CONTENT-BASED RESTRICTIONS ON FREE EXPRESSION: REEVALUATING THE HIGH VERSUS LOW VALUE SPEECH DISTINCTION

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I. INTRODUCTION

The First Amendment to the United States Constitution is deceptively short and simple in its language. It states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1] In the rarified purity of constitutional prose, such a requirement may seem straightforwardly unproblematic: Congress shall make no law abridging the freedom of speech, end of debate.

This is not the end of the debate, however. Scholars, judges, and citizens alike engage in often heated discussions concerning the guaranteed right of citizens to freedom of expression and when, if ever, freedom of expression should be limited, regulated, or even prohibited.[2] The way one answers such questions is important precisely because of the impact such limitations would have on everyday life in the United States.[3]

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1. U.S. CONST. amend. I.

2. A recent example of the American public and judiciary struggling with this issue can be found in the legal and moral debate surrounding the Communications Decency Act of 1996 ("CDA"), Pub. L. No. 104-104, § 502, 110 Stat. 56, 133 (1996) (codified as amended at 47 U.S.C. § 223 (1994 & Supp. II 1996)). Among other provisions, the CDA made it a crime to knowingly transmit an obscene or indecent message or image to a person the sender knew was under eighteen years old. 47 U.S.C. § 223(a)(1) (Supp. II 1996). The Act also criminalized knowingly sending a patently offensive message or image to a specific person under the age of eighteen or the displaying of patently offensive messages or images in any way available to minors. 47 U.S.C. § 223(d) (Supp. II 1996). Although part of the CDA has been deemed unconstitutional by *Reno v. ACLU*, 521 U.S. 844 (1997), the very fact that Congress considered curtailing such speech shows that the debate concerning acceptable restrictions on expression continues.

3. As the CDA debate shows, such a comment is not simply hyperbole. The

This Note critically examines the current U.S. Supreme Court framework used to determine when free expression should be curtailed.[4] In particular, this Note focuses on the judicial and academic debate concerning pornography regulation.[5] Whether, and to what extent, pornography should be considered protected speech is a paradigm "hard case" for First Amendment analysis.[6] Using the pornography debate as a starting point, the current framework is outlined, criticisms of the framework are reviewed, and a new framework is proposed, one designed to meet the perceived shortcomings of earlier criticisms.[7]

The idea for this Note owes much to Catharine MacKinnon's recent work on pornography and the First Amendment.[8] In *Only Words*, MacKinnon offers some instructive new interpretations of an old argument.[9] Is pornography like political speech delivered on a town square?[10] Or is it like less tolerated speech, such as the yelling of fire in a crowded theater where no fire indeed exists?[11] Or, as theorists like MacKinnon have argued, is pornography more like a "Whites Only" sign posted on the door of a public establishment and hence not really an instance of speech at all, but instead an instance of subordination or discrimination?[12] As these questions indicate, making sense of when, if ever, speech should be curtailed may be a difficult task, but nonetheless a task well worth the effort.

American experience has been shaped by a core set of important freedoms, with freedom of expression at or near the center. *See* U.S. CONST. amend. I. People express themselves in numerous and sundry ways each day. Any infringement of expression will affect someone, and probably a lot of people, in dramatic ways, making the need for principled regulation of speech very important.

4. The current Supreme Court framework is discussed in detail in Part II.B, *infra*.

5. The pornography debate is chosen as the vehicle for analysis because it illustrates well the current framework and has been the focus of much scholarly criticism. *See infra* Part III. Additionally, the insights gained by studying the pornography debate should be applicable to speech restrictions generally. *See infra* Part IV.

6. Pornography is considered to be such a "hard case" because its "speech" status is unclear. It is unclear, in other words, whether pornography is a legitimate vehicle for the transmission of ideas to others or whether it is simply a "masturbatory aid" with little or no conceptual content. CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 210–11 (1995).

7. *See infra* Part IV.

8. *See* CATHARINE A. MACKINNON, ONLY WORDS (1993).

9. *See infra* Part III.B.

10. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973); Police Dep't v. Mosley, 408 U.S. 92 (1972). Both *Miller* and *Mosley* stand for the proposition that speech with serious artistic, cultural, or scientific value, especially including political discourse, should be protected.

11. *See* Dennis v. United States, 341 U.S. 494 (1951) (approving the use of the "clear and present danger" test for curtailing speech designed to produce imminent harm).

12. *See* MACKINNON, *supra* note 8, at 11–13.

II. CONTENT-BASED RESTRICTIONS ON EXPRESSION: THE CURRENT FRAMEWORK

In practice, the First Amendment's admonition to make *no* law abridging the freedom of speech has been interpreted to mean Congress is to make no law abridging the freedom of *certain kinds* of speech.[13] The most pervasively employed doctrine in the jurisprudence of free expression, and the one supposedly used by Congress in determining when to restrict free speech, is the distinction between content-based and content-neutral restrictions on expression.[14] Congress knows that the courts will apply two very different standards of review depending on whether the legislation it passes engages in content-based or content-neutral discrimination.[15] In turn, these tests point to paradigm types of speech that either can or cannot be censored, giving Congress, and the various state legislatures, some guidelines for what kinds of speech acts are controllable and the circumstances under which they might be controlled.[16]

A. Content-Neutral Restrictions

"Content-neutral restrictions limit communication without regard to the message conveyed."[17] As Professor Stone goes on to elaborate, "[l]aws that prohibit noisy speeches near a hospital, ban billboards in residential communities, impose license fees for parades and demonstrations, or forbid the distribution of leaflets in public places are examples of content-neutral restrictions."[18] None of these regulations restrict speech or communication because of what the speakers actually say; all noisy speech is regulated, regardless of content, all participants in a given parade must pay a fee regardless of political affiliation, and so on.[19]

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13. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (stating courts may, on a case by case basis, determine whether a given speech act should be subject to regulation). Indeed, rigorous protection of free speech really began well into America's second century. As Sunstein remarks, there were very few free speech cases in the federal courts before 1919, and expression was much more easily curtailed by the government than it is today. *See* SUNSTEIN, *supra* note 6, at 4.

14. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

15. *See id.* at 190.

16. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982) (holding that child pornography may be regulated); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (affording commercial speech less protection than other kinds of speech); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (holding that libel and slander may be regulated); Miller v. California, 413 U.S. 15 (1973) (holding that obscenity, as distinct from pornography, may be regulated); *Dennis*, 341 U.S. at 494 (stating that speech construed as express incitement to riot may be regulated); *Chaplinsky*, 315 U.S. at 568 (holding that fighting words are afforded less protection than other kinds of speech).

17. Stone, *supra* note 14, at 189.

18. *Id.*

19. *See id* at 189–90.

"The Supreme Court tests the constitutionality of content-neutral restrictions with an essentially open-ended form of balancing."[20] "In each case the Court considers the extent to which the restriction limits communication, 'the substantiality of the government interests' served by the restriction, and 'whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment.'"[21] In other words, content-neutral restrictions on expression are allowed if the interests served by such restrictions are great and if the government implements the restrictions in a substantially non-intrusive manner.

Within the realm of content-neutral restrictions on free speech, the balancing test just described appears to be a sensible response to a classical dilemma. The test protects, on the one hand, legitimate governmental and societal interests in limiting speech without, on the other hand, substantially interfering with the "search for truth" or other values protected by the First Amendment.[22] As Professor Stone argues,

> [u]nlike a consistently deferential approach, which would uphold every content-neutral restriction that rationally furthers legitimate government interests, the Court's [content-neutral balancing] approach critically examines restrictions that seriously threaten significant first amendment interests. And unlike a rigid "clear and present danger" or "compelling interest" approach, which would invalidate almost all content-neutral restrictions, the Court's analysis does not sacrifice legitimate governmental interests when significant first amendment interests are not at issue.[23]

B. Content-Based Restrictions

Of considerably more interest to the question of pornography and free speech is First Amendment doctrine concerning content-based restrictions on free expression. As discussed below, the Supreme Court's test of acceptability for such restrictions is much more stringent than the test for content-neutral restrictions.[24]

The first part of the content-based restriction test requires the Court to determine "whether the restricted speech is of only low First Amendment value,

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20. *Id.* at 190.

21. *Id.* (quoting Schad v. Bourough of Mount Ephraim, 452 U.S. 61, 70 (1981)).

22. *See id.* at 193.

23. *Id.* The "clear and present danger test" allows the government to restrict expression if necessary to prevent immediate and severe damage to interests that the government may lawfully protect. This famous test was formulated by Justice Oliver Wendell Holmes in *Schenck v. United States*, 249 U.S. 47 (1919). The "compelling interest test" is a more stringent form of balancing than the standard referred to above where the state or federal government's interest in limiting expression must survive "strict scrutiny," which places a greater evidentiary burden on the state to justify its actions. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (establishing and defining the strict scrutiny test).

24. *See infra* notes 25–46 and accompanying text.

and thus deserving of only limited constitutional protection."[25] The "low value theory" first appeared in *Chaplinsky v. New Hampshire*, where the Supreme Court observed that "certain well-defined and narrowly limited classes of speech...are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[26]

When determining whether a particular class of speech has "low" First Amendment value, the Court applies a "defining out" approach.[27] As Stone describes it, the "Court begins with the presumption that the first amendment protects all communication and then creates areas of nonprotection only after it affirmatively finds that a particular class of speech does not sufficiently further the underlying purposes of the first amendment."[28] These purposes are, fundamentally, "Millian" in character, dealing with society's interest in expressing and transmitting ideas, gaining truth, and avoiding mere dogma.[29] Examples of classes of speech that, according to the Court, have only low First Amendment value include express incitement,[30] false statements of fact,[31] obscenity,[32] commercial speech,[33] fighting words,[34] and child pornography.[35]

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25. Stone, *supra* note 14, at 194.

26. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

27. *See* Stone, *supra* note 14, at 194.

28. *Id.*

29. *See* JOHN STUART MILL, ON LIBERTY 15–52 (Elizabeth Rapaport ed., 1978). *See also infra* notes 186–87 and accompanying text.

30. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969); Dennis v. United States, 341 U.S. 494 (1951).

31. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

32. *See* Miller v. California, 413 U.S. 15 (1973).

33. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

34. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

35. *See* New York v. Ferber, 458 U.S. 747 (1982). Note that obscenity and child pornography, both considered regulable speech by the Supreme Court, are not the same as pornography, which is considered high value speech under the First Amendment. *Compare Ferber*, 458 U.S. at 747 (child pornography) *and Miller*, 413 U.S. at 15 (obscenity), *with* American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (pornography), *aff'd*, 475 U.S. 1001 (1986). Under the Supreme Court's three-part test, material is legally obscene, and therefore not protected under the First Amendment, if, taken as a whole, the material (1) appeals to the prurient interest in sex, as determined by the average person applying contemporary community standards; (2) portrays sexual conduct, as specifically defined by the applicable state law, in a patently offensive way; and (3) lacks serious literary, artistic, political, or scientific value. *Miller*, 413 U.S. at 24. Child pornography, as distinct from both adult pornography and obscene material, is not protected by the First Amendment even if it falls short of the legal standard for obscenity, primarily because the Court recognizes the distinct harms that can come to children both by its production and consumption. *Ferber*, 458 U.S. at 756.

However, just because a given speech act is labeled as having only low First Amendment value does not mean "the government may suppress it at will."[36] Rather,

> the low value determination is merely the first step in the Court's analysis, for once the Court concludes that a particular class of speech is deserving of only limited first amendment protection, it then employs a form of categorical balancing, through which it defines the precise circumstances in which the speech may be restricted.[37]

In attempting to strike a balance for each class of low value speech, the Court considers the "relative value of the speech" and the "risk of inadvertently chilling 'high' value expression."[38] Using this two-part test for low value speech generates rather specific rules for each category.[39] For example, express incitement may be suppressed only if it is "directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action."[40] Obscenity, on the other hand, may be suppressed whenever a relatively undemanding scienter requirement is satisfied.[41]

Though the standards for restricting low value speech are demanding,[42] the standards for restricting high value speech are even more demanding.[43] In dealing with high value speech, which under current American law includes pornography (as opposed to obscenity or child pornography),[44] the Court does not employ a balancing test as it does with content-neutral restrictions, but instead utilizes a far more speech protective analysis.[45] Indeed, in "assessing the constitutionality of content-based restrictions on high value expression, the Court employs a standard that approaches absolute protection....[F]or except when low value speech is at issue, the Court has invalidated almost every content-based restriction that it has considered in the past quarter-century."[46] Such a track record for content-based restrictions on high value speech indicates that those who wish to restrict traditionally categorized high value speech, including pornography, have a hefty judicial prejudice to overcome.

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36. Stone, *supra* note 14, at 195.
37. *Id.*
38. *Id.*
39. *See supra* notes 30–35.
40. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (emphasis added).
41. *See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973).
42. *See supra* notes 25–41.
43. *See infra* notes 44–46.
44. *See supra* note 35.
45. *See* Stone, *supra* note 14, at 196.
46. *Id.*

III. ANTIPORNOGRAPHY ARGUMENTS: CRITICIZING THE CURRENT FRAMEWORK

Given the Supreme Court's current high-low speech distinction framework, anyone arguing that a given speech act should be limited based on its content must be prepared to argue that the speech in question falls within one of the historically accepted categories of low value speech or constitutes a new category of low value speech, neither of which is an easy thing to do.[47] Nonetheless, so-called "traditional" antipornography arguments attempt to do just that by claiming that far from being high value speech, pornography is qualitatively of low value and hence regulable.[48]

Feminist approaches to pornography regulation, on the other hand, often avoid the traditional approach in favor of other, more "novel" arguments.[49] Such is the case with Catharine MacKinnon's work in *Only Words*.[50] According to MacKinnon, pornography can be restricted if, traditional arguments notwithstanding, it really is not *primarily* an act of expression at all, and hence neither falls into the category of high or low value speech.[51]

Regardless of their differences, however, both traditional and feminist antipornography theorists share one thing in common: they criticize the existing content-based speech restriction framework for failing to regulate pornography, albeit for slightly different reasons.[52]

A. Sunstein: The Traditional Criticism

Professor Cass Sunstein attacks the Supreme Court's assumption that pornography is high value speech.[53] Sunstein argues that certain kinds of pornography should be, as obscenity already is, classified as low value speech so that government regulation of its content may be facilitated.[54]

According to Sunstein, "regulable pornography must (a) be sexually explicit, (b) depict women as enjoying or deserving some form of physical abuse, and (c) have the purpose and effect of producing sexual arousal."[55] Though Sunstein admits his definition produces certain "ambiguities" in light of the

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47. *See supra* Part II.B.

48. *See, e.g.*, Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 591.

49. *See id.* at 589–90.

50. MACKINNON, *supra* note 8, at 3–41. For a detailed account of MacKinnon's position, see *infra* Part III.B.

51. *See id.* at 16–17.

52. Though the traditional criticism does not question the high-low speech distinction itself, it does question the criteria whereby certain speech acts are classified as having high or low value. *See infra* Part III.A. The feminist criticism, on the other hand, questions the high-low dichotomy itself, and is therefore a greater departure from the existing Supreme Court framework. *See infra* Part III.B.

53. *See* Sunstein, *supra* note 48, at 591.

54. *See id.* at 602–08.

55. *Id.* at 592.

"limitations of language," he argues that his "basic concept should not be obscure. The central concern is that pornography both sexualizes violence and defines women as sexually subordinate to men."[56]

Focusing on the subordinating character of violent pornography is important for Sunstein, for it allows him to identify three categories of concrete, gender-related harms brought about by pornography so defined.[57] Such harms include "harms to those who participate in the production of pornography, harms to the victims of sex crimes that would not have been committed in the absence of pornography, and harms to society through social conditioning that fosters discrimination and other unlawful activities."[58]

Sunstein admits that the psychological, sociological, and criminological evidence and studies to date have not definitively established causal links between pornography and the three harms just mentioned.[59] However, as he states, "[i]f highly suggestive evidence of harm suffices—as it does in most areas of the law—the case for regulation [of pornography] is powerful."[60] Indeed, Sunstein makes an interesting comparison between pornography and the harms it may bring about and the possible harmful effects of various carcinogens.[61]

> In the context of carcinogens, for example, regulatory action is undertaken in cases in which one cannot be sure of the precise causal connection between a particular substance and cancer—even when the regulation is extraordinarily costly. Pornography may be at least as harmful as many carcinogens currently subject to regulation.[62]

If Sunstein's view is correct, then pornography becomes a prima facie candidate for regulation provided it also meets the criteria of low value speech.[63] Low value speech, it should be recalled, is speech that "does not sufficiently further the underlying purposes of the first amendment."[64] Sunstein argues that four factors are relevant in determining when a given speech act qualifies as low value speech.

> First, the speech must be far afield from the central concern of the first amendment, which, broadly speaking, is effective popular control of public affairs. Speech that concerns governmental processes is entitled to the highest level of protection; speech that

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56. *Id.*
57. *See id.* at 595.
58. *Id.*
59. *See id.* at 597–98.
60. *Id.* at 598.
61. *See id.* at 601.
62. *Id.* (citing S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 91 (2d ed. 1985) ("noting wide regulation of carcinogens despite disagreement over the precise objectives of safety regulation")). *See also* S. BREYER, REGULATION AND ITS REFORM 135–40 (1982) ("noting irony of extensive regulation of carcinogens despite lack of proof of clear causation").
63. *See id.* at 602–04.
64. Stone, *supra* note 14, at 194.

> has little or nothing to do with public affairs may be accorded less protection. Second, a distinction is drawn between cognitive and noncognitive aspects of speech. Speech that has purely noncognitive appeal will be entitled to less constitutional protection. Third, the purpose of the speaker is relevant: if the speaker is seeking to communicate a message, he will be treated more favorably than if he is not. Fourth, the various classes of low-value speech reflect judgments that in certain areas, government is unlikely to be acting for constitutionally impermissible reasons or producing constitutionally troublesome harms. In the cases of commercial speech, private libel, and fighting words, for example, government regulation is particularly likely to be based on legitimate reasons. Judicial scrutiny is therefore more deferential in these areas.[65]

With these four factors in place, Sunstein makes the final step in his argument and claims that pornography should be treated like other traditionally categorized low value speech acts.[66] First, Sunstein argues that it only makes sense for the government to regulate certain activities, including speech acts, that cause distinct and assignable harms.[67] As he puts it, a system "that granted absolute protection to speech would be unduly mechanical, treading unjustifiably on important values and goals."[68] In this context Sunstein mentions laws designed to limit threats, bribery, misleading commercial speech, and conspiracies, all of which justifiably, most believe, promote a well-ordered society even though they involve infringements on free expression.[69]

Second, once it is agreed that government ought to regulate certain activities for the common good, including some categories of speech, Sunstein then points out the similarities between pornography and other accepted categories of low value speech.[70] Like bribery, commercial speech, and fighting words, for example, Sunstein argues that regulable pornography, as he defines it, is not "in any sense" designed to affect the "course of self-government," but is instead designed solely to produce sexual arousal.[71] As he argues, though pornography is comprised "of words and pictures, [it] does not have the special properties that single out speech for special protection; it is more akin to a sexual aid than a communicative expression," and hence should be considered low value regulable speech by the courts.[72]

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65. Sunstein, *supra* note 48, at 603–04.
66. *See id.* at 605.
67. *See id.*
68. *Id.*
69. *See id. See also* cases cited *infra* notes 174–79.
70. *See* Sunstein, *supra* note 48, at 606–07.
71. *Id.*
72. *Id.*

B. MacKinnon: A Unique Criticism

The traditional arguments attempting to reclassify pornography as regulable low value speech have not persuaded the courts.[73] Therefore, instead of focusing on the relative values of certain speech acts, MacKinnon and other feminist theorists[74] instead focus on the "tortious-actions" committed just by engaging in certain expressive acts.[75] In other words, MacKinnon sets aside the difficulties inherent in defining protected versus nonprotected speech and instead focuses squarely on something the law can and has dealt with for centuries: bona fide harms to others.

Consider MacKinnon's own account of the genesis and development of the current defense of pornography.[76] MacKinnon argues that originally,

> the question of the legal regulation of pornography was framed as a question of the freedom of expression of the pornographers and their consumers. The government's interest in censoring the expression of ideas about sex was opposed to publishers' right to express themselves and readers' right to read and think about them.[77]

MacKinnon admits that a traditional free speech defense of pornography may have been appropriate at this time in American history.[78] As she puts it,

> [f]rozen in the classic form of prior debates over censorship of political and artistic speech, the pornography debate thus became one of governmental authority threatening to suppress genius and dissent. There was some basis in reality for this division of sides. Under the law of obscenity, governments did try to suppress art and literature because it was sexual in content.[79]

But, MacKinnon argues, and here she agrees with theorists like Sunstein, the operative difference between such a time and the present is that pornography no longer plausibly serves as the vehicle for ideas, and hence is no longer deserving of First Amendment protection.[80] Of course, people who defend pornography as a form of protected speech do not wish to give up the proposition that pornography transmits ideas.[81] As MacKinnon points out, the modern defense of pornography has not departed dramatically from the original defense: Pornography is placed "presumptively into the legal category 'speech' at the outset

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73. *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997); American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

74. MacKinnon's frequent collaborator, Andrea Dworkin, is the other most notable figure in the feminist camp. *See* ANDREA DWORKIN, INTERCOURSE (1987).

75. *See* MACKINNON, *supra* note 8, at 30.

76. *See id.* at 8–12.

77. *Id.* at 8.

78. *See id.*

79. *Id.*

80. *See id.* at 16.

81. *See id.* at 10.

through being rendered in terms of 'content,' 'message,' 'emotion,' what it 'says,' its 'viewpoint,' its 'ideas.'"[82]

MacKinnon argues that within "the confines of this approach, to say that pornography is an act against women is seen as metaphorical or magical, rhetorical or unreal, a literary hyperbole or propaganda device. On the assumption that words have only a referential relation to reality, pornography is defended as only words."[83] The words or images of pornography by themselves surely cannot hurt women, the traditional argument goes, and even if they do, the First Amendment protects the ideas expressed by high value speech, broadly construed, even when such speech tends to generate negative consequences.[84]

However, MacKinnon reminds us that "social life is full of words that are legally treated as the acts they constitute without so much as a whimper from the First Amendment."[85] As MacKinnon points out, giving the order to kill someone, committing bribery, engaging in price-fixing, sexually harassing employees, and either saying or placing signs in public places that say "Whites Only" are all formal acts of speech that are not protected under the First Amendment.[86]

What, then, do all such acts of non-protected speech have in common? MacKinnon's central argument is summarized as follows: "They [the examples above] are not seen as saying anything (although they do) but as doing something."[87] In other words, although all the examples of speech above actually do "say" something, it is simply the case that what they "do" is deemed to be their defining characteristic.[88]

On this score, MacKinnon argues, pornography is no different from other non-protected and primarily non-expressive acts.[89] Far from engaging the intellect *in any way*, which might at least prompt some protection, pornography instead engages the purely appetitive desires.[90] She focuses such an argument on both the production and consumption ends of the pornography industry.[91] As she suggests, women who perform for pornographic pictures and movies are not engaged in a great debate.[92] They are instead "exposed, humiliated, violated, degraded, mutilated, dismembered, bound, gagged, tortured, and killed."[93] And consumers of pornography, she continues, certainly are not concerned to participate in some marketplace of ideas.[94] For the consumer, argues MacKinnon, pornography is

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82. *Id.*
83. *Id.* at 11.
84. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (overturning conviction of Ku Klux Klan leader for advocating violence at Klan gathering).
85. MACKINNON, *supra* note 8, at 12.
86. *See id.* at 12–14. *See also* cases cited *infra* notes 180–85.
87. MACKINNON, *supra* note 8, at 13.
88. *See id.*
89. *See id.* at 14–22.
90. *See id.* at 16.
91. *See id.* at 15 (production); *id.* at 19 (consumption).
92. *See id.* at 17.
93. *Id.*
94. *See id.* at 19.

"masturbation material. It is used as sex. It therefore is sex."[95] In short, MacKinnon observes that "pornography does not engage the conscious mind in the chosen way the model of 'content,' in terms of which it is largely defended, envisions and requires."[96]

If MacKinnon is right, then pornography "is not restricted here [under her theory] because of what it says. It is restricted through what it does. Neither is it protected because it says something, given what it does."[97] For MacKinnon, the traditional argument in "constructing pornography as 'speech' is gaining constitutional protection for doing what pornography *does*: subordinating women through sex."[98]

MacKinnon is quick to point out, however, that she is not

> [S]aying that pornography is conduct and therefore not speech, or that it does things and therefore says nothing and is without meaning, or that all its harms are noncontent harms. In society, nothing is without meaning. Nothing has no content. Society is made of words, whose meanings the powerful control, or try to. At a certain point, when those who are hurt by them become real, *some words are recognized as the acts that they are.*[99]

MacKinnon does not, in other words, argue that pornography is not a kind of speech. Instead, it is a very special kind of speech, like a verbal order to kill someone, that is unique in some way that makes it fall below even the protection offered low value speech.[100]

C. Langton: Clarifying MacKinnon's Criticism

If MacKinnon is right, then the production and consumption of pornography should be curtailed, or even eliminated, because far from "saying" anything, pornography instead serves to "do" something, namely subordinate women.[101] As MacKinnon puts it, such an analysis makes pornography look more like a "Whites Only" sign at a restaurant than it does social commentary or political speech.[102]

What does it mean, however, for a given speech act to do more than it says? Commenting on work done by MacKinnon[103] just before the publication of *Only Words*, but work which nonetheless makes substantially the same arguments, Rae Langton[104] filters MacKinnon's analysis of so-called "unprotected" speech

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95. *Id.* at 17.
96. *Id.* at 16.
97. *Id.* at 23.
98. *Id.* at 29.
99. *Id.* at 29–30 (emphasis added).
100. *See id.*
101. *See supra* Part III.B.
102. *See* MACKINNON, *supra* note 8, at 13.
103. Catharine MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984).
104. Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 293

acts through J. L. Austin's theory of speech and language developed in *How to Do Things with Words*.[105] Langton's analysis of MacKinnon's arguments sheds light on MacKinnon's criticisms of the current high-low speech distinction and suggests other criticisms.[106]

To see this, one needs to understand some technical terminology developed by Austin and incorporated into Langton's defense of MacKinnon. As Langton reports, Austin argued that speech acts can be categorized in three ways.[107] First, a given speech act can have a certain *locutionary* content.[108] A statement's locution just is its semantic content.[109] When a person says "Whites Only," for example, the word "whites" means something, as does the word "only."[110] Taken together, both words mean something like "only non-blacks are welcome here."

Additionally, the same statement can have certain *perlocutionary* effects.[111] A statement's perlocution is the group of effects, or changes in the world, the statement brings about.[112] A "Whites Only" sign, in addition to meaning something, also brings about distinct effects: Blacks stay away from the establishment where the sign is posted, and if they do not, they are usually forcibly removed.

Third, and for Langton the most interesting, speech acts can have certain *illocutionary* content.[113] As Langton puts it, "An illocutionary act is the action performed simply *in* saying something."[114] Put another way, an illocution "can be thought of as a *use* of the locution to perform an action."[115]

Take again the instance of a "Whites Only" sign. The illocutionary force of the locution "Whites Only" can be that the *sign itself* discriminates against non-whites.[116] Note that the act of discriminating against non-whites can be separated from the perlocutionary effects discussed above; the sign might have the important effect of making blacks unwelcome, but it need not.[117] The very existence of the

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(1993).

105. J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962).

106. Langton's analysis forms the starting point of the new framework suggested in Part IV, *infra*.

107. *See* Langton, *supra* note 104, at 300.

108. *See id.* at 295.

109. *See id.*

110. The recurring example of the "Whites Only" sign is taken from MACKINNON, *supra* note 8, at 13.

111. *See* Langton, *supra* note 104, at 300.

112. *See id.*

113. *See id.*

114. *Id.*

115. *Id.*

116. *See* MACKINNON, *supra* note 8, at 13.

117. According to Langton, Austin "took pains to distinguish illocutions [acts] from perlocutions [effects], and he thought that the phrases 'in saying' and 'by saying' were typical–though by no means infallible–markers of the two." Langton, *supra* note 104, at 300.

sign can be seen as discriminatory separate from the perlocutionary effects it might bring about.[118]

But, as Langton points out, an utterance has "illocutionary force of a certain kind [only] when it satisfies certain felicity conditions,"[119] where felicity conditions just are the conventional circumstances required for a given statement to be understood in a certain way.[120] When the felicity conditions are right, then a given statement will secure *uptake* on the part of listeners, which is to say that listeners recognize that "an illocution of a certain kind is being performed."[121]

Langton's example of felicity conditions that secure a given uptake, which amounts to recognizing the illocutionary force in a statement, is the situation of a marriage ceremony.[122] Saying "I Do" only serves as the act of marrying a couple, and only secures the uptake of the audience concerning whether they recognize the couple as marrying, when certain felicity conditions are met. Such conditions include, among other things, that the couple be intending to marry and that the minister or official be licensed to perform marriages.[123] Lacking such felicity conditions, saying "I Do" will still have locutionary content, but it will no longer constitute the act of marrying, such as when two young children "play house" and pretend to marry.[124]

Austin's philosophy of speech acts, given above, is designed to help make sense of the following claim that Langton rightly attributes to MacKinnon. As Langton puts it, "When MacKinnon says that speech can subordinate, she means something more: that pornography can have the illocutionary force of subordination, and not simply have subordination as its locutionary content, or as its perlocutionary effect: *in* depicting subordination, pornographers subordinate."[125]

Does such a statement make sense? Can pornography be said to subordinate women *in itself*? For Langton, the answer is possibly yes.[126] As in the case of the marriage ceremony, pornography will only have the illocutionary content of subordination when certain felicity conditions hold.[127] Under the current interpretation of the First Amendment, one cannot engage in content-based discrimination based solely on the locutionary content or perlocutionary effects of a given speech act unless the speech is categorized as low value speech and the

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118. Consider the following example to illustrate this point. "In saying 'I do' I was marrying; by saying 'I do' I greatly distressed my mother. Saying 'I do' in the right context counts as–constitutes–marrying: that is the illocutionary act performed. It does not [necessarily] count as distressing my mother, even if it has that effect: that is the perlocutionary act performed." *Id.*

119. *Id.* at 301.

120. *See id.*

121. *Id.*

122. *See id.* at 308.

123. *See id.*

124. *See id.*

125. *Id.* at 302.

126. *See id.* at 312.

127. *See id.* at 309–14.

specific regulation conditions are met.[128] So, Langton submits, if a given speech act is to be censored, it must be on the basis of its illocutionary force.[129] It must, in other words, as MacKinnon argues in *Only Words*, be based on what it *does*, rather than on what it *says*.[130]

What felicity conditions are required to secure the uptake that pornography is the direct cause of the subordination of women? Langton looks at other cases of speech which are universally taken to have the illocutionary effect of subordinating people in order to answer this question.[131] Her example is of certain speech acts in Pretoria, South Africa prior to the abolition of apartheid.[132] Langton argues that people consider the speech of apartheid to subordinate blacks in South Africa based on three features of the speech acts.[133] Such speech acts "*rank* blacks as having inferior worth. They *legitimate* discriminatory behavior on the part of whites. And finally, they *deprive* blacks of some important powers."[134]

Langton's argument is that these same three conditions must apply in the case of pornography if pornographic speech is to have the illocutionary force of subordination.[135] She is convinced that pornography ranks women as inferior and legitimates discriminatory behavior toward them.[136] The problem, Langton argues, is whether pornographers have the ability, like the government or an employer, to deprive women of important powers.[137]

Langton's final analysis, however, is that pornography *can* deprive women of an important power.[138] She echoes precisely what MacKinnon argues in *Only Words*: Pornography has the effect of silencing women by making their speech meaningless and ineffective.[139] In short, pornography conditions people, and men specifically, to take the locutionary content of women's speech as something other than it is (she said no but she really meant yes),[140] to curtail the perlocutionary effects of women's speech (we will not implement her recommendation because we do not take her seriously),[141] and to destroy the very acts attempted by women when they speak (saying no is not the act of expressing displeasure, but rather the act of expressing pleasure).[142]

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128. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942). *See generally supra* Part II.B.
129. *See* Langton, *supra* note 104, at 312.
130. *See id. See also* MACKINNON, *supra* note 8, at 23.
131. *See* Langton, *supra* note 104, at 302–14.
132. *See id.* at 302.
133. *See id.* at 303.
134. *Id.*
135. *See id.* at 305.
136. *See id.* at 307–08.
137. *See id.*
138. *See id.* at 314–28.
139. *See id.* at 320–28. *See also* MACKINNON, *supra* note 8, at 5–6.
140. *See* Langton, *supra* note 104, at 321.
141. *See id.* at 321.
142. *See id.* at 328–29.

D. MacKinnon's Model Ordinance: Putting Theory into Practice

If MacKinnon's arguments, as amplified by Langton, are correct, then pornography may not fit easily into the existing bipolar categorization of speech acts commonly invoked by the courts in determining when it is appropriate to engage in content-based discrimination.[143]

Nowhere is this clearer than in the model pornography regulation ordinance drafted by MacKinnon and Andrea Dworkin, passed by the city of Indianapolis, Indiana,[144] and eventually struck down as unconstitutional by the Seventh Circuit Court of Appeals in *American Booksellers Ass'n, Inc. v. Hudnut.*[145] *American Booksellers* is interesting for two reasons: It illustrates the power of MacKinnon's legal philosophy to potentially affect change in the real world while also pointing out the unwillingness or sheer inability of the courts to contemplate a third unique ground for content-based regulation of expression.[146]

Based upon their sincere belief that pornography subordinates women, MacKinnon and Dworkin's model ordinance "defines the documented harms pornography does as violations of equality rights and makes them actionable as practices of discrimination, of second-class citizenship. This ordinance allows anyone hurt through pornography to prove its role in their abuse, to recover for the deprivation of their civil rights, and to stop it from continuing."[147] The actual ordinance passed by the city of Indianapolis included the following language.

> Pornography is 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 sevèred into body parts; or

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143. Pornography, on the MacKinnon/Langton account, is neither high nor low value speech, but is instead the illocutionary act of subordinating women. *Compare supra* Part II.B, *with supra* Parts III.B–C.

144. INDIANAPOLIS, IND. CODE § 16-3(q) (1984).

145. American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

146. Commenting on the Seventh Circuit's decision in *American Booksellers*, MacKinnon stated that "Judge Easterbrook did not say this law [the Indianapolis ordinance] was not a sex discrimination law, but he gave the state interest it therefore served—opposition to sex inequality—no constitutional weight." MACKINNON, *supra* note 8, at 93. Instead, the Seventh Circuit found the material controlled by the ordinance to be traditionally defined high value speech, and accordingly found the ordinance unconstitutional. *American Booksellers*, 771 F.2d at 332.

147. MACKINNON, *supra* note 8, at 91–92.

> (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.[148]

The ordinance also provided that the "use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section."[149]

With the above definition of pornography in place, the ordinance went on to enumerate four grounds for civil action.[150] People may not "traffic" in pornography,[151] "coerce" others into performing in pornographic works,[152] or "force" pornography on anyone.[153] Additionally, anyone "injured" by someone who has seen or read pornography has a right of action not only against that person, but also against the maker or seller of the pornography.[154]

After losing at the district court level,[155] the city of Indianapolis appealed to the Seventh Circuit, which upheld the district court decision that the ordinance violated the First Amendment.[156] The city then appealed to the United States Supreme Court, but the Court affirmed the lower judgments without oral argument.[157]

Judge Easterbrook, writing for the Seventh Circuit, clearly endorsed the traditional argument against content-based regulation of pornography.[158] As he put it, "[u]nder the First Amendment the government must leave to the people the evaluation of ideas,"[159] implying that pornography, even as defined by the ordinance, serves as the vehicle for the transmission of ideas. He then went on to cite a long list of cases which defend the notion that even pernicious, hateful, and potentially harmful speech is tolerated under the First Amendment.[160]

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148. INDIANAPOLIS, IND. CODE § 16-3(q) (1984).
149. *Id.*
150. *Id.* § 16-3(g).
151. *Id.* § 16-3(g)(4).
152. *Id.* § 16-3(g)(5).
153. *Id.*
154. *Id.* § 16-3(g)(7).
155. *See* American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984).
156. *See* American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985).
157. *See* Hudnut v. American Booksellers Ass'n, Inc., 475 U.S. 1001 (1986).
158. *See American Booksellers*, 771 F.2d at 327.
159. *Id.*
160. *See id.* at 328 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that the ideas of the Klan may be propagated); DeJonge v. Oregon, 299 U.S. 353 (1937)

MacKinnon, however, felt that Judge Easterbrook missed her point.[161] As MacKinnon remarked in *Only Words*,

> Judge Easterbrook got, off and on, that "subordination" is something pornography does, not something it just says, and that its active role had to be proven in each case brought under the ordinance. But he kept losing his mental bearings and referring to pornography as an "idea," finally concluding that the harm it does "demonstrates the power of pornography as speech."[162]

IV. REEVALUATING CONTENT-BASED RESTRICTIONS: A NEW FRAMEWORK

Given the traditional theoretical framework within which to work, Judge Easterbrook's decision was easy: The Indianapolis ordinance infringed on constitutionally protected high value speech by disallowing material with pornographic content as the ordinance defined it.[163] This automatically invoked the tests for content-based discrimination.[164] Additionally, because the ordinance could not be seen as an "ordinary" obscenity law,[165] the new ordinance did not seem to be aimed at traditionally defined low value speech, either.[166]

Furthermore, because under the ordinance it was irrelevant whether a given work had literary, artistic, political, or scientific value, it was unclear, as Judge Easterbrook put it, how Indianapolis would treat "works from James Joyce's *Ulysses* to Homer's *Iliad*."[167] Since these works are prima facie candidates for First

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(stating that Communists may speak freely and run for office); Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893 (D.C. Cir. 1984) (concluding that people may criticize the President by misrepresenting his positions, and that they have a right to post their misrepresentations on public property); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (holding that the Nazi Party may march through a city with a large Jewish population), *cert. denied*, 439 U.S. 916 (1978)). As Judge Easterbrook went on to say, "[p]eople 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.'" *Id.* (quoting Police Dep't v. Mosley, 408 U.S. 92, 95 (1972)).

161. *See* MACKINNON, *supra* note 8, at 92.

162. *Id.* (footnotes omitted).

163. *See American Booksellers*, 771 F.2d at 332.

164. *See* discussion *supra* Part II.B.

165. The state of Indiana already had an obscenity law which applied to the city of Indianapolis. *See* IND. CODE ANN. §§ 35-49-1-1 to 35-49-3-4 (Michie 1998). Additionally, the new ordinance departed substantially from the generally accepted constitutional test for obscenity. *See* Miller v. California, 413 U.S. 15 (1973); *See also supra* note 35 and accompanying text.

166. *See American Booksellers*, 771 F.2d at 331.

167. *Id.* at 325.

Amendment protection, the prejudice for absolute protection of high value speech was invoked, and the ordinance was deemed unconstitutional.[168]

MacKinnon's position, as amplified by Langton, forces one to reconsider whether judges like Easterbrook would make such decisions if they had a third category of speech acts to consider.[169] Indeed, breaking speech acts into their locutionary, perlocutionary, and illocutionary components suggests that the bipolar division of speech acts into high and low value categories for the purposes of content-based restriction may be inadequate.[170]

A. Three Categories of Speech

Using the MacKinnon/Langton criticism as a starting point, consider the following categorization of speech acts. The first two categories, namely high and low value speech, exactly track the Supreme Court's current breakdown of speech acts.[171] The third category, that of "sub value speech," stems from the partial enumeration of speech acts offered by MacKinnon where she claims First Amendment protection is inappropriate.[172]

High Value Speech (as currently classified under American law):

(1) Any political discourse, philosophical commentary, etc.
(2) In general, *any* speech with the *slightest* artistic, cultural, or scientific value[173]

Low Value Speech (as currently classified under American law):

(1) Express incitement[174]
(2) False statements of fact (including libel and slander)[175]
(3) Obscenity (as contrasted with pornography)[176]
(4) Commercial speech[177]

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168. *See id.*

169. For MacKinnon's criticism, see discussions *supra* Parts III.B and III.D. For Langton's clarification of MacKinnon's position, see *supra* Part III.C.

170. If, as a matter of fact, all speech can be broken into locutionary, perlocutionary, and illocutionary components, then it only makes sense for a robust constitutional theory of speech to take such components into account. *See supra* Part III.C.

171. *See supra* Part II.B.

172. *See* MACKINNON, *supra* note 8, at 12–14.

173. *See* Miller v. California, 413 U.S. 15 (1973); Police Dep't v. Mosley, 408 U.S. 92 (1972). The reader will recall that the current Supreme Court position is to treat all speech, in the beginning, as high value speech. The Court then applies the *Chaplinsky* dictum, on a case by case basis, to determine whether a given speech act should be subject to greater regulation. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Stone, *supra* note 14, at 194. *See also supra* Part II.B.

174. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969); Dennis v. United States, 341 U.S. 494 (1951).

175. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

176. *See Miller*, 413 U.S. at 15.

177. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

(5) Fighting words[178]
(6) Child pornography[179]

Sub Value Speech (as suggested by MacKinnon):[180]

(1) Giving the order to kill someone[181]
(2) Bribery[182]
(3) Price-fixing[183]
(4) Sexual harassment or discrimination[184]
(5) "Whites Only" signs[185]

The courts and MacKinnon have given some clues as to the defining characteristics of each class above. These common characteristics legitimate grouping certain speech acts together and further legitimate the varying degrees of protection offered such acts by the First Amendment.

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178. *See Chaplinsky*, 315 U.S. at 568.

179. *See* New York v. Ferber, 458 U.S. 747 (1982). The Supreme Court did something quite unique in *Ferber*. The court argued that even if child pornography has as its main purpose the expression of ideas about children, sexuality, etc., it would still be permissible for the courts to censor such material and sanction those involved in its production, distribution, and consumption. *Id.* Because the potential and actual harms to children are so great, and because children lack the autonomy of adults to make informed decisions about their lives and activities, the Court made child pornography low value speech regardless of the artistic, scientific, or political nature of the expression. *Id.* This special exception should be kept in mind when considering the characteristics of low value speech outlined below.

It could be argued that the same kind of special exception should apply to adult pornography because of the often devastating harms to women brought about by such material. However, such arguments generally fail due to the important differences between women and children, differences that center on the increased ability of adults to make informed choices about their endeavors. *See* American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

180. Note that each of these speech acts are currently deemed sanctionable under existing American law and that the First Amendment is rarely invoked to defend them. As MacKinnon argued, they are recognized as the acts that they are and are dealt with according to the harms they commit and not according to their expressive content. MACKINNON, *supra* note 8, at 12–16.

181. *See* Scales v. United States, 367 U.S. 203 (1961) (concluding that a member of a group engaged in illegal advocacy of assassination can be held criminally responsible).

182. *See* Salinas v. United States, 522 U.S. 52 (1997) (affirming the conviction of a sheriff and deputy sheriff on bribery counts).

183. *See* United States v. American Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984) ("Raise your goddamn fares twenty percent, I'll raise mine the next morning" is not protected speech, but rather attempted joint monopolization and a "highly verbal crime.").

184. *See* Stockett v. Tolin, 791 F. Supp. 1536 (S.D. Fla. 1992) (comment of "F— me or you're fired" from employer to employee); Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977) (verbal offer of "A" grade for sexual compliance).

185. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (prohibiting discriminatory sale or rental of property to "Whites Only"); Blow v. North Carolina, 379 U.S. 684 (1965) (holding that restaurant serving "Whites Only" violated the Civil Rights Act of 1964).

Characteristics of High Value Speech:[186]

(1) Serves primarily to communicate ideas
(2) Advances the search for truth
(3) Helps enliven current truths and avoid "mere dogma"
(4) In general, advances the pursuit of artistic, cultural, or scientific value
(5) Causal connection between speech and possible harm is too far removed or outweighed by benefits of speech[187]

Characteristics of Low Value Speech:[188]

(1) No essential part of any exposition of ideas
(2) Slight social value as a step to truth
(3) So that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality
(4) The speech in question is the proximate (or legal) cause of harm[189]

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186. The literature abounds with treatises and papers describing the characteristics of high value speech. *See, e.g.*, FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1995); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972). The accounts above, and the United States Supreme Court, all begin by saying that any speech that furthers the historical, political, and philosophical "purposes of the first amendment" should be considered high value speech. Stone, *supra* note 14, at 194. Analyzing the debate over what constitutes such purposes of the First Amendment is a fascinating endeavor, but one which is beyond the scope of this Note. Accordingly, this Note assumes the First Amendment embodies general Millian arguments in favor of free expression. *See* American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); Mill, *supra* note 29, at 15–52. The *Chaplinsky* dicta accords with Mill's arguments, as do Sunstein's four factors relevant to classifying low value speech. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Sunstein, *supra* note 48, at 603–04.

187. This turns out to be an extremely important aspect of high value speech. Unless the harm caused by such speech is *imminent*, meaning virtually certain to happen *immediately*, prior restraint of such expression is not permitted under existing American law. Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969). In other words, protected and so called "high value" speech can bring about disastrous consequences and still be considered protected speech. *See* cases cited *supra* note 160. The Millian presumption against censorship is so strongly embraced by the American judicial system that only the very few enumerated categories of low value speech, and the distinct harms they cause, are considered regulable. *See* Scanlon, *supra* note 186, at 204.

188. *See Chaplinsky*, 315 U.S. at 571–72.

189. *See generally Brandenburg*, 395 U.S. at 444. All actions, including the expressive acts within the category of low value speech, bring about a potentially large number of consequences in the world. The concept of proximate or legal causation is the law's attempt to define the special subset of harmful consequences, out of all the possible harmful consequences, for which a given person should be held responsible. As its name implies, proximate causation attempts to determine which harmful effects are "closely" enough related to an individual's actions so that holding him or her responsible for the consequences of such actions does not violate notions of fairness or justice. The classes of speech in the low value category themselves capture this notion of "closeness." There are

Characteristics of Sub Value Speech:

(1) Does not *primarily* transmit ideas, regardless of rich locutionary content[190]
(2) Not designed to promote truth acquisition in any way[191]
(3) The speech in question (the illocution itself) is the harmful act to be protected against.[192]

Interestingly, the three categories just outlined seem to track the three components of speech outlined by Austin.[193] High value speech tends to protect that class of expressive acts where the *locutionary* content of such expressions are deemed most important and are the purpose of the expression.[194] A law review note, for example, is a good instance of high value speech primarily because the *fundamental* purpose of a note is to communicate certain ideas, or locutions, concerning the law. The perlocutionary effects of writing a note, and certainly the illocutionary act performed in such a writing, are secondary, at best, to the primary goal of transmitting ideas to others.[195]

In defining the limited number of low value speech acts, on the other hand, the courts seem preoccupied not with the locutions themselves, but instead

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not, however, any magical formulae for determining when a given speech act is the proximate cause of a given harm; such issues are usually left up to juries to decide on a case by case basis. *See generally* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS §§ 42–45 (5th ed. 1984 & Supp. 1995).

190. The reader will recall Sunstein's third factor for making the distinction between high and low value speech, namely that "the purpose of the speaker is relevant: if the speaker is seeking to communicate a message, he will be treated more favorably than if he is not." Sunstein, *supra* note 48, at 603–04. There seems clearly a continuum of "seeking to communicate a message," with low value speech seeking to communicate more than sub value speech. In other words, low value speech does transmit some ideas, as the special exception for child pornography demonstrates, and these ideas are partly the reason for the expression. New York v. Ferber, 458 U.S. 747 (1982). When it comes to sub value speech, ideas are clearly present (in a locutionary way), but the act committed by the utterance is not designed primarily to transmit them. *See* discussion *supra* Part III.C. It is designed to do something, not to say something, whereas the communicating of ideas might still be partly the point behind low value speech.

191. Again, at least low value speech *might* be contributing to some sort of debate. Sub value speech does not seem to do this, regardless of its locutionary content. The locutions are just tools, transmitters for the actions, which are the real point of the expression, not the ideas. Langton, *supra* note 104, at 302.

192. *See, e.g.*, cases cited *supra* notes 181–86.

193. *See supra* Part III.C.

194. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973); Police Dep't v. Mosley, 408 U.S. 92 (1972); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

195. Normative judgments concerning the "correctness" or "goodness" of high value speech generally, and of law review notes specifically, play no role in their categorization as high value speech. Authors of such notes are, no doubt, happy about this. All that matters is that the speech in question have the *slightest* artistic, cultural, or scientific value. *See* cases cited *supra* note 194.

with the *perlocutions* such speech acts bring about.[196] Express incitement to riot is regulated not because the ideas expressed by an inflammatory speech are considered "bad" by the government, but instead because of the imminent harm that is about to occur.[197] Commercial speech is regulated not because the government has any intrinsic interest in making sure only certain ideas about food are expressed, but instead because false information about sodium content might lead to increased rates of heart attack, for example, in the people who take such information to be true.[198]

Finally, as the third characteristic of sub value speech indicates, such speech is not defined by its locutions or perlocutions, but rather by the *illocutions* it performs.[199] As MacKinnon put it, a "Whites Only" sign is not "legally seen as expressing the viewpoint 'we do not want Black people in this store,' or as dissenting from the policy view that both Blacks and whites must be served," but is instead legally seen "as the *act* of segregation that it is."[200]

Accordingly, breaking the world of speech acts into three categories in this way has at least two benefits. First, it is conceptually "neat." High and sub value speech represent the two extremes of speech act categorization, with those expressive acts deemed of high value receiving full First Amendment protection and those deemed of sub value receiving no First Amendment protection. With these two extremes in place, low value speech occupies an intermediate position where only partial First Amendment protection is offered.

Second, and perhaps more importantly, expanding First Amendment jurisprudence to include a new category of speech gives lawyers, judges, and juries alike a new way to think about the real-life cases that come before them. Again, had this tripartite framework been in place during the *American Booksellers* proceedings, the legal outcome may have been different.[201]

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196. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969); *Chaplinsky*, 315 U.S. at 568. *See also* cases cited *supra* notes 174–79.

197. *See Brandenburg*, 395 U.S. at 444; Dennis v. United States, 341 U.S. 494 (1951).

198. *See generally* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

199. *See* cases cited *supra* notes 181–86.

200. MACKINNON, *supra* note 8, at 13 (emphasis added). *See also* cases cited *supra* note 185.

201. *American Booksellers* struck down the MacKinnon/Dworkin model ordinance as unconstitutional. *See supra* notes 155–57 and accompanying text. Even if having the tripartite classification scheme discussed above in place would not have changed the outcome in that case, it would have at least provided a more complete set of neutral principles upon which the Seventh Circuit could have based its decision. Additionally, it would have allowed the court to fully appreciate MacKinnon's arguments concerning what speech can "do." *See* American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

B. Pornography and the Concept of "Floating"

For each of the speech acts listed above, the context in which they occur, and hence the felicity conditions that apply, are crucial for determining their categorization.[202] For example, an inflammatory, anti-Semitic speech might be considered "political discourse" if delivered in the law school seminar room, but may become "express incitement" if uttered before an angry mob huddled outside the home of a Rabbi.[203] Giving the order to kill someone might be high art if performed on a stage, but becomes the act of murder, and hence completely unprotected by the First Amendment, if uttered in a back alley by criminal thugs.[204] The names we give to various speech acts, then, seem implicitly to track these felicity conditions.[205] In other words, we tend to call various speech acts different things as they "float" from one category of speech to another.

In the realm of content-based discrimination against free expression, then, context is crucial: given the right felicity conditions, any speech act, including pornography, can be subject to content-based prior regulation.[206] Thus neither MacKinnon, who argues pornography has the illocutionary content of subordinating women through sex,[207] nor Judge Easterbrook, who argues pornography falls within the category of high value speech,[208] are completely correct.

To illustrate this point, consider how pornography can "float" between the three categories of speech. Under MacKinnon's model ordinance, something is "pornographic" if it presents women as sexual objects for domination, conquest, violation, exploitation, possession, or use.[209] Is it possible for a given speech act, under this definition, to be considered high value speech? Regardless of how distasteful one might find such a work, the answer seems undeniably to be yes. As Judge Easterbrook rightly pointed out, MacKinnon's model ordinance does not take account that much literary, artistic, scientific, philosophical, and political speech would be effectively banned by the ordinance.[210] Insofar as such speech is

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202. Even within the Supreme Court's traditional high-low speech dichotomy, one must know the facts surrounding each speech act in order to begin the classification task. *See* Miller v. California, 413 U.S. 15 (1973); Police Dep't v. Mosley, 408 U.S. 92 (1972); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The same applies when one is attempting to categorize sub value speech. *See* discussions *supra* Parts III.C, IV.A.

203. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969).

204. *See generally* Scales v. United States, 367 U.S. 203 (1961).

205. *See supra* Part IV.A.

206. This is, admittedly, a contentious claim. The reader is encouraged to reconsider the classifications of speech outlined in Part IV.A, *supra*, to test the plausibility of this claim. However, if one agrees with the characteristics of high, low, and sub value speech, then it should not be difficult to construct the felicity conditions necessary to place pornography in each category. *See infra* notes 209–20 and accompanying text.

207. *See* MACKINNON, *supra* note 8.

208. *See* American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

209. INDIANAPOLIS, IND. CODE § 16-3(q) (1984).

210. *See supra* text accompanying note 167.

precisely the kind of speech the First Amendment is designed to protect,[211] then the MacKinnon/Dworkin ordinance was appropriately overturned as unconstitutional.

But does it follow from this that pornography, as defined by the ordinance, *always* falls within the category of high value speech? The answer seems clearly to be no. Pornography that "floats" into the category of low value speech has, traditionally, been termed "obscenity."[212] The traditional legal definition of obscenity is designed to track those contexts where otherwise high value pornographic speech acts, even as defined by MacKinnon, do not primarily transmit ideas, further the search for truth, or otherwise serve to foster scientific, artistic, or cultural values.[213] Of course, it is quite difficult to determine when a given speech act no longer serves as the vehicle for ideas, which is presumably why the legal definition of obscenity requires so-called obscene speech to be enumerated by law or ordinance.[214] The hope is that legislators will utilize their superior fact-finding abilities and only make illegal those specific speech acts that are considered of little or no value to ongoing public debate.[215]

Speech acts that have the locutionary content of pornography as MacKinnon defines it, then, can be seen to fall within both the category of high and low value speech.[216] Pornography, as MacKinnon defines it, ultimately crosses the line from either high or low value speech to sub value speech when the conditions under which it arises make it *do* more than it *says*.[217] If, as MacKinnon's model ordinance indicates, women are presented as sexual objects who are cut up, mutilated, or otherwise physically hurt *and* the women in these depictions *actually are* mutilated or hurt, then we no longer call such expression pornography. Under the law, we call such actions "battery" or "murder,"[218] and we do not allow people who commit such crimes to claim First Amendment protection for their actions.[219]

V. CONCLUSION

Freedom of expression as protected by the First Amendment to the United States Constitution is a central right afforded Americans. Accordingly, United States courts have been quite reluctant to allow Congress or state legislatures to limit the free expression of citizens.[220]

However, the courts have recognized certain exceptions to this overwhelming prejudice in favor of protecting all forms of speech.[221] Content-

211. *See supra* note 173 and accompanying text.
212. *See* Miller v. California, 413 U.S. 15 (1973).
213. *See id.*
214. *See id.*
215. *See id.*
216. *See supra* text accompanying notes 209–16.
217. *See supra* Parts III.B, III.C, IV.A.
218. *See supra* note 181.
219. *See generally supra* notes 180–86 and accompanying text.
220. *See supra* Part II.B.
221. *See supra* Parts II.B, IV.A.

neutral restrictions on free speech pass constitutional scrutiny more easily than content-based restrictions. In the latter case, content-based restrictions are only allowed if (1) the speech in question falls within the category of "low value" as opposed to "high value" speech and (2) the so-called low value speech occurs in a context narrowly defined by the courts as the type of situation where restriction is appropriate.[222]

This Note has offered a reevaluation of the traditional distinction between high and low value speech. Centrally, breaking the world of speech acts into only two categories creates a certain amount of conceptual confusion. Thinking there are only two categories with which to work, judges and theorists may end up misclassifying a given speech act because other options are not considered.

Based on the work of Catharine MacKinnon and Rae Langton, work that in the case of MacKinnon implicitly, and in the case of Langton explicitly, breaks speech acts into their locutionary, perlocutionary, and illocutionary components, the category of "sub value" speech is advocated. As a class, sub value speech acts are not restricted because of what they say, but rather because of what they do. Their *illocutions*, or the acts performed just by their utterance, are the kinds of acts that society deem harmful enough to regulate.[223]

Using pornography regulation, and MacKinnon's model pornography control ordinance in particular, as a test case, the tripartite classification of speech acts into high, low, and sub value speech is illustrated.[224] Contrary to MacKinnon's position in *Only Words*[225] and the decision of the Seventh Circuit Court of Appeals in *American Booksellers*,[226] this Note concluded that pornography, like other speech acts, can float between the three categories and that people often call a given speech act by a different name depending on the category it currently occupies.[227]

What is the value of expanding the categorization of speech acts by adding the third category of sub value speech? Making clear that some speech acts do more than they say helps courts and theorists avoid "conceptual cloudiness" by providing a unique place to group those speech acts which are completely undeserving of First Amendment protection given their illocutionary content. Avoiding such conceptual confusion brings with it the benefit of avoiding constitutional protection for acts that, if not removed from the bipolar categorization of speech that has dominated First Amendment debate, would otherwise be protected. In other words, adding a third classification frees judges from having to "force" a given speech act into a category where it does not belong.

Finally, recognizing the locutionary, perlocutionary, and illocutionary aspects of speech drives home the larger theoretical point that context, or felicity

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222. *See supra* Part II.B.
223. *See supra* Part IV.
224. *See supra* Part IV.
225. MACKINNON, *supra* note 8.
226. American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).
227. *See supra* Part IV.B.

conditions, are crucial for determining first the classification of speech acts and second their subsequent protection or non-protection under the First Amendment.[228] Such an insight reminds people that context is crucial: Any speech act, given the right felicity conditions and the right uptake, is a candidate for prior content-based regulation. This insight helps mitigate the extreme bias toward speech protectionism that, like most extreme positions, tends to perpetrate injustice in its wake.[229]

228. *See supra* Part IV.B.

229. It might be argued that "extreme" protection of liberty, including the liberty of free expression, is not a bad thing. However, even John Stuart Mill, perhaps the greatest libertarian of all time, recognized that orderly self-government cannot succeed unless liberty is at least tempered by a "harm principle" whereby one's freedom to act ends at the point one's actions harm others. *See* Mill, *supra* note 29, at 15–52. Contemporary theorists make much the same point, and further argue for a return to a more modest First Amendment protection for free expression, especially when such expression harms others. *See* Sunstein, *supra* note 6; Owen M. Fiss, *Why the State?*, *in* DEMOCRACY AND THE MASS MEDIA 136 (Judith Lichtenberg ed., 1993).