PUBLIC AFFAIRS QUARTERLY
Volume 12, Number 4, October 1998

PORNOGRAPHY, VERBAL ACTS, AND VIEWPOINT DISCRIMINATION

Cynthia A. Stark

Spawned by the "second wave" of the feminist movement, a heated debate over the legal regulation of pornography has been waging for nearly three decades, both inside and outside of the academy.[1] In the literature advocating the restriction of pornography one finds, broadly, two approaches. One, the "harmful speech" approach, argues that certain sexually explicit expression is sufficiently harmful to women to be exempted from First Amendment protection.[2] On this view, pornography belongs, along with such things as defamation and false advertising, in the legal category "unprotected speech." The other approach—call it the "verbal act" approach—maintains that pornography, though it is normally made up of words and/or images, is not primarily a form of speech.[3] Rather, it is, like sexual harassment or bribery, a kind of harmful action that involves words. Legally restricting it, *qua* harmful, the argument goes, does not violate the First Amendment because the First Amendment does not pertain to it.[4]

To fashion a definition of pornography that is neutral between the verbal act and harmful speech approaches and at the same time covers the contended material, we can adopt the definition given by advocates of the verbal act approach, with one conspicuous omission. Supporters of the verbal act strategy, most prominently, Catharine MacKinnon and Andrea Dworkin, make it a part of the definition of pornography that it is an action. Specifically, they claim that pornography is the act of subordination. Omitting the assertion that pornography is the act of subordination, we get the following definition: pornography is graphic, sexually explicit material that contains at least one of six additional criteria which pertain to content. The list of criteria includes such things as "women are presented as sexual objects for domination," women are presented as . . . enjoy[ing] humiliation" or as "being penetrated by objects or animals."[5]

Speech and Action in a Legal Context

The claim on the part of the verbal act approach that pornography is the act of subordination and not a form of speech has generated much criticism and misunderstanding.[6] For example, it seems obvious that showing that something is an action, in the ordinary sense, is not sufficient for showing that it should fall outside of the boundaries of the First Amendment. Burning a cross on someone's lawn, burning a U.S. flag, and wearing a black armband are all actions, in the ordinary sense.[7] Yet each of these actions has been judged to raise First Amendment issues, for they primarily are done to communicate a message. Indeed, all of these actions have been judged by the Supreme Court to be protected by the First Amendment. Laws prohibiting them have been found unconstitutional. Furthermore, it seems obvious that pornography is made up of words and images and so *is* speech in the ordinary sense. Many have wondered how a picture can be an action and have regarded supporters of the verbal act approach as promoting a confused and implausible ontology.[8] But the verbal act approach does not maintain that pornography is an act in the ordinary sense nor does it deny that pornography is speech in the ordinary sense.[9] The claim that pornography is an action is simply the claim that pornography is similar to a whole host of utterances that are conceived as actions in a legal context because they are not primarily communicative. "I now pronounce you husband and wife" is an example of such an utterance. Though obviously made up of words, the utterance does not express an idea. Rather, said under the appropriate circumstances, it constitutes the act of marrying.[10] Whether or not one has the right to marry people, even though marrying people involves speech, is not an issue for the First Amendment. So, when some anti-pornography feminists claim that pornography is an action, and that therefore the regulation of pornography is not an issue for the First Amendment, they are stating that although pornography is made up of words and images, it does not serve primarily to communicate ideas. Instead it serves to maintain the subordinate status of women.

In summary, the line between speech and action within a legal context does not mark a deep metaphysical divide. Both actions (in the ordinary sense) and utterances can be actions in the legal sense if they are not primarily communicative. Likewise, both actions (in the ordinary sense) and utterances can be speech in the legal sense if they are primarily communicative.

Utterances as Actions

The general strategy used by MacKinnon, whom I am taking to be representative of those who advocate the verbal act approach to regulating pornography, can be outlined as follows: MacKinnon assumes that certain uses of language that traditionally have been regarded as beyond the reach of the First Amendment have been so regarded largely because they are, legally speaking, actions and not speech. They are utterances that primarily do something rather than say something. Examples include *quid pro quo* sexual harassment, discriminatory job announcements, price-fixing and criminal solicitation.[11] She assumes, furthermore, that appealing to the speech/action distinction is a sound method for deciding whether the First Amendment applies to particular utterances.[12] Her main objective is to show that pornography is sufficiently similar to those utterances regarded as actions, and hence as not subject to the First Amendment, that it too should be regarded as an action and hence as not subject to the First Amendment.[13]

My thesis is directed at MacKinnon's acceptance of the notion that the speech/action distinction can legitimately serve as a basis for determining the scope of the First Amendment. I will argue that the legal distinction between speech and action upon which the verbal act approach lies is unstable and therefore cannot serve as the basis for determining which utterances fall within the scope of the First Amendment. Indeed, attempting to sort utterances by means of the speech/action distinction in order to make this determination can lead to a paradox, which I call "the viewpoint paradox." It follows that decisions about which utterances fall within the scope of the First Amendment will depend, not upon whether or not it is an action, but upon whether or not it is the kind of utterance that, seen from a normative point of view, raises First Amendment issues.

Among the various verbal acts lying outside of the First Amendment to which MacKinnon compares pornography, we can discern two distinct types. Some are utterances that are designed to bring about an action; they are causally connected to certain actions. Following Kent Greenawalt, I will call these utterances "weak imperatives" (WI's).[14] An example of a WI is the utterance, "You should kill our uncle so we can collect on his will." Statements of this sort constitute acts of criminal solicitation and, of course, are not covered by the First Amendment, presumably, in part, because they are correlated with the commission of illegal acts such as murder.[15] A second class of verbal acts identified by

MacKinnon as falling outside of the boundaries of the First Amendment are called, again using Greenawalt's terminology, "situation altering utterances" (SAU's). These are utterances, such as "I now pronounce you husband and wife," that are classed as actions because they change one's social environment.[16] WI's and SAU's are both contrasted with ordinary statements of fact and value, which are paradigmatic instances of speech. Examples of these include, "It is 75 degrees outside" and "Capitalism is an unjust economic system."

The lines separating these three types of utterance are blurry. WI's and SAU's can express facts and values; assertions of fact or value can issue in action. For instance, the assertion, "It is 75 degrees outside" might prompt me to leave my jacket behind; indeed, it might be uttered to persuade me to leave my jacket behind. Likewise, the utterance, "You should kill our uncle so that we can collect on his will," besides encouraging one to commit a crime, also expresses judgments of fact and value. Saying "aye" in response to a proposed resolution is not only a SAU, insofar as it constitutes voting, but also expresses a value insofar as it endorses the content of the resolution. This blurriness, as we will see, renders the division between WI's and SAU's on the one hand and statements of fact and value on the other extremely problematic as a means for deciding which utterances should be subject to the First Amendment.

Pornography as a Weak Imperative

It is fairly clear from her texts that MacKinnon regards pornography as both a WI and a SAU.[17] She maintains, in other words, that pornography compels its consumers to act in ways that contribute to the subordination of women and that pornography itself subordinates women. Though these claims are quite distinct, she tends not to distinguish them clearly.[18] I will consider them individually, beginning with the contention that pornography is a WI.

The following passage from MacKinnon shows that she holds not only that pornography causes men to harm women (the central claim of the harmful speech approach) but also that pornography is essentially noncommunicative (the distinguishing claim of the WI approach):

> Empirically, of all two-dimensional forms of sex, it is only pornography, not its ideas as such, that gives men erections that support aggression against women in particular. Put another way, an erection is neither a thought nor a feeling, but a behavior. It is only pornography that rapists use to select whom they rape and to get up for their rapes. This is not because they are persuaded by its ideas or even inflamed by its emotions, or because it is so conceptually or emotionally compelling, but because they are sexually habituated to its kick, a process that is largely unconscious and works as primitive conditioning, with pictures and words as sexual stimuli. Pornography consumers are not consuming an idea any more than eating a loaf of bread is consuming the ideas on its wrapper or the ideas in its recipe.[19]

While this passage, and others, suggest that MacKinnon advances the WI view, she is sometimes mistakenly interpreted as expressing the harmful speech view.[20] This mistake is easy to make because the two views are close cousins. The harmful speech approach, recall, holds that pornography is speech, but so closely correlated to harmful actions as to warrant its exemption from First Amendment protection. The WI approach maintains that pornography is not speech and so is not subject to the First Amendment. But the ground upon which pornography is judged as not speech, on this view, is the fact that it is directly correlated with actions.[21] So, these two approaches share two essential features: both rely upon the claim that pornography is causally related to certain actions and both maintain that this causal connection is a legitimate basis for placing pornography beyond the reach of the First Amendment. The difference between them is that the WI approach uses the causal connection between pornography and certain actions to argue that pornography is an action, where the harmful speech approach uses this connection simply to argue that pornography should be unprotected speech. One is tempted to conclude that this is a trivial difference. This temptation should be resisted, however, because the WI approach is designed to avoid a problem that the harmful speech approach cannot: the problem of viewpoint discrimination.

A critical tenet of First Amendment law is the presumption that regulations on speech based upon its content are invalid. In order for a content-based regulation to be found constitutional, the state must have a compelling interest in the regulation. In order to validate content-neutral restrictions, on the other hand, the state need not have as compelling an interest.[22] An example of a content-neutral regulation is a prohibition on billboards, say, in a particular area. In this case the regulation has nothing to do with the content of the speech that the billboards would contain. An example of a content-based regulation is a prohibition on billboards dealing with abortion. Here the restriction is directed at the content of the expression that the billboards would display.

Some content-based restrictions are viewpoint-neutral. That is, they prohibit expression about certain subjects, no matter what point of view about the subject is expressed.[23] A restriction upon billboards concerning abortion is an illustration of a of a viewpoint-neutral, content-based

regulation. By contrast, a restriction upon billboards denouncing abortion, but not upon billboards containing other messages about abortion would be viewpoint-based. While some content-based, viewpoint-neutral regulations are permitted, viewpoint-based restrictions are almost always found unconstitutional.[24]

It appears that the Court applies the content distinction[25] to utterances judged to be speech but not to utterances conceived as actions. For instance, the content distinction was applied in a case concerning a prohibition on public employees expressing certain kinds of opinions about public affairs.[26] (The prohibition was judged constitutional on the ground that it is viewpoint-neutral.[27]) By contrast, utterances such as, "You should kill our uncle so we can collect on his will," which is judged an action, has never been subject to the content distinction, even though forbidding such utterances discriminates on the basis of content, and, indeed, on the basis of viewpoint. Utterances that encourage crimes do so in virtue of their content—in virtue of what, in particular, they say.[28] The utterance "You should *not* kill our uncle so that we can collect on his will" is, obviously, not a case of criminal solicitation, and what makes it not a case of criminal solicitation is the particular viewpoint expressed. But it has never been suggested that soliciting crimes should be a form of protected speech on the ground that regulating such solicitation would constitute viewpoint discrimination. So, if an utterance is considered an action, it appears, then, even if it expresses a viewpoint, it is not regarded as subject to the "no viewpoint discrimination" principle.

Pornography, as legally defined, expresses a certain viewpoint about women.[29] It expresses, for the example, the view that women enjoy humiliation and pain, that women get pleasure from rape or that sexually abusing women is acceptable.[30] The problem with the harmful speech approach is that insofar as it grants that pornography is speech, it, first, exposes pornography to the content distinction, and second, provides grounds for conceiving of the regulation of pornography as a case of viewpoint discrimination. Hence, those favoring regulating pornography as harmful speech are faced with the daunting task of convincing the Court to validate a viewpoint-based regulation.[31] The verbal act approach, on the other hand, seems to sidestep the problem of viewpoint discrimination, for if it can be demonstrated that pornography is an action—in this case a WI—and hence that it lies outside of the bounds of the First Amendment altogether, then the content distinction does not apply. If one can show, in other words, that pornography, as an utterance, is similar to things like criminal solicitation, as utterances, then one can argue for its regulation without having to justify a viewpoint-based restriction on speech.

The Viewpoint Paradox

To show that pornography is a WI, one must show that it is tied to actions in a way that makes it reasonable to consider it itself an action.[32] To show that pornography, as a WI, is deserving of regulation, one must show that it is tied in this way to harmful actions. The kinds of sexually explicit materials that are said to be correlated with harmful acts against women are those materials captured by the legal definition of pornography: depictions of women being tortured or hurt in an context that is sexual. As we saw above, such depictions are said to promote and encourage sexual harassment and violence by associating harming women with sexual pleasure and orgasm. These materials are therefore regarded as implicated in the high rate of discrimination and violence against women we find in the U.S.[33] According to this line of reasoning, what makes these materials capable of producing acts of violence against women, unsurprisingly, is their viewpoint: what, in particular, they say about women's sexuality and women's status.[34] So, to show that certain materials are best considered not speech, but actions that contribute to the subordination of women, one must invoke their viewpoint, just as one must appeal to the viewpoint expressed in an utterance in order to show that it is an instance of criminal solicitation. It follows that one must invoke the viewpoint contained in pornography in order to show that the First Amendment does not apply to it.[35] At the same time, though, that an utterance expresses a viewpoint is a major factor qualifying it as speech, and not action.[36] What is more, since restrictions based upon an utterance's expressing a particular viewpoint are generally considered constitutionally invalid, restrictions upon certain WI's, *which are WI's because of their viewpoint*, will be considered invalid.

The instability of the demarcation between WI's on the one hand, and statements of fact and value on the other[37], in combination with the prohibition upon viewpoint discrimination, generates a two-tiered paradox. The evidence necessary to establish that an utterance is a WI, and therefore beyond the reach of the First Amendment, will look to many, not only like evidence that the utterance is speech, and hence within the reach of the First Amendment, but also like evidence that the utterance should be protected by the First Amendment, since restricting it would suppress the expression of a certain viewpoint.

Initially it looked as though the verbal act approach had an advantage over the harmful speech approach, since it could avoid having to justify a viewpoint-based regulation upon speech. It turns out, however, that the verbal act approach must do something even harder than simply justifying a viewpoint-based regulation. It must overcome the viewpoint

paradox. It must challenge the very applicability of the of the content distinction to its proposed regulations. In a social and legal environment that has traditionally regarded sexually explicit materials as speech, and which is strongly committed to the content distinction, advocates of the verbal act approach wage an uphill battle.[38]

Pornography as a Situation Altering Utterance

The viewpoint paradox, which I claimed arises when one attempts to show that pornography is a WI, also arises in attempts to demonstrate that pornography is a SAU. A SAU, recall, is an utterance that is itself a kind of action insofar as it alters the social environment. The kind of action that pornography is, according to MacKinnon, is the act of subordination. To subordinate someone, MacKinnon says, is to put them in a position of inferiority or loss of power or to demean or denigrate them.[39] Pornography, then, if it is a SAU that subordinates women, shapes the social environment by placing women in a position of inferiority relative to men. To illustrate how pornography can be the act of subordination, MacKinnon compares it to the utterance "White Only":[40]

> Social inequality is substantially created and enforced—that is, *done*—through words and images. Social hierarchy cannot and does not exist without being embodied in meanings and expressed in communications. A sign *saying* "White Only" is only words, but it 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, or even as hate speech, the restriction of which would need to be debated in First Amendment terms. It is seen as the act of segregation that it is. . . . Segregation cannot happen without someone *saying* "get out" or "you don't belong here" at some point. Elevation and denigration are . . . accomplished through meaningful symbols and communicative acts in which saying it is doing it.[41]

MacKinnon is not terribly clear about *how* pornography itself subordinates women. She seems content to simply *assert* that pornography is analogous to various SAU's, such as "White Only," "help wanted—male," which is an act of discrimination, and "sleep with me and I'll give you an A," which is an act of bribery. But let us grant that pornography is a SAU that is capable of subordinating women. Let us say that it does so by authoritatively ranking women as sexual objects and by authorizing sexual violence against women.[42] The ability of pornography to do this—if it is able to do this—is, in large part, a function of its viewpoint.[43] It is in virtue of the fact that pornography portrays women

as objects for men's sexual use and abuse, and depicts women as deserving or enjoying such abuse that it ranks women as inferior to men. If some sexually explicit material expressed a different viewpoint—say, the view that women are not simply sexual objects to be used by men, but are sexual agents with their own legitimate sexual needs—then it would not subordinate women.[44] But that pornography expresses a particular viewpoint about women is what has been used to support the claim that pornography is speech and that it should be protected by the First Amendment. So again we see the paradox: it is the misogynistic viewpoint about women expressed by pornography that both makes it capable of subordinating women—that is, makes it an action—and makes it qualify as a form of speech. Pornography's viewpoint serves to support both the claim that it lies outside of the boundaries of the First Amendment and the claim that it should be protected by the First Amendment.

Resolving the Paradox

MacKinnon concludes that the existence of the paradox (which she never identifies as such) shows that many decisions about which utterances are speech and which are actions are essentially political.[45] Pornography is characterized as speech and judged protected, according to MacKinnon, primarily because men want pornography to remain available.[46] While she sees the speech/action division as generally legitimate, she takes issue with how it is applied in a system of male dominance. While there is clearly truth to the claim that political considerations sometimes underlie decisions about which utterances are to be debated within a First Amendment framework, there is a deeper problem—the speech/action distinction itself. In fact, the viewpoint paradox evaporates if we abandon the distinction as a basis for deciding which utterances fall within the boundaries of the First Amendment. The merit of giving up the speech/action distinction for this purpose can be illustrated by returning to our earlier example of criminal solicitation.

While the private solicitation of a crime, such as the request that someone murder one's uncle so he can collect on his will, is not seen as raising First Amendment issues, the public solicitation of crimes has been judged to raise problems from a First Amendment perspective.[47] Standing on a street corner and encouraging an audience to resist the draft, for example, or to attempt to overthrow the government is to encourage criminal conduct. Yet utterances of this sort are often protected by the First Amendment, provided the crime encouraged is not specifically described and not likely to occur in the very near future.[48] It will not do to invoke the speech/action distinction to account for the difference in status

assigned to private versus public encouragements to crime because these two types of utterance hardly differ from one another descriptively: both are designed to produce actions, they have roughly the same likelihood (i.e., low) of resulting in the actual commission of a crime,[49] and both implicitly express a whole host of facts and values.

One way in which these two sorts of utterances obviously differ, however, has to do with *the nature* of the statements of fact and value that are associated with them. In particular, the statements of value and fact associated with public encouragements to crime, which almost always occur in the context of political protest, are more directly related to the justifications for freedom of speech than are private encouragements. Let us say, for example, that encouraging someone to murder one's uncle for the purposes of collecting on his will implies the following assertions of value or fact: that getting the uncle's money sooner as opposed to later would be good, that it is possible to get away with having the uncle murdered, that it is worth having him killed to get his money, etc. These statements of fact and value are remotely, if at all, conducive to the discovery of important truths, to the promotion of democracy, or to the recognition of individual autonomy, all of which are standard justifications for preserving the freedom of speech.[50] By contrast, the value statements implicit in encouraging citizens to resist the draft, *are*, arguably, related to these justifications: public questioning of the morality of the draft may lead to the clarification of significant moral principles. Exposure to the idea of civil disobedience is, plausibly, conducive to the promotion of democracy insofar as it raises the issue of the proper authority of government.

A similar argument can be made in the case of SAU's. Just as the statement "Why don't you kill our uncle" bears little relation to the various rationales for freedom of speech, neither does the statement "Sleep with me and I'll give you an A." And just as the imperative "Resist the draft" bears a strong a relation to these rationales, so does the warning "Burn that draft card and I'll throw you in jail."

It follows that no matter whether an utterance is an assertion of fact or value, a WI or a SAU, what should determine whether the First Amendment has any bearing on it is its connection to those justifications. If an utterance is found to be directly connected to those justifications, *then* the question of whether or not it should be *protected* by the First Amendment arises. This issue, of course, is complex and hinges upon a number of factors, including how harmful the utterance is, whether there are alternative avenues for expressing the same idea, and, again, the nature of the utterance's relation to the justifications for freedom of speech.

We can resolve the viewpoint paradox by simply giving up the speech/action distinction for the purposes of deciding which utterances are subject to the First Amendment and recognizing that the reason certain utterances do not raise First Amendment issues is not (or at least not primarily) that they are actions, but that it is obvious that their expressive value is minimal. If one wants to show, then, that regulating pornography should not even raise First Amendment issues (let alone be protected by it) one must show that pornography, as an utterance, is only remotely, if at all, associated with the justifications for freedom of speech. So, even if it is true that pornography, as MacKinnon asserts, is a SAU or a WI, it does not follow that pornography should not be subject to the First Amendment. The issue, in determining whether or not pornography should be subject to the First Amendment, is whether or not the statements of fact and value contained in it are strongly associated with the justifications for freedom of speech. If it turns out that they are not, then MacKinnon is right in claiming that the regulation of pornography should not be debated within a First Amendment context. If it turns out that they are, then the question of whether or not pornography should be protected by the First Amendment must be addressed.

In suggesting that we judge the First Amendment's bearing upon utterances on the basis of those utterance's connection to justifications for freedom of speech, I am suggesting a particular approach to First Amendment adjudication and not endorsing any particular traditional justification for freedom of speech. Indeed, some traditional justifications are clearly flawed. For instance, the notion that the "free market of ideas" will lead to people's adopting a predominance of true ideas ignores the extent to which powerful groups with access to various media can ensure that their perspective, true or false, prevails. It may turn out that the best justification for the freedom of speech supports the regulation of misogynistic, racist or other uses of language that perpetuate an unequal distribution of political power and voice. Or again, the best justification for freedom of speech may not support such regulations. The point simply is that in arguing for civil restrictions on purportedly harmful forms of expression, anti-pornography feminists, and others, should not rely upon the notion that these types of expression are not, in the legal sense, speech.

The University of Utah

NOTES

I owe thanks to Jami L. Anderson, Peggy Battin, Leslie Francis, Kent Greenawalt, Dan Greenwood and Bruce Landesman for helpful feedback on this paper. Thanks also to Trish White for inviting me to present my ideas to faculty in the University of Utah law school who aided me much in developing my view.

1. For a brief history of the effort of feminists to restrict pornography legally see John Stoltenberg, *Refusing to Be a Man: Essays on Sex and Justice* (New York: Meridian, 1989), pp. 137–46. See also Edward Donnerstein, David Linz and Steven Penrod, *The Question of Pornography* (New York: The Free Press, 1987), pp. 137–70 and the introduction in Diana Russell, ed., *Making Violence Sexy: Feminist Views on Pornography* (New York: Teachers College Press, 1993), pp. 1–22. Government sponsored commissions have issued reports on pornography in both the U.S. and Britain. See *The Report of the Presidential Commission on Obscenity and Pornography* (1970) and *Report of the Committee on Obscenity and Film Censorship*, 1979. A summary of the U.S. commission's findings can be found in Donnerstein, *et al.*, pp. 23–37. Excerpts from the British commission are in David Copp and Susan Wendell, eds., *Pornography and Censorship* (New York: Prometheus Books, 1983), pp. 185–206. Criticism of the U.S. commission's conclusions can be found in Donnerstein, *et al.*, pp. 171–96 and in Irene Diamond, "Pornography and Repression: A Reconsideration of 'Who' and 'What'"; Pauline B. Bart and Margaret Josza, "Dirty Books, Dirty Films and Dirty Data" and Diana E. H. Russell," Pornography and Violence: What Does the New Research Say?" all in Laura Lederer, *Take Back the Night: Women on Pornography* (New York: William Morrow, 1980). See also, Diana E. H. Russell, "The Experts Cop Out" in Russell.

2. A prominent advocate of this position is Cass Sunstein. See his, "Pornography and the First Amendment," *Duke Law Journal* 1986: 589–627 and *Democracy and the Problem of Free Speech* (New York: The Free Press, 1995), pp. 209–26. See also, Daniel Linz, Charles W. Turner, Bradford W. Hesse and Steven Penrod, "Bases of Liability for Injuries Produced by Media Portrayals of Violent Pornography" and Steven Penrod and Daniel Linz, "Using Psychological Research on Violent Pornography to Inform Legal Change" both in Neil M. Malamuth and Edward Donnerstein, *Pornography and Sexual Aggression* (New York: Academic Press, 1984) and Wendy Kaminer "Pornography and the First Amendment: Prior Restraints and Private Action" in Lederer.

3. The most well-known supporter of this position is Catharine MacKinnon. See her "Not a Moral Issue" and "Francis Biddle's Sister: Pornography, Civil Rights and Speech" in *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987); "Sexuality, Pornography and Method: 'Pleasure Under Patriarchy'" in Cass R. Sunstein, ed., *Feminism and Political Theory* (Chicago: University of Chicago Press, 1990) and *Only Words* (Cambridge, MA: Harvard University Press, 1993). Also see Rae Langton, "Speech Acts and Unspeakable Acts," *Philosophy & Public Affairs* 22, 4 (1993): 293–330. For a discussion of hate speech as a speech act see Andrew Altman, "Liberalism and Campus Hate Speech," *Ethics* 103 (1993): 302–17. For an alternative way (i.e., not a verbal act approach) of arguing that pornography is the act of subordination see Melinda Vadas, "A First Look at the Pornography/Civil Rights Ordinance: Could Pornography Be the Subordination of Women?" *Journal of Philosophy* 84 (1987): 487–511.

4. Utterances qualifying as speech but seen as beyond the reach of the First Amendment I will refer to as either "exempt" or "unprotected." Utterances that are not conceptualized as speech at all, I will refer to as "not subject to" or "outside of the boundaries of the First Amendment" (or similar phrases).

5. The full definition of pornography as stated in the Indianapolis Ordinance is as follows: "*Pornography* shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (1) Women are presented as sexual objects who enjoy pain or humiliation; or (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or (4) Women are presented being penetrated by objects or animals; or (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding or bruised, or hurt in a context that makes those 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." I quote the Indianapolis Ordinance since that is the version judged to be in violation of the First Amendment in *American Booksellers Association v. Hudnut*. Various versions of the Anti-Pornography Ordinance can be found in Andrea Dworkin and Catharine A. MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Minneapolis: Organizing Against Pornography, 1988).

The MacKinnon/Dworkin Ordinance is designed to make pornography civilly actionable. It would provide grounds for women to sue for damages in civil court if they can show that they have been harmed by pornography. (The causes of action are listed and explained in Dworkin and MacKinnon, pp. 41–51.) In this respect (as well as in virtue of the material covered) the regulations endorsed by anti-pornography feminists differ from obscenity laws, which make the production and/or distribution of obscene material a criminal offense and permit prior restraint. Whenever I refer, in this paper, to the "restricting" or "regulating" of pornography I am referring to civil regulations.

6. For discussion of the expression/action distinction generally, see Thomas Emerson, *The System of Freedom of Expression* (New York: Random House, 1970), pp. 9–17; Alan E. Fuchs, "Further Steps Toward a General Theory of Freedom of Expression," *William and Mary Law Review* 18 (1976): 347-77; Kent Greenawalt, *Speech, Crime and the Uses of Language* (New York: Oxford University Press, 1989), pp. 228–30; Sunstein, *Democracy*, pp. 125–26 and 180–93. For a discussion of the distinction as it applies to obscenity, see Frederick Shauer, "Speech and 'Speech'—Obscenity and 'Obscenity': An Exercise in the Interpretation of Constitutional Language," *The Georgetown Law Journal* 67 (1979): 899–933.

For criticism of the claim that pornography is an action, see Ronald Dworkin, "Women and Pornography," *New York Review*, October 21, 1993, p. 38; Cynthia A. Stark, "Is Pornography an Action?: The Causal Vs. the Conceptual View of Pornography's Harm," *Social Theory and Practice* 23/2 (Summer 1997): 277–306;

Thomas I. Emerson, "Pornography and the First Amendment: A Reply to Professor MacKinnon," *Yale Law and Policy Review* 3 (1984): 130–43.

7. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989); *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

8. For instance, Judge Frank Easterbrook, who handed down the appeals court decision on the Indianapolis Ordinance, claimed that the idea that pornography is an action involves a "certain sleight of hand." (Quoted in Langton, p. 294.)

9. See Shauer, especially pp. 905–10.

10. For a discussion of utterances that are actions ("speech acts") see J. L. Austin, *How to Do Things With Words* (New York: Oxford University Press, 1965).

11. MacKinnon, *Only Words*, pp. 13–14.

12. *Ibid.*, p. 11.

13. *Ibid.*, pp. 12–15.

14. Greenawalt, *Speech, Crime and the Uses of Language*, pp. 68–71 and *Fighting Words: Individuals, Communities and Liberties of Speech* (Princeton, NJ: Princeton University Press, 1995), pp. 6–7. WI's are typically urgings. As such, they are 1) designed to bring about an action, 2) connected causally to the actions they are intended to produce and 3) primarily non-communicative. I am setting aside the issue of speaker intention, here, and focusing on the causal and non-communicative aspects of WI's. These two features are what MacKinnon claims are central to pornography. This emphasis in her work warrants, to my mind, identifying her view as a WI view.

15. Greenawalt, *Speech, Crime and the Uses of Language*, pp. 110–11.

16. *Ibid.*, pp. 57–68 and *Fighting Words*, pp. 6–7.

17. MacKinnon, *Only Words*, pp. 3–41; "Not a Moral Issue," especially pp. 146–49; "Francis Biddle's Sister," especially pp. 166–73 and "Sexuality, Pornography and Method," especially pp. 208–25.

18. She often suggests that the fact that pornography encourages men to hurt women (in ways that cumulatively result in women's subordination) counts as evidence that pornography itself subordinates women. See, for example, MacKinnon, "Not a Moral Issue" and "Francis Biddle's Sister," especially pp. 176–78.

19. MacKinnon, *Only Words*, p. 16.

20. One prominent scholar who makes this mistake is Nadine Strossen in her *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights* (NY: Scribner, 1995). Strossen persistently attributes to MacKinnon the view that "sexually oriented expression" is a major cause of violence and discrimination against women and should therefore be restricted. It is false that MacKinnon believes that sexually oriented expression is a major cause of women's oppression, though she does believe that pornography is a major cause. Her principal point is to deny that pornography is a form of expression.

21. The results of research done on the effects of pornography are discussed in Donnerstein & Malamuth; Donnerstein, et al.; Diamond, et al. and Russell, both in Lederer; Diana E. H. Russell, "Research on How Women Experience the Impact of Pornography," Edward Donnerstein, "Pornography and Violence Against Women," Edward Donnerstein and Leonard Berkowitz, "Victim Reactions in Aggressive Erotic Films as a Factor in Violence Against Women," Neil M. Malamuth and James V. P. Check, "Penile Tumescence and Perceptual Responses to Rape as a Function of Victim's Perceived Reactions," Dolf Zillmann, Jennings Bryant, Paul W. Cominsky and Norman J. Medoff, "Excitation and Hedonic Valence in the Effect of Erotica on Motivated Intermale Aggression" all in Copp and Wendell; Mimi H. Silbert and Ayala M. Pines, "Pornography and Sexual Abuse of Women," Diana E. H. Russell, "Pornography and Rape: A Causal Model," Alice Mayall and Diana E. H. Russell, "Racism in Pornography," Charlene Y. Senn, "The Research on Women and Pornography: The Many Faces of Harm," and Diana E. H. Russell and Karen Trocki, "Evidence of Harm" all in Russell.

For a thorough listing of sources on the empirical work done on pornography see MacKinnon, *Feminism Unmodified*, pp. 264–65 n. 9, p. 273 n. 59 and p. 295 nn. 116–18; Alisa Carse, "Pornography: An Uncivil Liberty?," *Hypatia* 10 (1995), p. 178 n. 31 and Langton, p. 306 n. 33. Some controversy exists around the claim that pornography is causally related to violence against women. For the purposes of this paper, I will assume that the claim is true. Nothing in my argument against the verbal act approach, however, depends upon this assumption.

22. For discussion of this distinction see Sunstein, *Democracy and the Problem of Free Speech*, pp. 11–14 and "Pornography and the First Amendment," pp. 609–10; Geoffrey R. Stone, "Restrictions on Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions," *The University of Chicago Law Review* 46 (1978): 81–115; Martin H. Reddish, "The Content Distinction in First Amendment Analysis," *Stanford Law Review* 34 (1981): 113–51 and Greenawalt, *Speech, Crime and the Uses of Language*, pp. 225–27 and *Fighting Words*, pp. 16–17.

23. Of course apparently viewpoint-neutral—indeed, apparently content-neutral—regulations can have a discriminatory impact. See Reddish, p. 131.

24. Sunstein, *Democracy and the Problem of Free Speech*, p. 13; Stone, p. 83; Reddish, p. 118.

25. Henceforth, the phrase "content distinction" shall refer to the three-part distinction among content-neutral, content-based but viewpoint-neutral, and viewpoint-based regulations.

26. *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973). For discussion of this case, see Reddish, pp. 115, 123, 125–30, 137 and 147.

27. The court appears to have overlooked the possibility of a content-based, viewpoint-neutral distinction in this case. Though the restriction allowed by the court in *Letter Carriers* is not viewpoint-based, it is not therefore, as the court seems to have supposed, content-neutral. See Reddish, pp. 125–26.

28. Greenawalt, *Fighting Words*, p. 16 and *Speech, Crime and the Uses of Language*, pp. 113–15. MacKinnon makes a similar point regarding utterances that discriminate. See *Only Words*, p. 14.

29. See *American Booksellers*. For an argument against the claim that the feminist anti-pornography ordinance is unconstitutional because it regulates on the basis of content or viewpoint, see Sunstein, "Pornography and the First Amendment," pp. 609–18. For an argument that the feminist anti-pornography ordinance *does* discriminate on the basis of viewpoint, see Geoffrey Stone, "Anti-pornography Legislation as Viewpoint Discrimination," *Harvard Journal of Law and Public Policy* 9 (1986): 461–80.

30. One might argue that these are not the messages conveyed by the materials alleged to express them. See Lisa Duggan, Nan Hunter and Carol Vance, "Feminist Anti-Pornography Legislation," in *Morality in Practice*, James P. Sterba, ed. (Belmont, CA: Wadsworth, 1991): 318–27.

31. This is precisely what a district court refused to do in *American Booksellers*. (The district court's decision was confirmed by the Seventh U.S. Circuit Court of Appeals and summarily affirmed by the U.S. Supreme Court.)

32. Again, I am avoiding here the issue of speaker intention. An obvious difference between encouragements to crime and pornography is that a speaker encouraging a crime *intends* for his utterance to cause an action. One could reasonably claim that pornographic utterances are not *intended* to produce actions, or at least not the kinds of actions (sexual harassment, for example) that feminists have claimed it produces. (See n. 14.)

33. According to *Crime in the United States: 1995 Uniform Crime Report*, there were 97,464 forcible rapes in 1995; 72 women per 100,000 were victims of forcible rape. Between 1987 and 1991, on average, each year, women experienced over 57,200 violent victimizations committed by an intimate (i.e., husband, ex-husband or boyfriend). Each of those years, approximately 5 out of every 1000 women was a victim of violence perpetrated by an intimate. 1,432 females were killed by intimates in 1992. In that same year, about one third of female murder victims over the age of 14 were killed by an intimate. ("Domestic Violence: Violence Between Intimates," Bureau of Justice Statistics, November 1994.) For a recent discussion of the incidence of rape, see Annette Fuentes, "Crime Rates are Down . . . But What About Rape?" *Ms.* 8/3 (Nov.–Dec. 1997), pp. 19–22.

34. See MacKinnon, *Only Words*, pp. 14 and 22–24.

35. Hence the list of six "scenarios" contained in the Indianapolis anti-pornography ordinance.

36. See MacKinnon, *Only Words*, pp. 23–25.

37. See Greenawalt, *Speech, Crime and the Uses of Language*, p. 69.

38. The task is all the more difficult in that it must be undertaken in a social environment that does not take sufficiently seriously violence and other harms perpetrated by men against women. MacKinnon's frustration with what I have called the paradox of viewpoint discrimination is palpable throughout chapter 1 of *Only Words*.

39. MacKinnon, "Francis Biddle's Sister," p. 176. See also Langton, p. 303.

40. An extended discussion of the utterance "White Only" as an illocutionary act and a discussion of pornography as an illocutionary act is found in Langton. See also, Stark, 284–89.

41. MacKinnon, *Only Words*, p. 13.

42. Langton, 307–8. See also Stark, 281–84.

43. It is also a function of the authority of the producers of pornography. See Langton, pp. 304–5 and 311–12.

44. And therefore would not be pornography on MacKinnon's definition.

45. Sunstein makes a similar point about the decision to validate certain viewpoint-based regulations (such as limitations on tobacco advertising) and to invalidate others (such as regulations upon pornography).

46. *Penthouse* has a circulation rate of 1,100,594; *Hustler* has a circulation rate of 1,335,000. (*Standard Periodical Directory*, 12th Edition [New York: Oxbridge Communications, Inc, 1997]).

47. Greenawalt, *Speech, Crime and the Uses of Language*, pp. 266–69.

48. *Ibid.*, p. 266. These are essentially the criteria of the Brandenburg test. For discussion of the Brandenburg test, see Staughton Lynd, "*Brandenburg v. Ohio*: A Speech Test for All Seasons?," *The University of Chicago Law Review* 43 (1975): 151–91. For an argument that pornography should be prohibited on the ground that it does not meet the conditions for protection set out by the Brandenburg test, see Linz, *et al.* in Malamuth and Donnerstein.

49. *Ibid.*, p. 111.

50. See Kent Greenawalt, "Free Speech Justifications," *Columbia Law Review* 89 (1989): 119–55.