whether to name a cooking show "Cook your Ass off," "Cook your Bum off," or "Cook your Bottom off.")

<sup>10</sup> The contemporary era provides an interesting opportunity to view the readily available "bleeped" version of comedy sketches that originally appeared on cable in a "non-bleeped" version. *See, e.g.,* Jon Stewart's "Rob Ford--eating p\*ssy": <http://www.thedailyshow.com/watch/thu-november-14-2013/cracked>; Jon Stewart's "Smokey the Bear",: <http://www.thedailyshow.com/watch/thu-october-3-2013/shutstorm-2013--america-sits-on-its-balls---smokey-the-bear> (No reputable website had a link to the entire episode, but Comedy Central provided a link to the individual sketch. The same is true for the Rob Ford segment below.)

<sup>11</sup> CHARLES BAROTTI, NEW YORKER CARTOON BANK, Image ID: 4352, <http://www.condenaststore.com/~/-/cartoon-bank?aid=806328329&gclid=CMYr4pSWrL0CFaLm7AodDXUAPA>



From one perspective, this cartoon is a straightforward example of a joke about censorship. Digging deeper, one might also identify the stealthy figures in the picture as censors—thus adding the ironic twist that the censors’ words are censored. It is a joke about censorship, using censorship as its medium.

The internet is also brimming with examples of censorship humor. Take for instance the comic ditties featuring censorship in movies. One version presents a spoof— which has a sequence of actual edgy lines--followed by a fabricated version of the lines designed to suggest what a censored, cleaned-up version would be like.<sup>12</sup> Hilarious or not, these are important to this study because it is the censored line – not the original line-- that makes you smile, and possibly laugh. As parodies, these spoofs are part of a tradition reflected in art forms outside the internet as well.

One recent theatrical example, *Arguendo*, actually presents a double parody: a spoof on nude dancing and a spoof on the U.S. Supreme Court arguments about the

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<sup>12</sup> See <http://www.youtube.com/watch?v=4koLWPq2qDY>

constitutionality of the censorship, *Barnes v. Glen Theatre, Inc.*<sup>13</sup> The show plays off of both the censorship law at issue in the case as well as the Supreme Court's treatment of that law and underlying (censored) expressive conduct (nude dancing).<sup>14</sup> A related version of this genre features actual, unaltered examples of censorship, where the censors themselves butchered a communication with (apparently) unintended comic effect.<sup>15</sup>

Both of these humor categories--those that fabricate a censor's work and those that poke fun at unaltered censor's work--represent a special strain of censorship humor. For this strain, it is the censor herself who is the butt of the joke. Contributing to this genre are humorists who target Chinese government censors, and the apparently ridiculous choices they make in the interest of social control.<sup>16</sup>

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<sup>13</sup> 501 U.S. 560 (1991). Holding close to parody's technical requirement that a portion of the original be reflected in the parody, *Arguendo* used the actual transcript of the oral arguments. In this way, the play spoofed the Supreme Court decisionmaking, while also parodying the underlying censorship regulation at issue in the case. For a description and review of *Arguendo*, see [http://www.nytimes.com/2013/09/25/theater/reviews/arguendo-by-elevator-repair-service-at-the-public-theater.html?\\_r=0](http://www.nytimes.com/2013/09/25/theater/reviews/arguendo-by-elevator-repair-service-at-the-public-theater.html?_r=0)

<sup>14</sup> The show ends with yet another layer of parody when member of the cast actually engaging in the censored activity: performance in the nude. For an example of theatre where the performers play at the edges of censorship by apparently dancing nude behind small towels that the dancers dangle—sometimes precariously—in front of their genitals, see <http://www.youtube.com/watch?v=FyJySQedevk>

<sup>15</sup> See <http://www.cracked.com/quick-fixes/7-hilarious-ways-badass-movie-lines-got-ruined-by-tv-censors/> and [http://www.cracked.com/article\\_20209\\_the-6-most-hilarious-failures-in-music-censorship-history.html](http://www.cracked.com/article_20209_the-6-most-hilarious-failures-in-music-censorship-history.html)

<sup>16</sup> Consider the following description of studies of Chinese government censors:

Recently, a group of graduate students at Carnegie Mellon University conducted a long-term project on what words are flagged by internet censors in China. . . . Most surprisingly iodized salt is flagged. Why salt? After the [Fukushima](#) earthquake, rumors spread around China that iodized salt could protect someone from radiation poisoning. In order to [quell](#) that rumor, the Chinese government has been directly censoring it.

Focusing on U.S. government censorship, George Carlin's Seven Dirty Words places the censor at the butt of the joke in the same way as the Chinese censorship jokes. Carlin's approach has staying power today, although in today's times of looser censorship on cable channels, the jokester might turn the tables on the censor. Consider the Stephen Colbert Show segment in which Colbert and another famous guy—Hugh Laurie—read a list of expletives – uncensored and in the mode of something like “Masterpiece Theatre.”<sup>17</sup> While this Colbert/Lourie comedy works in homage to Carlin, it takes the form of meta-humor, a popular strain of contemporary comedy that makes a joke about a joke,<sup>18</sup> Meta-humor's self-conscious allusion to the operation of the humor itself does not, however, detract from the prime object of the humor: censorship. In this way the joke acknowledges (unwittingly or not) the continuing relevance of censors.<sup>19</sup> The same can be said of the following Roz Chast NEW YORKER cartoon:<sup>20</sup>

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<http://hotword.dictionary.com/censorship/>

<sup>17</sup> See [http://www.youtube.com/watch?v=\\_3YcOtXtvzY](http://www.youtube.com/watch?v=_3YcOtXtvzY) See also the ABC Jimmy Kimmel program "This Week in Unnecessary Censorship" in which Kimmel bleeps ordinary words in clips to make them seem obscene.

<sup>18</sup> <http://www.urbandictionary.com/define.php?term=metahumor>

<sup>19</sup> There is a contrary example to note. Jerry Seinfeld has identified a joke that he has performed and believes loses much of its force if he does not use an expletive. An anti-censorship example, one might say. See 35:24 in the following link: <http://www.youtube.com/watch?v=OKY6BGcx37k>

<sup>20</sup> ROZ CHAST, NEW YORKER CARTOON BANK, Image ID 2880, <http://www.condenaststore.com/~/-/cartoon-bank?aid=806328329&gclid=CMyr4pSWrL0CFaLm7AodDXUAPA>



For a final example, on a more edgy cultural front, consider the Boondocks comic strip and TV production. The show features lots of bleeped words—presumably for comic effect. In one show, the edgy bit arose (in significant part) from the producer’s decision not to bleep out full statements of the n-word.<sup>21</sup> Of course the n-word is not independently funny—and to many may never be capable of inspiring humor--but it is the contrast between the censored and the non-censored that adds comedy to the non-bleeped expletives. Some may believe that humor also

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<sup>21</sup> Here are links to specific Boondocks shows illustrating this:

<http://www.youtube.com/watch?v=QCa9f8cPRbk>

<http://www.youtube.com/watch?v=RBUJCCja4u4>

[http://www.youtube.com/watch?v=NcJBCu\\_NRyY](http://www.youtube.com/watch?v=NcJBCu_NRyY)

results because bleeping some words enhances the highly politicized connotations of the non-bleeped n-word.<sup>22</sup>

## II. Humor Theory

Ah... you might say...the humor in these jokes is censorship itself. From this point of view, the argument goes, the jokester is making fun of the ridiculous wrongfulness of suppressing speech. One certainly sees this when one observes that the object of the humorist's efforts is the censor itself – as in George Carlin's riff, mockery of TV censorship as well as those who poke fun at Chinese censorship on the internet.

As a preliminary matter, one might argue that is clearly an example of age-old superiority humor. Superiority humor is well studied, identified with ancient thinkers (Aristotle, Plato, Socrates, and Cicero), who associated humor with aggression. From this perspective, humor is a mechanism of disparaging others in order to enhance one's own sense of well-being.<sup>23</sup> Applied to this circumstance, superiority theory provides that we laugh because the censor is a fool, and we are not. It matters not

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<sup>22</sup>For commentary on the Boondocks decision to feature the n-word, *see, e.g.*, ['The Boondocks': Not the N-Word Show](#) (providing a general overview of the show, but includes quotes from creator Aaron McGruder about race and use of the n-word); [Sharpton criticizes 'Boondocks' for showing King saying the n-word](#) (critique by Al Sharpton of the decision); [The N-Word: The Most Popular Ugly Word Ever](#) (discussing the n-word in pop culture in general, and specifically mentioning the Boondocks' Martin Luther King episode); ['The Boondocks' goes uncut on iTunes](#) (mentioning that the n-word is routinely not edited in the show, although other explicit language is).

<sup>23</sup> *See, e.g.*, R.A. Martin, *Humor and laughter*, in 4 ENCYCLOPEDIA OF PSYCHOLOGY 203 (A.E. Kazdin, ed., Oxford University Press 2000). *See also* HUMOR & LAUGHTER *supra* note 17, at 1 (observing that Cicero, Quintilian, and Aristotle believed that laughter has its basis in “shabbiness or deformity” and is “degrading to morals, art and religion, a form of behavior from which civilized man should shrink”).

whether the foolishness is hapless or evil: the point is that we, the audience, are superior to the censor.

This spirit appears in the strand of censorship humor satirizing the censor. Classic censorship satire appears in Joseph Heller's *CATCH 22* through the character of Captain John Yossarian. Yossarian acts as the wartime censor of the service personnel's personal letters of service personnel. To combat boredom and indulge a mischievous spirit, he sometimes chooses specific words (such as the article "the") to slash from one letter, then censors all but that same word in another letter (creating a narrative composed only of the word "the"). Yossarian tops off the foolishness by signing a name on each letter, picking amusing pseudonyms (such as "Washington Irving," "Irving Washington," or the name of his unit chaplain).<sup>24</sup> The Yossarian trope works particularly well as superiority humor because his tomfoolery itself satirizes the concept of censoring the serviceman's letters.

And of course one can also argue that laughter results in many censorship situations because the audience is releasing anxiety over the censorship itself, which they perceive infringes their cherished freedoms. Scholars repeatedly observe that laughter is not always linked to unqualified enjoyment of humor.<sup>25</sup> In addition,

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<sup>24</sup> For more comedy about censorship in wartime, consider the following clips from *Good Morning Vietnam* regarding Adrian Cronauer dealing with censorship: <http://www.youtube.com/watch?v=8UY2uw3yoIA>. See also <http://www.youtube.com/watch?v=xRjYX0j-kpA> (featuring Adrian Cronauer discussing censorship).

<sup>25</sup> See, e.g., ROBERT R. PROVINE, *LAUGHTER: A SCIENTIFIC INVESTIGATION 3* (Viking 2000) (concluding that most laughter is produced by speakers, not listeners, and typically results from factors other than witticisms); JON E. ROECKELEIN, *THE PSYCHOLOGY OF HUMOR 13* (Greenwood Press 2002) (citing R.A. Martin, *Humor and laughter*, in 4 *ENCYCLOPEDIA OF PSYCHOLOGY* 40-51 (A.E. Kazdin, ed., Oxford University Press 2000) (observing that laughter is often unrelated to amusement); Jonathan Tierney, "What's so Funny? Well, Maybe Nothing," *N.Y. TIMES*, Mar. 13, 2007, at 1 (describing recent studies linking laughter with functions unrelated to humor).

laughter derived from anxiety about government regulation or oppression is not such a remarkable phenomenon: history is filled with instances when humor has served as a social safety valve.<sup>26</sup> Consider, for example, the jokes that flourished in Hitler's Germany<sup>27</sup> and during the Egyptian uprising of 2011.<sup>28</sup> Release humor often arises in tense contexts, and also usually focuses on taboo subjects. Indeed, Freud expounded the theory that release humor provides a vehicle for providing relief from anxiety about taboo topics, such as sex, death, incest, and excretion.<sup>29</sup>

In the "release humor" category, censorship humor often turns the tables on the censor. Where the humourist fabricates an instance of fictional censorship—the censor is the victim and the censorship can become a platform for protest. So for example in the Colbert/Laurie vignette—a litany of non-censored expletives are the tools for making fun of the process of censorship. The result is particularly empowering for both joke teller and audience, since not only do they release anxiety

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<sup>26</sup> Ozan O. Varol, *Revolutionary Humor* 21-23 (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2325782&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325782&download=yes) (explaining that "[h]umor can provide joy in an otherwise joyless landscape, serve as an omen of better days, dissolve widespread feelings of solitude, and mollify those afraid to speak up for fear of persecution").

<sup>27</sup> For a compilation of these jokes, see RUDOLPH HERZOG, *DEAD FUNNY: TELLING JOKES IN HITLER'S GERMANY* (2012).

<sup>28</sup> See, e.g., Satenik Harutyunyan, "Humor: Egypt's Revolutionary Ally" July 31, 2012, available at <http://blog.cartoonmovement.com/2012/07/humor-egypts-revolutionary-ally.html>; Anna Louie Sussman, "Laugh, O Revolution: Humor in the Egyptian Uprising" (February 23, 2011), available at <http://www.theatlantic.com/international/archive/2011/02/laugh-o-revolution-humor-in-the-egyptian-uprising/71530/>

<sup>29</sup> See SIGMUND FREUD, *JOKES AND THEIR RELATION TO THE UNCONSCIOUS* (1905). Although the concept of release humor is associated most often with Freud, some ascribe credit to others as well. See, e.g., MICHAEL BILLIG, *LAUGHTER AND RIDICULE: TOWARDS A SOCIAL CRITIQUE OF HUMOUR* 86 (Sage 2005) (tracing history of theory to Bain and Spencer); MURRAY S. DAVIS, *WHAT'S SO FUNNY* 7 (1993) (naming Freud and Spencer as the progenitors of release theory).

about the existence of censorship in their lives, but they use the censorship device itself to ridicule it—and perhaps even amplify it.<sup>30</sup> In effect, the joke teller turns the censor’s muzzle into a microphone.

Both of these theories—superiority and release--touches another insight about humor: violation often induces humor—that is, violation in the form of norm breaches, taboo topics, or perceived threat.<sup>31</sup> Of course violation alone does not generate humor; other conditions must be present. In particular, the audience needs to perceive an apparently contradictory sentiment at play: the context must appear safe, playful, or – at least-- non-serious.<sup>32</sup> The fact that censorship humor often frolics in the realm of the “naughty” certainly accounts for part of its allure.<sup>33</sup>

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<sup>30</sup> See Ozan O. Varol, *Revolutionary Humor* 33 (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2325782&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325782&download=yes) (analyzing Turkish examples where protesters deployed humor in order to criticize the government’s censorship efforts). See also Peter Grabosky, *Regulation by Ridicule: Humorous Denigration as a Regulatory Instrument*, LAW, CULTURE AND THE HUMANITIES, <http://lch.sagepub.com/> (analyzing ridicule’s the regulatory effect).

<sup>31</sup> See A. Peter McGraw & Caleb Warren, *Benign Violations: Making Immoral Behavior Funny*, 21 PSYCHOLOGICAL SCIENCE 1141, 1142 (2010) (observing that humor results from norm and taboo violations as well as apparent threat); RICHARD R. PROVINE, LAUGHTER: A SCIENTIFIC INVESTIGATION X (VIKING 2000); T.C. Veach, A *Theory of Humor*, 11 Humor: International Journal of Humor Research 161, X (1998).

<sup>32</sup> A. Peter McGraw & Caleb Warren, *Benign Violations: Making Immoral Behavior Funny*, 21 PSYCHOLOGICAL SCIENCE 1141, 1142 (2010) (discussing the confluence of these two apparently contradictory conditions). See generally PETER MCGRAW & JOEL WARNER, THE HUMOR CODE 9-14 (SIMON & SCHUSTER 2014) (describing the development of the benign violation theory and critiques of the theory).

<sup>33</sup> Steven Pinker provides a persuasive account of the linguistic and psychological reasons behind the pleasure humans derive from swearing. He explains that “taboo words, though evocative of the nastier aspects of their referents, don’t get their punch from those connotations alone. Taboo status *itself* gives a word an emotional zing, regardless of its actual referent.” STEVEN PINKER, THE STUFF OF THOUGHT 357 (2007). See also Steven Pinker, *What the F\*\*\*?* THE NEW REPUBLIC (OCT. 8, 2007), available at [http://pinker.wjh.harvard.edu/books/stuff/media\\_articles/TNR%20Online%20%20Wh at%20the%20F%20\(1%20of%203\)%20\(print\).htm](http://pinker.wjh.harvard.edu/books/stuff/media_articles/TNR%20Online%20%20Wh at%20the%20F%20(1%20of%203)%20(print).htm) (observing that swearing “recruits

The confluence of both safety and breach beckons a vein of humor theory that is particularly relevant to censorship humor: the concept of a benign violation. As explained in one psychological study, humor may arise if an individual simultaneously perceives both that a situation is non-threatening, yet violates some norm.<sup>34</sup> Applied to censorship humor, the argument would go something like this: Human experience shows that comedy often operates in the realm of controlled danger. Once a joke spills over into real danger or a serious violation of a code, the joke is no longer funny.<sup>35</sup> A censored joke might be able to keep an otherwise unfunny joke in the realm of the funny. The censored joke obliquely reflects a real violation—and thus acts as an interesting and important recognition of danger—but the danger is controlled, thus obscuring, hiding, or perhaps diminishing the actual violation. For these reasons, the violation is benign to the listener—the danger having been “bleeped out” —metaphorically or literally--by the censor.

To the extent that enjoying a benign violation is at work in audience laughter about censorship, the process might start because the censorship highlights a particular norm. Next the context and circumstances make the audience feel safe in the norm’s transgression. How does it do this? Often the prompt for the audience to

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our expressive faculties to the fullest: the combinatorial power of syntax; the evocativeness of metaphor, the pleasure of alliteration, meter, and rhyme; and the emotional charge of our attitudes...).

<sup>34</sup> A. Peter McGraw & Caleb Warren, *Benign Violations: Making Immoral Behavior Funny*, 21 PSYCHOLOGICAL SCIENCE 1141, 1142 (2010).

<sup>35</sup> A frequently cited example of a joke that navigates the line between the moral and immoral is the classic “Aristocrats” joke, which is an improvised joke used by stand-up comedians that sometimes defies so many taboos that it transcends the category of meta-humor (humor about humor) and penetrates the realm of anti-humor. For a graphic clip of Gilbert Gottfried delivering the joke, see: <http://www.youtube.com/watch?v=aGA0dIz9-Wk>. A 2005 film documentary called *The Aristocrats*, produced by Penn Jillette, Matthew Maguire, and Paul Provenza, features several comedians performing the joke.

shed their worry is a context or content cue that the transgression is artful or playful. (That's artful in "for the purpose of art" sense, not in the sense of being deft or manipulative.) Sometimes the cue may be as simple as the joke-teller's smile. Other times the audience orientation toward playfulness comes from the surprise that accompanies the apparent violation, which is certainly part of the humor at work in the *Candid Camera* vignettes.<sup>36</sup> One might also say that the audience itself needs a playful attitude to *enjoy* the benign violation. Why? The audience needs to recognize the violation, but needs to at least temporarily suspend its embrace of norms and values threatened because no harm will occur.

That's not to say that the audience may not have mixed feelings about the violation. Research confirms that many humorous experiences include opposed emotions such as amusement and disgust.<sup>37</sup> Moreover, the process of embracing a benign violation is consistent with the philosophical observation that moral flaws in a joke "can decrease amusement." True moral flaws—"not just everyday outrageousness" can inspire "[m]oral disgust," which in turn "can trump amusement."<sup>38</sup>

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<sup>36</sup> Scholars often point to surprise as an element of humor. Surprise can occur because of an unexpected resolution to a joke—such as when the joke establishes a pattern and then deviates. In this instance, the audience processes the sudden change of perception required as pleasurable surprise. See Norman R.F. Maier, *A Gestalt Theory of Humor*, 23 BRIT. J. PSYCH. 69, 69-74 (1932) (describing the process of surprise).

Yet surprise is not always an element, as demonstrated by one's ability to enjoy the same joke again and again. See SCOTT WEEMS, HA! 47 (BASIC BOOKS 2014) (describing research establishing that shock or surprise are not essential components of humor).

<sup>37</sup>S.H. Hemenover & U. Schimmack, 21 COGNITION & EMOTION 1102, X (2005).

<sup>38</sup>Aaron Smuts, *Do Moral Flaws Enhance Amusement?*, 46 AM. PHILOSOPHICAL Q. 151, 151 (2009).

A related condition that helps to inspire humor from a norm violation is co-authorship in the joke. Censorship humor plays right into this dynamic. Where a joke transgresses a norm, the participants in the joke-telling process are emboldened by the perception that they are permitted to breach the norm. The audience itself provides a perfect source for that “permission”—if in fact that they successfully receive the cue that a joke is underway. Building on this cue, censorship often enlists the audience to become co-author of the joke because the audience needs to fill in the omitted content marked by the <bleep>. In writing their own version of the joke script, the audience receives reward from their own insight in identifying what was “really said.” Of course, this solipsistic reward system does not operate where censorship works by stealth. Where the censorship is obvious, however, the joke is co-constructed, and there can be happiness on both sides: the audience enjoys the process of creatively participating in writing the joke script and the joke-teller enjoys the audience serving as co-conspirator.<sup>39</sup> How fun is that? (The fun is magnified by the human tendency to assume that it was a “negative”—in this instance, some sort of norm violation—that prompted the censor’s editing knife.)

The notion of a benign violation reflects perhaps the most pervasive concept in humor scholarship: incongruity. With a benign violation, an incongruity arises because a norm breach has occurred, but the breach is not harmful. The social

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<sup>39</sup>There’s a qualification to this: the audience must have psychological distance from the violation in order to perceive it as benign. Sometimes that distance may require the passage of time from a negative event; other sources of distance are lack of intimacy with the subject matter, spacial separation from the subject matter, or reduced probability that the event described in the joke will actually occur. A. Peter McGraw & Caleb Warren, *Benign Violations: Making Immoral Behavior Funny*, 21 PSYCHOLOGICAL SCIENCE 1141, 1146 (2010) (observing that psychological distance takes “many forms-temporal, social, spatial, likelihood, or hypotheticality.”) Mel Brooks expresses this in concrete form: “Tragedy is when I cut my finger. Comedy is when you walk into an open sewer and die.” [http://en.wikiquote.org/wiki/Talk:Mel\\_Brooks](http://en.wikiquote.org/wiki/Talk:Mel_Brooks) (Last searched on March 23, 2014).

contract may view the norm as essential to the smooth running of society; thus one would expect some harm to the individual or the group where the norm is not followed. When the harm does not occur, the audience is pleasantly surprised and perceives a joke.

While incongruity can help to explain the humor in benign violations, the concept's pedigree goes much deeper. Indeed, the list of thinkers who have identified a connection between humor and incongruity starts again with ancient thinkers-- Plato, Aristotle, Cicero--extends into the modern era to include such characters as Immanuel Kant, Arthur Schopenhauer, and Henri Bergson<sup>40</sup>--and continues to the present day, in which robust debate surrounds the role of incongruity in humor. Indeed, most contemporary humor scholars accept that incongruity is a necessary, but not sufficient, condition for communication to have a comedic quality.<sup>41</sup> According to the general incongruity theory, humor results from the juxtaposition of two incongruous or inconsistent phenomena.<sup>42</sup> This juxtaposition – the argument goes – creates surprise, an unlikely turn of mind, or even a new concept altogether. Viewed in this light, joke production can have the same air of accomplishment as artistic creativity and scientific discovery.<sup>43</sup>

Humorous incongruity can manifest in myriad, seemingly unrelated ways. For

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<sup>40</sup>Giovannantonio Forabosco, *Is the Concept of Incongruity Still a Useful Construct for the Advancement of Humor Research?*, 4.1 LODZ PAPERS IN PRAGMATICS 45, 46 (2008).

<sup>41</sup> Laura E. Little, *Just a Joke: Defamatory Humor and Incongruity's Promise*, 21 SOUTHERN CAL. INTERDISCIPLINARY L. REV. 95, 104-107, 15-160 (2009) (discussing debates about the role of incongruity in humor).

<sup>42</sup>Laura E. Little, *Regulating Funny: Humor and the Law*, 94 CORNELL L. REV. 1235, 1245 (2009) (summarizing incongruity theory).

<sup>43</sup> See, e.g., R.A. Martin, *Humor and Laughter*, in 4 ENCYCLOPEDIA OF PSYCHOLOGY 203 (A.E. Kadzin, ed., Oxford University Press 2000).

example, incongruity might result because a joke suddenly alters perspective or point of view. Literary theorist Henri Bergson characterizes this type of incongruity as a form of inversion, such as when a comic depicts characters in one situation, and then reverses the characters' roles.<sup>44</sup> Or, as Freud observed, comic incongruity can from the "coupling of dissimilar things, contrasting ideas, 'sense in nonsense', [and] the succession of bewilderment and enlightenment."<sup>45</sup>

As noted above, contemporary humor theorists focus considerable attention on incongruity theory, squabbling a bit over its role in humor. First, theorists have proffered varying theories about how incongruity makes something fun, with explanations ranging from pleasure in incongruity's intellectual provocation, the mental exercise needed to perceive and resolve it, colorful or ear-catching contexts that create the incongruity, the emotional roller coaster it can create, and the stinging social critique it can highlight.<sup>46</sup> All seem to agree that incongruity alone is not

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<sup>44</sup>HENRI BERGSON, LAUGHTER: AN ESSAY ON THE MEANING OF THE COMIC 88 (Green Integer 1911) (imploping the reader to "[p]icture to yourself certain characters in a certain situation: if you reverse the situation and the roles").

<sup>45</sup> SIGMUND FREUD, JOKES AND THEIR RELATION TO THE UNCONSCIOUS 14 (James Strachey, trans. Norton 1960).

<sup>46</sup>*See, e.g.,* Laura E. Little, *Regulating Funny: Humor and the Law*, 94 CORNELL L.REV. 1235, 1248 (2009) (listing possible explanations for incongruity's capacity to generate humor); Tony Veale, *Incongruity in Humor: Root cause or epiphenomenon?* 17-4 HUMOR: INTERNATIONAL J. OF HUMOR RESEARCH 410, 424 (2004) (describing the mentally stimulating process of doubling back on the set up for a joke after hearing the punchline in an attempt to resolve incongruity); Patricia Ewick & Susan S. Silbey, *No Laughing Matter: Humor and Contradictions in Stories of Law*, 50 DEPAUL L. REV. 559, 561 (2000) (observing that because humor often places two or more disparate elements in competition, humor enjoys a "quality of suspense" and can "up-end" perceptions of reality, thereby creating a hearty challenge to hierarchy, and communicating a form of "justice"); Victor Raskin & Salvatore Attardo, *Non-literalism and non-bona fide in language: An approach to formal and computational treatments of humor*, 2(1) PRAGMATICS AND COGNITION 31, 35, 37 (1994) (discussing "recoil effect" of a joke on a listener who experiences surprise, unexpected insight, and sometimes even an emotional roller coaster when processing a joke).

sufficient to produce humor.<sup>47</sup> As linguist Tony Veale explains: incongruity is an “ingredient of such unfunny phenomena as poetic metaphors, magic tricks and . . . whodunit thrillers.”<sup>48</sup> Yet scholars disagree about whether the “heuristic” value of the concept has already been “fully exploited” in humor studies that seek to nail down the source of humor,<sup>49</sup> or whether incongruity continues to provide an enormously useful focus for further theoretical and experimental study.<sup>50</sup>

Superiority theory, release theory, benign violations, and incongruity: these are dominant theories in the plethora of social science, medical, and humanities literature on the source of a laugh. These theories may prove helpful in explaining why an audience chuckles when confronted with some kind of censorship. Predictably—and appropriately--the theories differ in their usefulness depending on the particular context in which censorship is presenting.

There lingers, however, an important question that bears directly on law. Although it is quite possible that some laughter at censorship derives from fear,

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<sup>47</sup> See, e.g., MICHAEL BILLING, *LAUGHTER AND RIDICULE: TOWARDS A SOCIAL CRITIQUE OF HUMOUR* 76 (Sage 2005) (noting that usual presence of incongruity in comedy does not “explain why the perception of incongruity should be followed by a sense of pleasure and laughter.” Michael K. Kundall, Jr., *Humor and the limits of Incongruity*, 19 *CREATIVITY RES. J.* 203, 204 (2007) (stating that there “is more to the perception of humor than a simple recognition of an incongruity); Tony Veale, *Incongruity in Humor: Root cause or epiphenomenon?* 17-4 *HUMOR: INTERNATIONAL J. OF HUMOR RESEARCH* 410, 424 (2004) (describing incongruous situations that are not funny).

<sup>48</sup> Tony Veale, *Incongruity in Humor: Root cause or epiphenomenon?* 17-4 *HUMOR: INTERNATIONAL J. OF HUMOR RESEARCH* 410, 424 (2004).

<sup>49</sup> Giovannantonio Forabosco, *Is the Concept of Incongruity Still a Useful Construct for the Advancement of Humor Research?*, 4.1 *LODZ PAPERS IN PRAGMATICS* 45, 46 (2008).

<sup>50</sup> See, e.g., JOHN MORREALL, *Comic Relief: A Comprehensive Philosophy of Humor* 14-15 (2009) (arguing that incongruity theory continues to be useful, but scholars need to explore further how it is that human beings can enjoy incongruity).

anxiety, or anger, the pervasiveness of censorship jokes in comedic fora suggests that there's plenty of pleasure to be had as well. Given that we as individuals generally resist being muzzled and that we as a society often hold censorship out as a generic evil, is it not truly odd *we can laugh at censorship*? Since the matter deals with legal norms and line drawing, the law itself provides a logical place to turn. And what more relevant part of the law is available than cases interpreting the First Amendment's protection against censorship. To these cases I now turn.

### III. First Amendment Opinions

Starting around the 1930's, the United States Supreme Court began to trumpet freedom of communication as a fundamental right, clearly expressing its suspicion of any content-based restriction on speech.<sup>51</sup> While the Court has wavered at times, the

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<sup>51</sup> See, e.g., *Stromberg v. California*, 283 U.S. 359 (1931) (display of a red flag in protest of the government was protected speech); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (a self-described Communist could not be prosecuted for speaking peacefully with a lawful message); *Herndon v. Lowry*, 301 U.S. 242 (1937) (mere speculation that speech may incite violence was insufficient justification to suppress it); *Herndon v. Lowry*, 301 U.S. 242 (1937) (mere speculation that speech may incite violence was insufficient justification to suppress it). See generally Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 774-775 (2008).

Justice Oliver Wendell Holmes is often credited with helping to spur the Court's enthusiasm for a fundamental free speech right with his iconic dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In rejecting the Court's decision to uphold the convictions of five defendants accused of printing materials that were critical of the U.S. during war, Holmes took the opportunity to celebrate the notion that open discourse – not oppressive legislation – was the key to bearing truth in a free society. *Id.* at 630 (Holmes, J., dissenting). Of course this position was not a novel one in American politics. In his first Inaugural Address, Thomas Jefferson stated that any dissenters should be allowed to “stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 n. 8 (1974).

Court has for the most part faithfully implemented this principle for nearly 100 years. Freedom of communication—free from government censorship -- is an icon that appears to be here to stay for a while. Indeed, the symbolic importance of freedom of communication principles permeates the United States Supreme Court's jurisprudence. Suggestive of how deeply entrenched the free speech value is in American society, Congress occasionally joins the fray to assert First Amendment principles to the rest of the world.<sup>52</sup> Along with congressional shows of political theatre,<sup>53</sup> the Court routinely provides a soap box speech about freedom of speech principles serving as a beacon of freedom and a handmaiden of democracy.

Of course, the justices have not uniformly struck down all speech regulation. The United States Supreme Court repeatedly finds ways to uphold regulations on speech. When it chooses to uphold these restrictions, the Court most commonly deploys some kind of functional balancing, weighing the damage to freedom of communication against governmental interests that infringe the communication. While of some interest to this study, balancing is not the most revealing analytical

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<sup>52</sup>*See, e.g.*, Speech Act of 2010, 28 U.S.C. § 4101 (setting forth a prohibition against enforcement of foreign libel judgments that do not conform with U.S. First Amendment principles or the freedom of expression principles of the state where recognition or enforcement is sought).

<sup>53</sup> Consider the following rhetorical flourishes in the SPEECH Act's preliminary findings:

- (1) the freedom of speech and the press is enshrined in the first amendment to the Constitution, and is necessary to promote the vigorous dialogue necessary to shape public policy in a representative democracy;
- (2) Some persons are obstructing the free expression of United States authors and publishers, and in turn chilling the first amendment to the Constitution of the United States interest of the citizenry in receiving information on matters of importance, by seeking out foreign jurisdictions that do not provide the full extent of free-speech protections to authors and publishers that are available in the United States, and suing a United States author or publisher in that foreign jurisdiction.

prism for understanding censorship humor. More interesting –and perhaps more insightful—are those instances where the justices appear to embrace speech restrictions as inherently beneficial. As a foil for understanding, however, I start with balancing.

### A. Balancing

When upholding speech regulation, the United State Supreme Court most often does so in the name of some countervailing interest.<sup>54</sup> Typical counter-interests are avoiding threats to public safety,<sup>55</sup> protecting national security,<sup>56</sup> preserving fair trial rights,<sup>57</sup> and ensuring the right to vote.<sup>58</sup> In most instances, this countervailing interest analysis takes a functional form, characterized by the language of balancing—

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<sup>54</sup> See, e.g., Christina Wells, *Regulating Offensiveness: Snyder v. Phelps, Emotion, and the First Amendment*, 1 CAL. L. REV. CIRCUIT 71, 72 (2010) (stating that the Supreme Court’s “free speech jurisprudence . . . allows regulation of speech solely because others find the message offensive.”)

<sup>55</sup> See, e.g., *Feiner v. New York*, 340 U.S. 315 (1951) (upholding arrest of college student who had refused to stop a speech that was apparently enflaming the crowd).

<sup>56</sup> See, e.g., *Near v. Minnesota*, 283 U.S. 697 (1931) (acknowledging exceptional cases where prior restraint is constitutional including where “a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops” and where necessary to avoid “incitements of acts of violence and the overthrow of force of orderly government”).

<sup>57</sup> E.g., *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (establishing that silence orders on pretrial publicity may be upheld upon showing of substantial likelihood of material prejudice).

<sup>58</sup> See, e.g., *Burson v. Freeman*, 504 U.S. 191 (1992) (plurality opinion) (upholding content-based restriction on political speech that was narrowly tailored to prevent voter intimidation and election fraud).

with admonitions added for good measure about narrowly tailoring the restrictions to their purposes.<sup>59</sup>

For this project here, a particularly apt balancing example emerges from the Supreme Court's decision in *F.C.C. v. Pacifica Foundation*.<sup>60</sup> In *Pacifica*, a radio station featured an early afternoon, twelve minute broadcast of a George Carlin monologue entitled "Filthy Words," which repeatedly referred to excretion and sexual activity. The Federal Communications Commission responded by putting a complaint letter in the radio station's file, noting that it might decide to impose sanctions should it learn of another violation of the restrictions in additional broadcasts. When the matter came to the Supreme Court, five justices ruled that the FCC's action was constitutional, but failed to produce a majority opinion agreeing on the constitutional basis for the holding. All five justices did, however, acknowledge strong interests weighing in favor of the speech restriction, pointing to the pervasive presence of broadcast in American lives (with its concomitant ability to invade the privacy of a listener's home) and broadcast's accessibility to children who are too young to read. In various ways, all five justices relied on the rhetoric of weighing interests.

*Pacifica's* countervailing interest approach to constitutional adjudication prevails across a wide swath of constitutional regulations, but has a particularly strong pull on the justices as they navigate the challenges of speech regulation. Even in

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<sup>59</sup> As such this balancing approach has a strong consequentialist flavor. "Consequentialists maintain that choices are not morally 'good' or 'bad' in themselves, but should instead be assessed solely by virtue of the outcomes they bring about, that is, by their consequences." Gabriella Blum, *The Law of War and the "Lesser Evil,"* 35 YALE J. INT'L L. 1, 38 n. 166 (2010). Consequentialism is often contrasted with deontology, a philosophy aligned with the intrinsic value approach discussed below. Peter Brandon Bayer, *Sacrifice and Sacred Honor: Why the Constitution is a "Suicide Pact,"* 20 WM. & MARY RTS. J. 287, 392 n. 574 (2011) (noting that the "metaphor of balancing is inapt" in the realm of "moral precepts" and deontological thinking).

<sup>60</sup> 438 U.S. 740 (1978).

cases in which the speech being restricted is utterly morally reprehensible – such as child pornography – the Court does not necessarily invoke a priori moral reasons for suppressing the speech, but rather takes a consequentialist approach, listing a host of specific government interests in avoiding harm flowing from the speech.

Take for example *New York v. Ferber*,<sup>61</sup> in which the Court held that a law prohibiting the distribution of child pornography was constitutional and did not violate the First Amendment. At the forefront of the Court's reasoning was the state's interest in protecting the physical and psychological well-being of minors.<sup>62</sup> Further, the Court reasoned, unfettered distribution channels for child pornography provided an economic incentive to produce it, an incentive undermined by the nationwide prohibitions against distribution.<sup>63</sup> Although the Court did appear to harbor disgust for child pornography distributors, its stated reasons for upholding the law were antiseptic-sounding, harm-avoiding government interests rather than moral repulsion.

A similar distinction also appears in *Ashcroft v. Free Speech Coalition*, where the Court found unconstitutional a law banning virtual depictions of child pornography.<sup>64</sup> While sexually explicit portrayals of minors might be easily characterized as morally repugnant, the Court determined that the law was not supported by sufficient countervailing interests to merit the restriction.<sup>65</sup> In the Court's view, the law violated the First Amendment to the extent that it prohibited

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<sup>61</sup> 458 U.S. 747 (1982).

<sup>62</sup> *Id.* at 756-57.

<sup>63</sup> *Id.* at 759-760.

<sup>64</sup> 535 U.S. 234 (2002).

<sup>65</sup> The Court found the law in question – the Child Pornography Prevention Act of 1996 – to be less damaging because it targeted virtual child pornography, but it also considered the law overbroad. *Id.* at 246-49.

speech that was not actually obscene and to the extent that it prohibited virtual child pornography that was not produced through exploitation of real children.

While perhaps part of the dominant rhetoric, balancing does not always accompany the Court's decision to uphold speech regulations. One can observe the justices in First Amendment free speech cases displaying particularly adroit—and sometimes elusive—analytics in order to classify challenged provisions as reasonable time, place, or manner restrictions,<sup>66</sup> to identify restricted speech as unprotected,<sup>67</sup> or to interpret restrictions as targeting secondary effects of speech.<sup>68</sup> Whether or not one might cast any of these as artifices designed to shield the justices' underlying motivations, the various analytics are sufficiently opaque as to counsel against any definitive characterization. What we can say is that these modes of First Amendment analysis are not clearly aligned with balancing and that we cannot know for sure whether the opinions employing them reflect concealed judgments about the value of speech involved or the value of censorship itself.

## B. Intrinsic Value

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<sup>66</sup> *United States v. O'Brien*, 391 U.S. 367 (1968) (explaining that the Court will uphold time, place, or manner restrictions if they are content neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication).

<sup>67</sup> *E.g.*, *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 57 (1973) (upholding prohibition on public display of obscene exhibitions limited to consenting adults).

<sup>68</sup> *See, e.g.*, *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (treating ordinance directed at theatres that specialize in adult films as a regulation of the “secondary effects” of the theatres on the surrounding community, not the adult films themselves).

Now we come to perhaps the most enlightening strain of First Amendment analysis for present purposes. While clearly discernible, the strain does not take the form of any official doctrine or “test.” Nonetheless one can discern language in various First Amendment contexts suggesting that a justice or group of justices perceive that a speech restriction is valid—and indeed to be celebrated—because of its alignment with a worthwhile value. The mainstream balancing rhetoric flowing through most First Amendment jurisprudence starts with the premise that speech restrictions are detrimental to society, but can nonetheless be justified if they result in sufficient instrumental benefit. But bubbling beneath the surface of other freedom of communication opinions is a suggestion that the alignment between a speech restriction and a socially beneficial value can imbue the speech restrictions with intrinsic value itself,<sup>69</sup> rather than value derived from their potential to serve another government interest.

Several of the opinions suggesting a speech restriction’s intrinsic worth concern matters associated with morality. This is not surprising--given that judgments about moral virtue and vice are often associated the concept of intrinsic value. After all, isn’t virtue “good” and vice “bad”?<sup>70</sup> Other opinions in this group touch on

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<sup>69</sup> See Michael J. Zimmerman, “Intrinsic v. Extrinsic Value,” STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/entries/value-intrinsic-extrinsic/>

<sup>70</sup> See Michael J. Zimmerman, “Intrinsic v. Extrinsic Value,” STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/entries/value-intrinsic-extrinsic/>

In this way, the intrinsic value approach aligns itself with deontology, the philosophy that moral principles should be obeyed regardless of their outcome. ALLEN W. WOOD, KANTIAN ETHICS 259-261 (2008). According to the “deontological perspective, certain choices are inherently evil and can never be justified, even if they would bring about a good outcome.” Gabriella Blum, *The Law of War and the “Lesser Evil,”* 35 YALE J. INT’L L. 1, 38 n. 165 (2010).

related topics: educating the young, loyalty to national ideals, and independence from government thought-control. I discuss an example of each below.

### 1. Morality

*Barnes v. Glen Theatre, Inc.*<sup>71</sup> provides an example of morality-laden reasoning.<sup>72</sup> The case presented a constitutional challenge to Indiana’s public nudity statute that extended to female dancers, forbidding them from displaying full nudity in their performances. The statute was cast as a public decency provision and prohibited consenting adults from viewing nude dancers in public (even where the dancing occurred away from any unconsenting adults or children).

A splintered Supreme Court upheld the statute against First Amendment challenge. The *Barnes* plurality concluded that the restriction on speech was justified by the state’s interest in protecting morality.<sup>73</sup> Although this reasoning is evocative of balancing analysis (a government interest in morality outweighing speech restrictions), the reasoning differs from many other balancing cases in the First Amendment context. In the common First Amendment balancing case, the Court gives weight to a government interest in protecting someone or something from harm

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<sup>71</sup> 501 U.S. 560, 569 (1991).

<sup>72</sup> *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 292-93 (1991), stated: “With little discussion but with far-reaching implications, the three-member *Barnes* plurality transformed the protection of morality into an ‘important or substantial’ state interest. . . . Protecting morality had never before been considered a sufficient justification for restricting otherwise admittedly protected speech.”

<sup>73</sup> *Id.* at 569-70. In support of using morality as a substantial government interest, the plurality cited the now overruled and widely criticized *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). Perhaps this shows that morality as a substantial government interest is flimsy at best. The plurality’s appeal to a countervailing interest seems to be mere rhetoric – the plurality is essentially upholding the restriction because it believes the restriction inherently promotes good.

that could flow from speech. In *Barnes*, however, the plurality cited only the “substantial government interest in protecting order and morality,” which the plurality concluded was “unrelated to the suppression of free expression.”<sup>74</sup> In this way, the *Barnes* plurality seemed to fuse two concepts in upholding a restriction: it combined a countervailing government interest (morality) with the idea that the interest itself (morality) is respectable. The Court elevated the restriction’s status to an independent benefit to be protected, suggesting that respect for morality and the constraint on nude dancing were intertwined.

Justice Scalia’s concurrence in *Barnes* was even more forceful in promoting morality as a singular justification for the law. Although he stated that the law prohibiting public nudity was undeserving of First Amendment scrutiny because it regulated conduct, not expression, his opinion paid tribute to moral regulation. He wrote, “Our society prohibits, and all human societies have prohibited, certain activities not because they harm others, but because they are considered, in the traditional phrase... immoral.”<sup>75</sup> To illustrate this point, Justice Scalia reasoned that the statute would be violated and still constitutional if “60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there was not an offended innocent in the crowd.”<sup>76</sup> Perhaps asserting the obvious, but in an apparent effort to underscore his point, Justice Scalia observed that “absent specific

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<sup>74</sup> 501 U.S. 560, 569 (1991). This portion of the Court’s reasoning evokes the secondary effects reasoning of cases like *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (treating ordinance directed at theatres that specialize in adult films as a regulation of the “secondary effects” of the theatres on the surrounding community, not the adult films themselves).

<sup>75</sup> *Barnes*, 501 U.S. at 575 (Scalia, J., concurring).

<sup>76</sup> *Id.*

constitutional protection for the conduct involved, the Constitution does not prohibit [laws] simply because they regulate ‘morality.’”<sup>77</sup>

Justice Souter’s concurrence in the case provides a useful contrast, which exposes how the other justices’ appeal to moral authority in *Barnes* differed from typical First Amendment balancing. Justice Souter voted to uphold the Indiana law because its prohibition on nude dancing could reasonably be seen as furthering the government’s “interest in preventing prostitution, sexual assault, and associated crimes.”<sup>78</sup> In other words, Justice Souter sought to find a concrete competing government interest related to avoiding harm, while the plurality and Justice Scalia viewed the statute as worthy of moral respect without identifying any a harm-avoiding interest.<sup>79</sup>

## 2. Civility

Just as the *Barnes* plurality and Justice Scalia deferred to the government interest in morality, the majority in *Bethel School District v. Fraser*,<sup>80</sup> expressed respect for the government interest in teaching civility to public school students. Finding that this government interest in civility justified the speech regulation in the case, the *Fraser* Court ruled that a school district acted appropriately in imposing sanctions upon a student for his “offensively lewd and indecent speech.” As in other school speech cases, the majority’s opinion used balancing language. Yet –unlike in

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 584 (Souter, J., concurring).

<sup>79</sup> See Amy Adler, *Girls! Girls! Girls! The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1119 (2005) (contrasting Justice Souter’s concurrence with “the *Barnes* plurality’s dubious reliance on morality”).

<sup>80</sup> 478 U.S. 675 (1986).

the earlier school speech cases<sup>81</sup> -- the *Fraser* balancing analysis did not mention a school's interest in avoiding disruptions to school discipline.<sup>82</sup> Rather, the Court's holding targeted the values of civility and self-restraint: "the undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behaviour."<sup>83</sup>

The *Fraser* Court's praise for civility was earnest and clear. In fact, the Court began its opinion with a citation to a classic history of the United States: "Public education must prepare students for citizenship. . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self- government in the community and the nation."<sup>84</sup> Beyond recognition that students should be taught respect for the "sensibilities of others,"<sup>85</sup> the Court observed that sanctioning a student's inappropriate speech had the pedagogical value of conveying the virtue of self-control: "The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct."<sup>86</sup> In so stating, the Court suggested that the school's

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<sup>81</sup> See, e.g., *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

<sup>82</sup> It bears noting that the *Fraser* Court did mention avoiding harm at one point in the opinion when it noted that the student's speech that was sanctioned "could well be seriously damaging to its less mature audience." 478 U.S. at 683.

<sup>83</sup> 478 U.S. at 681.

<sup>84</sup> 478 U.S. at 681 (citing C. BEARD & C. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

<sup>85</sup> 478 U.S. at 681.

<sup>86</sup> 478 U.S. at 683.

“censorship” of the speech had the inherent value of teaching the importance of self-censorship in a civilized society.

### 3. Loyalty to National Ideals

The Supreme Court’s 1989 flag-burning case--*Texas v. Johnson*<sup>87</sup> -- provided an opportunity for the justices to conjoin censorship with yet another value: loyalty to national ideals.<sup>88</sup> *Texas v. Johnson* concerned a demonstrator who burned a flag in protest outside the 1984 Republican National Convention and later was convicted under a statute prohibiting desecration of a venerated object.<sup>89</sup> The majority in *Texas v. Johnson* struck down the law, taking a well-travelled route to its conclusion: “The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.”<sup>90</sup> Relevant here are the two dissents—written by Justice Stevens and Chief Justice Rehnquist – declaring the symbolic value of the flag to be so extraordinary as to disqualify the case from usual First Amendment analysis.

To Justice Stevens, the flag holds a level of importance so significant that a law forbidding its desecration is worthwhile *prima facie*. Justice Stevens explained that even if burning the flag were to fall within the usual rules that the Court

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<sup>87</sup> 491 U.S. 397 (1989).

<sup>88</sup> Loyalty to national ideals can include patriotism, but is a broader concept. As Justice Stevens explains in his *Texas v. Johnson* dissent, those who are not citizens and do not possess a patriotic affinity with the United States may nonetheless embrace the core ideas that animate the U.S. system of government. *See supra* notes and accompanying text, immediately below.

<sup>89</sup> *Id.* at 399-400.

<sup>90</sup> *Id.* at 419 (majority opinion).

developed for traditional speech, the flag presents “an intangible dimension that makes those rules inapplicable.”<sup>91</sup> For Justice Stevens, that dimension includes more than “nationhood and national unity,” but also encompasses the ideals “of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations.”<sup>92</sup>

Chief Justice Rehnquist echoed these sentiments.<sup>93</sup> Chief Justice Rehnquist explained that the flag did not represent any particular point of view. Rather it possessed greater meaning, and for that reason, “[m]illions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have.”<sup>94</sup>

The flag-glorifying language in these dissents subtly endorses the censorship resulting from the flag desecration prohibition. The dissents regarded the flag as so venerable that no censor need appeal to countervailing government interest – such as keeping the peace or maintaining national unity – to justify any restriction on expression. For this reason, the dissents also had no need to identify specific harm flowing from the prohibited expression.<sup>95</sup> In this way, the dissents’ approach resembled that in the *Fraser* and *Barnes* opinions discussed above. But the *Texas v. Johnson* dissents went further, suggesting that the very existence of the prohibition

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<sup>91</sup> *Id.* at 436 (Stevens, J., dissenting).

<sup>92</sup> *Id.* at 436 (Stevens, J., dissenting).

<sup>93</sup> *Id.* at 422 (Rehnquist, C. J., dissenting).

<sup>94</sup> *Id.* at 422 (Rehnquist, C. J., dissenting).

<sup>95</sup> It is true that Justice Steven spoke of “tarnish” the flag’s value that would follow if its public destruction were “sanction[ed].” He did not, however, articulate this as any component of a government interest needed to justify the prohibition.

reinforced the flag's importance. This notion that positive value flows from censorship's protection is arguably implicit in the dissents' celebratory words about the flag. Driving home the matter, Justice Stevens made the point explicit: "sanctioning the public desecration of the flag will tarnish its value – both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it."<sup>96</sup>

#### 4. Independence from Government Thought Control

As a final example of censorship's inherent value, consider *Federal Communications Commission v. League of Women Voters*,<sup>97</sup> concerning a section of the Public Broadcasting Act that forbade non-profit educational broadcasting stations receiving Corporation for Public Broadcasting grants from editorializing or endorsing candidates for public office. Noting that the provision was not narrowly tailored, the majority struck it down using standard First Amendment fare. Rather, it is (again) Justice Stevens's dissent—finding the prohibition valid -- that bears attention here.

Justice Stevens cast the Public Broadcast Act's speech restraint on government sponsored speech as a wise attempt to control "the insidious evils of government propaganda favoring particular points of view."<sup>98</sup> For Justice Stevens, the government was not prohibiting speech in order to accomplish a mischief usually associated with censorship: citizen thought control. Rather, the government was trying to protect citizens from the government's *own* thought control mechanisms made possible by its ability to dispense money. Justice Stevens proceeds on the

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<sup>96</sup> 491 U.S. at 437 (Stevens, J.)

<sup>97</sup> 468 U.S. 364 (1984).

<sup>98</sup> 468 U.S., at 409.

assumption—ipse dixit—that this attempt to protect against government thought control is indeed a very good thing.<sup>99</sup> Quite a remarkable irony, this: the glories of the censor using the tools of censorship against itself.

Further evidence of his belief that the censorship regulation in *League of Women Voters* served a beneficial end-in-itself emerges from the vigor of Justice Stevens' language. Of particular note is the opening paragraph of his dissent, where he delights in the wisdom of using censorship in order to protect against the censor's potential message and influence:

The court jester who mocks the King must choose his words with great care. An artist is likely to paint a flattering portrait of his patron. The child who wants a new toy does not preface his request with a comment on how fat his mother is. Newspaper publishers have been known to listen to their advertising managers. Elected officials may remember how their elections were financed. By enacting the statutory provision that the Court invalidates today, a sophisticated group of legislators expressed a concern about the potential impact of Government funds on pervasive and powerful organs of mass communication. One need not have heard the raucous voice of Adolf Hitler over Radio Berlin to appreciate the importance of that concern.<sup>100</sup>

This passage seems to memorialize Justice Stevens' belief that control of government speech ensures the citizenry can enjoy independence of thought. In some ways, this reasoning is instrumental, since he sees censorship as serving a detached end: independent social thought. And, indeed, he peppered his opinion with references to balancing. Yet his language is also consistent with the proposition that the government censorship ensures a certain peace of mind for citizens because the government enjoys one less special avenue for influencing their political beliefs.

## 5. Shared Insights

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<sup>99</sup> Justice Stevens presents a similar, more expansive, version of this argument in his discussion of “distorting influences” in his dissent in *Citizens United v. Federal Election Commission*, 558 U.S. \_\_ (2010).

<sup>100</sup> 468 U.S. at 409-410.

What can we conclude from these four examples of justices' embrace of censorship's intrinsic value? Do the examples provide any shared insights into the question "why is censorship funny" or at least the question whether any censorship can ever benefit us as individuals or as a social group? As I observed at the outset of this section, the examples provide no coherent doctrine or test. They do not necessarily represent a trend. They are, however, the product of wise individuals, whose minds are toned by consistent work with difficult legal questions, disciplined by structured constitutional analysis, and informed by regular exposure to society's struggles with freedom of expression principles. From that perspective, the opinions might suggest that despite repeated, unqualified statements about the dangers of censorship, the justices' views on censorship are more complex. The possibility lurks that they believe censorship can sometimes be beneficial. The occasional passion emanating from the opinions belies the authors' wholesale embrace of the proposition that all censorship is bad and must not be tolerated unless outweighed by some profound government counter-purpose. Beyond this observation, I proceed cautiously and declare only that existing constitutional law appears to leave room for recognizing that censorship can possess inherent social and individual benefits.

#### **IV. Human Attraction to Censorship?**

While prudence counsels against extracting a general message about First Amendment law from the censorship opinions, one can reasonably find evidence in the opinions that their authors don't mind censorship as much as classic dictum would suggest. Might this be a sentiment shared by the governed as well? Several reasons suggest themselves for why censorship possesses attractive qualities, even for citizens

and decisionmakers in a country that dearly cherishes freedom of communication. These attractive qualities derive from censorship's capacity to identify boundaries.

The potential benefits of boundaries are varied. For individuals, boundaries grant comfort simply because they impose structure, ensure predictability, and simplify life by reducing the choices needed to navigate life's challenges. Censorship boundaries can also reinforce the merits of silence and the value of leaving words unspoken. Silence possesses worth to the extent that it reinforces the poetry of minimalism, fosters peace and calm,<sup>101</sup> establishes understanding between people,<sup>102</sup> deepens knowledge,<sup>103</sup> and acknowledges respect for sensitive topics.<sup>104</sup> Some scholarship even identifies instances where the First Amendment protects and values silence by recognizing a right to editorial discretion that includes the right not publish or otherwise to disclose information.<sup>105</sup>

Boundaries also serve an important social function in delineating groups, establishing group membership, and defining group identity. Part of establishing the

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<sup>101</sup> W.B. YEATS ("We can make our minds so like still water that beings gather about us that they may see, it may be, their own images, and so live for a moment with a clearer, perhaps even with a fiercer life because of our quiet.")

<sup>102</sup> NICHOLAS SPARKS, *THE NOTEBOOK* (stating that "Silence is pure and holy. It draws people together because only those who are comfortable with each other can sit without speaking.")

<sup>103</sup> CHAIM POTOK, *THE CHOSEN* ("I've begun to realize that you can listen to silence and learn from it. It has a quality and a dimension all its own."); RUMI, *THE ESSENTIAL RUMI* ("Let silence take you to the core of life.")

<sup>104</sup> A few hurtful words uttered between two people on a sensitive topic can permanently undermine a personal relationship.

<sup>105</sup> See, e.g., Robert A. Sedler, *Self-Censorship and the First Amendment*, 25 *NOTRE DAME J. OF LAW, ETHICS & PUBLIC POLICY* 13, 25, 33 (2011) (citing the refusal to disclose the rape victim identity and the refusal to disclose harmful national security information as examples of "self-censorship good").

identity of a group includes judgments about what is and what is not an appropriate subject and mode of communication among group members as well as between the group members and those external to the group.<sup>106</sup>

Group identity is also fostered by conceptual boundaries tied to the rule of law. Several scholars have noted that Americans take particular pride—and therefore particular benefit for establishing national identity—in their commitment to the rule of law.<sup>107</sup> The process of establishing the line between law and non-law clarifies the definition of law and thus makes government by law more effective. Obvious censorship of illegal communication instructs the governed on the content of the law—demonstrating clearly the distinction between protected and unprotected communication.

And finally-- of particular relevance for the purposes of this article-- boundaries between what is and is not legal or moral may actually be an important component of the alchemy that creates a funny communication.<sup>108</sup> By demarcating an

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<sup>106</sup> See, e.g., Marta Dynel, *Swearing Methodologically: The (Im)Politeness of Expletives in Anonymous Commentaries on Youtube*, 10 J. ENGLISH STUDIES 25, 27 (2012) (explaining that cursing can promote group membership); Ad J.J.M. Vingerhoets, et al., *Swearing: A Biopsychosocial Perspective*, 22 PSYCHOLOGICAL TOPICS 287, 300 (2013) (observing the connection between swearing and group cohesiveness).

<sup>107</sup> See, e.g., RONALD CASS, *THE RULE OF LAW IN AMERICA* xii (JOHNS HOPKINS PRESS 2001) (observing that commitment to rule of law is core to American “national self-definition...For most of the world...the nation most immediately associated with the rule of law—is the United States); Austin Sarat, *At the Boundaries of Law: Executive Clemency, Sovereign Prerogative, and the Dilemma of American Legality*, 57 AMERICAN QUARTERLY 611-612 (2005) (arguing that for Americans, “no set of conceptual boundaries is more important...than those associated with the idea of the rule of law).

<sup>108</sup> Humor theorists Michael Pickering and Sharon Lockyer argue that that regulation (presumably by law, social norms, or both) provides a necessary condition for humor to exist: “Paradoxically, making offensive jokes about others with total impunity would mean that there are no boundaries to push at any more. This would lead to the defeat of humor. . . Humor is only possible because certain boundaries, rules and

area of impropriety, censorship establishes a border that humor can probe and tweak. In this way, censorship humor arguably celebrates censorship for its evidence of the line between “right” or “wrong” . . . or at least for its contribution to charting that line. We might sometimes laugh out of a feeling of superiority over the norm transgressor, believing that – at least for now – we are on the norm-abiding side of the line. Likewise, we might laugh from the emotional sizzle prompted by experiencing a violation<sup>109</sup> or at understanding that the offensiveness of a joke is precisely what makes it funny.<sup>110</sup> Or finally, our laughter might simply show how tickled we are to have a line that guides our way between permitted and forbidden behavior. Whatever the cause—it is the line between permitted and forbidden that makes the humor possible.

In evaluating these lessons of censorship humor and the benefits of boundaries, we must be mindful of both a puzzle and a problematic wrinkle remaining. First the puzzle: one must not forget that—at its core--humor is mysterious. The fine minds that have tackled the challenge of explaining humor have contributed deeply to understanding the necessary conditions for comedy to occur. Many have also ably documented the social, cultural, and biological effects of humor.

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taboos exist in the first place. Their existence, along with the satisfaction and sense of agency gained in overcoming them, are equally vital to why we laugh.” Michael Pickering & Sharon Lockyer, *Introduction: The Ethics and Aesthetics of Humour and Comedy*, in *BEYOND A JOKE* 14-15 (Palgrave MacMillan 2005).

<sup>109</sup> Cf. STEVEN PINKER, *THE STUFF OF THOUGHT* 357 (2007) (observing that “[t]aboo status *itself* gives a word an emotional zing”); Ad J.J.M. Vingerhoets, et al., *Swearing: A Biopsychosocial Perspective*, 22 *PSYCHOLOGICAL TOPICS* 287, 300 (2013) (concluding that swearing has diverse emotional power: eliciting humor, creating an informal atmosphere, group binding, lessening social support, and relieving stress).

<sup>110</sup> Daniel Jacobson, *Ethical Criticism and the Vice of Moderation*, in *CONTEMPORARY DEBATE IN AESTHETICS AND THE PHILOSOPHY OF ART* 342, 350 (BLACKWELL PUBLISHING UK 2006) (observing that “sometimes it is exactly what is offensive about a joke that makes it funny”).

None, however, have truly explained the spark that actually makes a communication funny. We must be humble and restrained in drawing definitive conclusions from analysis of any type of humor, including censorship humor.

The problematic wrinkle pertains to morality and matters relating to morality. Censorship is often associated with moral judgments. As noted above, it is no surprise that the Supreme Court opinions suggesting inherent benefits of censorship concerned controversy over immoral behavior. And of course morality is also particularly fertile ground for raucous—often joyous—laughs. Morality overlaps with forbidden concepts and activities. The forbidden in turn adds zing to communication, which sometimes translates into comedy. The problematic wrinkle arises because law and morality are not coextensive.<sup>111</sup> One may find censorship in areas where morality is offended, but legal norms are not. The moral boundaries that delight some do not delight all. Unlike legal boundaries, moral boundaries are not appropriately policed with the strong arm of government.<sup>112</sup>

When we regulate morality without reference to legal norms, we start regulating taste. Matters of good taste reflect moral and cultural judgments that work outside law's narrow ambit. The law may wisely choose to tolerate—and not regulate—matters that offend some moral or cultural taboo, but that nonetheless provide an able vehicle for challenging beliefs, fostering introspection, encouraging

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<sup>111</sup> See, e.g., Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1982) (“[t]he rules and principles of justice, the formal institutions of the law, and the conventions of a social order are . . . but a small part of the normative universe that ought to claim our attention.”)

<sup>112</sup> As philosopher Ted Cohen explains: “some jokes on some occasions and maybe some jokes on all occasions are . . . ‘in bad taste’ and should be thought of as morally objectionable. . . [But n]ot everything you dislike is illegal, or should be.” TED COHEN, *JOKES* 83 (U. Chicago 1999).

independent thought, and encouraging debate.<sup>113</sup> To give morality and taste regulation the force of law foregoes the protection and constraints of legal procedure and the democratic process. The lesson then is that--in evaluating and learning from censorship humor-- we must understand that the boundaries that please some in the audience are not always the boundaries appropriate for the censor's work.<sup>114</sup>

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<sup>113</sup> Taboo expressions allow for speakers and their audience to explore emotions and perception that may not be fully disclosed by more conventional communication. *See, e.g.,* Christopher Hun, *A Puzzle about Pejoratives*, 159 *PHILOS. STUD.* 383-384 (2012) (exploring the functions of pejoratives). *See also* Daniel Jacobson, *Ethical Criticism and the Vice of Moderation*, in *CONTEMPORARY DEBATE IN AESTHETICS AND THE PHILOSOPHY OF ART* 342, 347-349 (BLACKWELL PUBLISHING UK 2006) (critiquing the connection between moral criticism and aesthetic criticism of art).

<sup>114</sup>*See supra* note 1 for discussion of how --for the purpose of this article--I confine censorship to instances where the *state* uses legal or official means to restrict expression.

Steven Pinker explains the distinction as follows in connection with the question whether to regulate swearing:

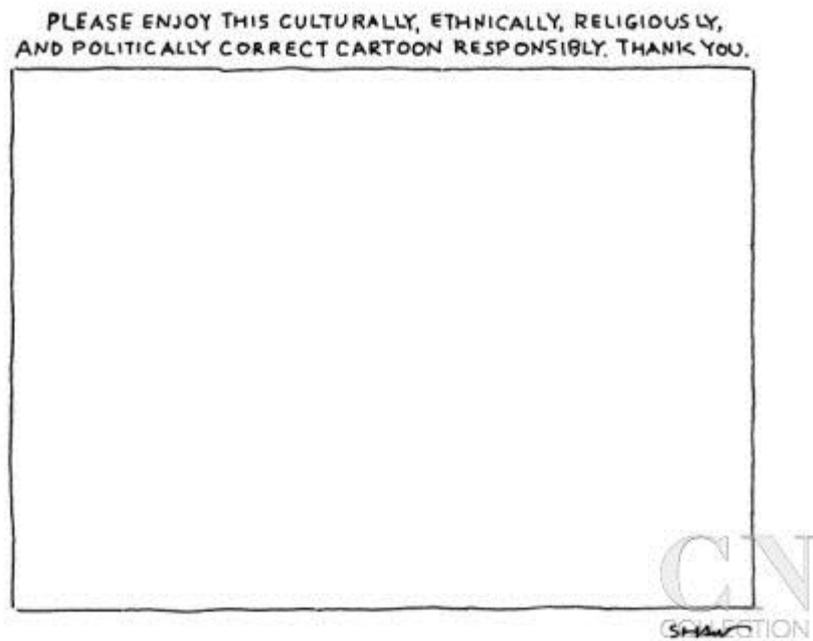
[I]t is not among the legitimate functions of government to punish people who use certain words or allow others to use them. On the other hand, private media have the prerogative of enforcing a house style, driven by standards of taste and the demands of the market, that excludes words their audience doesn't enjoy hearing. In other words, if an entertainer says *fucking brilliant*, it's none of the government's business, but if some people would rather not explain to their young children what a blow job is, there should be television channels that don't force them to.

STEVEN PINKER, *THE STUFF OF THOUGHT* 358 (2007).

## CONCLUSION

Let's not hope for more censorship. Robust censorship, together with the tyranny of good taste, does not promote a successful, happy, and productive society.

Consider the following:<sup>115</sup>



Whether or not you find this cartoon funny, it has a potent message: we must be vigilant to avoid the culture-destroying, debate-suppressing, and soul-killing effects of censorship. That said, however, we are also well advised to understand the competing dynamics at play in the individual and social responses to censorship. Humor is an important vehicle to work toward that understanding.

As a significant meme for comedy in the U.S., censorship contributes to the mysterious enjoyment that humor produces. While that enjoyment alone does not justify censorship, the complex relationship between humor and censorship should

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<sup>115</sup> MICHAEL SHAW, NEW YORKER CARTOON BANK, Item 8546194, [http://www.condenaststore.com/-sp/Title-over-empty-cartoon-frame-reads-Please-Enjoy-this-Culturally-Ethni-New-Yorker-Cartoon-Prints\\_i8546194\\_.htm](http://www.condenaststore.com/-sp/Title-over-empty-cartoon-frame-reads-Please-Enjoy-this-Culturally-Ethni-New-Yorker-Cartoon-Prints_i8546194_.htm)

inform decisionmaking as society evaluates the form and wisdom of censorship. Indeed, the possibility exists that laughter at censorship humor is a “tell” that exposes our appreciation for the benefits of boundaries in guiding personal and collective lives. If, in fact, we benefit from censorship’s role in highlighting those boundaries, that benefit should also guide the form and scope of censorship. Analysis suggests that different types of censorship have varying deleterious and (possible) positive effects—varying both in degree and quality. If, in fact, censorship must exist, society benefits from understanding these differences. And if, in fact, censorship must exist, we can be grateful to the comedians for helping us understand and control it.