

# LOOKING AT PORNOGRAPHY THROUGH HABERMASIAN LENSES: AFFIRMATIVE ACTION FOR SPEECH

CRAIG B. BLEIFER\*

Introduction .....	153
I. The Freedom of Communicative Action .....	158
A. Communicative Versus Strategic Action .....	158
B. Applying Communicative Action to Free Speech .....	160
C. Applying Solum’s Theory to Pornography .....	162
1. Causation: Manipulative Effects .....	163
2. Intent to Cause Manipulative Effects .....	166
3. Good and Bad Effects of Speech .....	167
II. The Freedom to Advocate .....	169
A. A Broader View of Habermas’s Project .....	169
B. Further Problems With the Freedom of Communicative Action .....	174
C. The Framework Reformulated: Freedom to Advocate ...	175
D. Protection for Aesthetic Forms .....	178
III. Deafening Speech? .....	185
A. The Dworkin/MacKinnon Perspective on Pornography ..	186
B. Distinguishing Communicative Action from Strategic Action and Deafening Speech .....	188
C. Problems with the Silencing Effect and Causation .....	190
D. Reconciling Substantive and Procedural Justice: Affirmative Access to Speech.....	191
E. Comparing Affirmative Action for Speech to Kantian Theories of the Marketplace of Speech .....	194
F. Implementing Affirmative Action for Speech .....	197
Conclusion: Is Counterspeech Possible? .....	199

## INTRODUCTION

What raises us out of nature is the only thing whose nature we can know: *language*. Through its structure, autonomy and responsibility are posited for us.<sup>1</sup>

The freedom of speech can be viewed as either an inherent personal

---

\* B.A., 1988, Vassar College; J.D., 1992, New York University School of Law.

1. JÜRGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 314 (Jeremy J. Shapiro trans., 1971) [hereinafter, HABERMAS, KNOWLEDGE AND HUMAN INTERESTS] (quoting from Habermas’s 1965 inaugural lecture at Frankfurt University).

right that government should protect or as a means to improving government and existence. Once the question of free speech becomes "how free?" we draw lines according to logic, morality, politics, or intuition. This Article asks whether a free society should draw those lines to prohibit pornography.

This Article examines the freedom of speech through the lens of Jürgen Habermas's philosophy. Habermas's writings encompass philosophy, sociology, psychology, linguistics, and politics, and he is viewed as a major figure in the resurgence of German philosophy since the Second World War.<sup>2</sup>

His work makes a good foundation for a theory of free speech because he has written extensively about speech and its relation to the conditions under which freedom is possible. Habermas is not a free speech theorist in the usual sense; he is concerned with freedom *and* speech. He argues that undistorted communication is necessary if societies are to become more free.

Pornography immediately tests his argument. Is pornography speech or action? Can it be said to cause actions that harm others? Do speech acts themselves constitute a harm, and is it justifiable to regulate speech acts that harm others? Is the harm aggravated by the speaker's relative position of power or the speaker's (or victim's) gender, race, social class, or politics? Pornography tests not only the limits of speech but also the limits of art: Can speech be labeled artistic? Who should decide? Does artistic speech deserve special protection? Does the sincerity, motivation, or goal of the pornographic speaker matter?

For these reasons, pornography is one of the best test cases for a freedom-of-speech theory. Pornography directly exposes conflicts in the theory. For example, political speakers' sincerity or motivation is considered irrelevant when asking whether government should permit speech on the steps of city hall; we focus only on equal access and public safety, and ignore the speakers' motives, even if unsavory. Arguably, public safety is also relevant to pornography,<sup>3</sup> as is equal access.<sup>4</sup> But when confronted with pornography, we also ask, "Does the pornographer really think this is art or is the pornographer just out to make money?"

Why are sincerity and motivation relevant to pornography but not to politics? Habermas would consider motivation to be relevant in both cases. For this reason, I have found Habermas to be useful in building a theory of free speech.

Part I explores Habermas's semantic analysis of individual speech acts,

---

2. THOMAS A. MCCARTHY, *THE CRITICAL THEORY OF JÜRGEN HABERMAS* ix (1978).

3. It has been charged that pornography harms its audience. See *infra* notes 51-53 and accompanying text.

4. It has been charged that pornography in a male-dominated media structure silences women's voices. See *infra* notes 205-207 and accompanying text.

asking whether particular speech acts are communicative (roughly equivalent to persuasive) or strategic (roughly equivalent to coercive).<sup>5</sup> In order to determine whether speech is persuasive or coercive, we must examine (1) the potential for speech to affect its audience; (2) whether that effect is bad; and (3) the speaker's intent with regard to that harm. A purely semantic application of Habermasian concepts fails to adequately support a workable theory of free speech, however, due to practical problems of proof, and because the analysis is vulnerable to personal bias.

Part II suggests that the shortcomings of this semantic application stem from a failure to acknowledge the larger body of Habermas's writings. The concepts of communicative and strategic speech are useful tools for textual analysis, but Habermas intends them to be applied as a paradigm for decision making structures in society. I extend Habermas's framework to develop a second conception of speech: the *freedom to advocate*, including the freedom to persuade by using counterspeech. This new theory encompasses and protects both the verbal and the purely aesthetic elements of a work in response to a legal trend to discount aesthetic elements when determining legal obscenity.<sup>6</sup>

In part III, a fully developed freedom-to-advocate theory, as well as the basic concepts of communicative and strategic speech, are used to examine the arguments of Catharine MacKinnon and Andrea Dworkin.<sup>7</sup> They argue that pornography should be regulated or prohibited because it silences the free speech of women. I will argue that their conception of pornography's silencing effect arises from a conflation of speech and action.

Dworkin and MacKinnon reject the speech/action distinction because they are skeptical of human rationality. The Dworkin/MacKinnon concept of justice (which includes substantive freedoms) may, however, be ultimately compatible with a Habermasian view of the world (which places faith in the right procedures to get the right answers) if affirmative action is applied to speech. I will attempt to reconcile Dworkin's and MacKinnon's concern for *access* to speech opportunities with Habermas's conception of an ideal speech situation.<sup>8</sup> I contrast this affirmative action conception of

---

5. See JÜRGEN HABERMAS, *Social Action and Rationality*, in JÜRGEN HABERMAS ON SOCIETY AND POLITICS: A READER 142 (Steven Seidman ed., 1989) [hereinafter HABERMAS, *Social Action*]; 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION (REASON AND THE RATIONALIZATION OF SOCIETY)* 305-10. (Thomas A. McCarthy trans., 1984) [hereinafter HABERMAS, 1 COMMUNICATIVE ACTION].

6. See *infra* notes 118-19, 121-24 and accompanying text.

7. See ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1989); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*]; CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter MACKINNON, *TOWARD A FEMINIST THEORY*].

8. The "ideal speech situation" is a concept which I will discuss in detail below. See *infra* notes 89-92 and accompanying text. Essentially, the ideal speech situation requires

speech, which is grounded in the idea that speech is a means for seeking social good, with liberal Kantian theories of the speech marketplace, which view speech as an end in itself.

Finally, part IV examines the possibility of effective counterspeech to pornography, and concludes that pornography's social effects can be remedied by giving access to alternative voices.

Disputes over the regulation of pornography are often predetermined by the definition of pornography. To avoid these, I will define pornography to include most sexually explicit material. I intend this formulation to be more inclusive than the legal term "obscenity." Pornography usually refers to extremely explicit sexual material, or to a violent or degrading form of this, but is often used to include more innocuous material.

I use the broadest possible formulation for several reasons. First, much of the legal effort to ban pornography reaches over the broad scope of most sexually explicit material.<sup>9</sup> Second, the message of sexually violent material has more in common with tamer material like the *Sports Illustrated* swimsuit edition than is immediately apparent. The distinction between degrading and violent material, and so-called soft-core porn has been criticized as trivializing the violence in all pornography: "If there is no inequality, no violation, no dominance, no force, there is no sexual arousal."<sup>10</sup> Finally, while I think that the speech theory articulated below can be applied to any conception of pornography, a broad definition is the most appropriate for this analysis because broadly drawn legal boundaries tend to define pornography and its prohibitions. Adopting a narrow definition at the outset would be unrealistic and, perhaps, circular.

It is also appropriate at the outset to note that while I will draw some comparisons between the theory developed in this Article and current

---

discussion which is unlimited and free from distorting influences. See McCARTHY, *supra* note 2, at 306 (describing Habermas's "ideal speech situation").

9. One example is the definition of pornography in an ordinance drafted by Catharine MacKinnon and Andrea Dworkin:

'Pornography is the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures of sexual submission, servility or display; or (vi) women's body parts—including but not limited to vaginas, breasts, and buttocks—are exhibited, such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.' Pornography also includes 'the use of men, children, or transsexuals in the place of women.'

MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 262 n.1 (quoting legal definition).

10. *Id.* at 160. For a contrary feminist view that not all pornography contains messages involving violence, see *infra* notes 172, 240 and accompanying text.

Supreme Court obscenity doctrine,<sup>11</sup> this Article does not attempt to show the inconsistencies or tensions within current obscenity doctrine;<sup>12</sup> to propose that the doctrine has been applied improperly in cases of popular musical expression,<sup>13</sup> or to argue that the doctrine fails to take account of contemporary concepts of art.<sup>14</sup> Nor does this Article offer a theory of free speech that depends on a particular interpretation of this nation's history, the text of the U.S. Constitution, or Supreme Court precedents.<sup>15</sup> The concepts offered in this Article delineate what free speech theory *should* be in a free society, and presuppose a conception of how a free society might operate. Current obscenity law and free speech doctrine do not yet provide for a freedom to advocate and so they cannot guide us.

Our legal traditions are too constraining to allow a Habermasian analysis of free speech. To appreciate Habermas's insight, we must discuss what speech itself is and what constitutes a free society. An informed discussion must encompass political, moral, and philosophical considerations

---

11. The three-part test for obscenity is "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct . . . ; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973) (citation omitted). This test rejected the earlier "utterly without redeeming social value" test as set forth in *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966). In *Pope v. Illinois*, 481 U.S. 497 (1987), the Court made clear that the standard for serious value was not what an "ordinary member of any given community" would say, but "whether a *reasonable* person would find such value. . . ." *Id.* at 500-01 (emphasis added). Serious value is measured not against community standards but against an objective standard.

12. Kathleen Sullivan has argued that the need for judges to avoid the embarrassing analysis of whether they are aroused by patently offensive materials has produced the "community standards" test of *Miller*, which

subdivide[s] the community rather than the individual psyche, and find[s] the work sexually arousing to one subcommunity while patently offensive to others . . . . This is the escape hatch used by the Supreme Court to permit suppression of homoerotic, sadomasochistic, or other "deviant" pornography—deem it someone else's turn-on, but offensive to the community at large. And this may be the truest account of what is really going on in the 2 Live Crew case: the dominant culture is reining in a black male youth subculture whose portrait of its own sexuality offends those outside it.

Kathleen M. Sullivan, *2 Live Crew and the Cultural Contradictions of Miller*, in 1991 FIRST AMENDMENT HANDBOOK 589, 590 (James L. Swanson ed., 1991).

13. See Anne L. Clark, "As Nasty As They Wanna Be": *Popular Music On Trial*, 65 N.Y.U. L. REV. 1481, 1515-20 (1990) (footnote omitted). "[A]ll music targeted thus far, including the very explicit lyrics of 2 Live Crew, is protected speech under prevailing standards." *Id.* at 1483.

14. One such argument is that post-modern art "rebels against the demand that a work of art be serious, or that it have any traditional 'value' at all. *Miller*, then, evaluates contemporary art by the very standard which that art seeks to defy." Amy M. Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1359 (1990).

15. Compare David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991) (arguing for a free speech theory, based in part on Habermasian concepts, that justifies the Supreme Court's First Amendment jurisprudence). See *infra* notes 210, 218-21 and accompanying text.

of a sort not typically addressed by legislators or judges. Habermas's philosophy questions the way our society is constructed. From that inquiry we may consider how free our speech should be.

## I.

### THE FREEDOM OF COMMUNICATIVE ACTION

#### A. *Communicative Versus Strategic Action*

Jürgen Habermas has described two ways in which people relate to one another: "communicative action" and "strategic action."<sup>16</sup> Generally, strategic action uses speech to achieve a goal. The speaker acts purposefully to manipulate the listener into accepting the speaker's goals or desires.<sup>17</sup> By contrast, a speaker conducting communicative action seeks to achieve understanding through rational consensus with the listener.<sup>18</sup> In communicative action, "participants are not primarily oriented to their own individual successes; they pursue their individual goals under the condition that they can harmonize their plans of action on the basis of common situation definitions."<sup>19</sup>

Habermas defines these two types of speech in terms of their reliance on either illocutionary (communicative) or perlocutionary (manipulative) statements.<sup>20</sup> Illocutionary statements allow a hearer to rationally comprehend and accept or reject the validity of the statement.<sup>21</sup> According to Habermas, illocutionary, or communicative, aims are largely self-identifying:

By means of an illocutionary act a speaker lets a hearer know that he wants what he says to be understood as a greeting, command, warning, explanation, and so forth. His communicative intent does not go beyond wanting the hearer to understand the manifest content of the speech act.<sup>22</sup>

By contrast, the effects of manipulative statements on the hearer are not completely the product of the hearer's free will. "These effects ensue,"

16. Habermas, *Social Action*, *supra* note 5, at 156-64. Habermas emphasizes that "the communicative model of action does not equate action with communication. Language is a medium of communication that serves understanding, whereas actors, in coming to an understanding with one another so as to coordinate their actions, pursue their particular aims." *Id.* at 155.

17. *Id.* at 156-57.

18. *Id.* at 157-58.

19. *Id.* at 157.

20. *Id.* at 159-64. Habermas elaborates on J.L. Austin's distinction between locutionary, illocutionary, and perlocutionary speech acts. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 101 (J.O. Urmson & Marina Sabisà eds., 2d ed. 1975) (defining locutionary speech acts as those that express meaning, illocutionary speech acts as those having force (e.g., ordering), and perlocutionary speech acts as attempts to bring about or achieve something through speech (e.g., convincing)).

21. Habermas, *Social Action*, *supra* note 5, at 159-60.

22. *Id.* at 160.

according to Habermas, "whenever a speaker acts with an orientation to success and thereby instrumentalizes speech acts for purposes that are only contingently related to the meaning of what is said."<sup>23</sup> In other words, one achieves manipulative goals by intentionally using communicative acts to bring about a reaction in the hearer. This manipulation occurs by stimulating feelings or actions, rather than reasoned understanding,<sup>24</sup> in order to frighten, upset, annoy, plunge into doubt, mislead, offend, infuriate, or humiliate.<sup>25</sup>

While the nature of communicative speech is self-evident, discerning the nature of manipulative speech requires knowing the speaker's true intentions.<sup>26</sup> However, in order to manipulate, the speaker must conceal her intentions.<sup>27</sup> Although *all* communicative speech can produce unforeseen consequences in the audience,<sup>28</sup> manipulative speech assumes the character of concealed strategic action because the speaker is "acting strategically while he deceives other participants regarding the fact that he is *not* satisfying the presuppositions" of truth and validity that normally accompany communicative aims.<sup>29</sup>

Accordingly, strategic action is interest-based or goal-specific communication which uses the manipulative effects of speech in order to influence the decisions of other actors in the speaker's favor.<sup>30</sup> Problems and conflicts are solved by a "balance of interests according to factual power positions" rather than agreement or consensus.<sup>31</sup> Strategic action is thus

23. *Id.*

24. This claim of the priority of communicative speech plays a central role in Habermas's broader theory, which is discussed *infra* at Part II. A. This claim is controversial. Communication may be intertwined with purpose: communicative acts are often designed to bring about results rather than understanding. If this is true, then communicative speech did not arise before manipulative speech, but stands on an equal plane with it, and perhaps Habermas has merely "wished" that manipulative speech is derivative. DAVID M. RASMUSSEN, *READING HABERMAS* 39-40 (1990). To his credit, Habermas recognizes that actual speech acts combine communicative and manipulative aims. *See infra* note 28.

25. Habermas, *Social Action*, *supra* note 5, at 162. Note the negative connotation of Habermas's examples. However, Habermas makes no explicit distinction between these negative aims of manipulative speech and its other arguably good uses. The negative examples do illustrate Habermas's point that strategic action, which is based on manipulative speech, may be abusive when it is used in the realm of discourse, and leads to victories by power rather than by the force of a better argument.

26. *Id.* at 160.

27. As Habermas explains, a speaker who wants to be successful in a strategic sense "may not let his perlocutionary aims be known, whereas illocutionary aims can be achieved only through being expressed. Illocutions are expressed openly; perlocutions may not be 'admitted' as such." *Id.* at 162.

28. Habermas concedes that concrete instances of communication are impure in this respect. HABERMAS, 1 COMMUNICATIVE ACTION, *supra* note 5, at 289; *see also* DAVID INGRAM, *HABERMAS AND THE DIALECTIC OF REASON* 40 n.36 (1987) (concluding that Habermas concedes that actual instances of speech are impure, combining many different aspects).

29. Habermas, *Social Action*, *supra* note 5, at 163.

30. *Id.* at 164.

31. Jürgen Habermas, *Towards a Communication-Concept of Rational Collective Will-*

successful only if the speaker's goals are actually met.

By comparison, communicative action seeks to offer the speaker's views to another, who is then free to accept or reject those views on rational grounds.<sup>32</sup> Habermas writes that the "concept of communicative action presupposes language as the medium for a kind of reaching understanding, in the course of which participants, through relating to a world, reciprocally raise validity claims that can be accepted or contested."<sup>33</sup> Communicative action permits a contest of values, in hopes of reaching an agreement or value consensus. Communicative actors solve problems by appealing to shared rational values,<sup>34</sup> not by short-circuiting this process through manipulation.

Accordingly, communicative action presupposes a shared system (e.g., of grammar) and a shared definition of the situation within which agreement can be reached. "[N]o participant has a monopoly on [the] correct interpretation" of that situation, and all participants may interpret and expand it to include their interests.<sup>35</sup> However, to achieve understanding and coordinate action, the participants must agree on what constitutes a valid point of view.<sup>36</sup> According to Habermas, every speech act makes claims to factual truth, normative rightness, and honesty or sincerity (which means that the speaker actually believes what she is saying), and such claims are open to debate, appraisal, and critique by other participants.<sup>37</sup>

### B. *Applying Communicative Action to Free Speech*

Professor Lawrence Solum has used Habermas's distinction between communicative and strategic action to create a theory of freedom of communicative action which excludes strategic action from First Amendment protection.<sup>38</sup> Solum's theory applies Habermas's semantic analysis to determine whether particular speech is communicative or strategic in nature.

Under Solum's framework, the First Amendment freedom of speech "should be and is best understood as the freedom to engage in communicative action, and . . . [the] freedom of speech does not encompass the freedom to engage in strategic action."<sup>39</sup> For example, the state is justified in

---

*Formation. A Thought-Experiment*, 2 *RATIO JURIS* 144, 146 (1989) [hereinafter Habermas, *Will-Formation*].

32. Justice Oliver Wendell Holmes seems to have made a similar distinction: "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it . . . the only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result." *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (dissenting opinion).

33. Habermas, *Social Action*, *supra* note 5, at 153.

34. Habermas, *Will-Formation*, *supra* note 31, at 146.

35. Habermas, *Social Action*, *supra* note 5, at 154-55.

36. *Id.* at 153.

37. *Id.* at 154.

38. Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 *N.W. U. L. REV.* 54, 107-08 (1989).

39. *Id.* at 106.



prohibiting people from falsely shouting "fire" in a crowded theatre because this is a strategic use of the manipulative effect of speech to cause a panic. Arguably, the speaker is not attempting to create an understanding about any useful information.<sup>40</sup> Solum's theory would allow the state to regulate sincere speech acts which have unintended perlocutionary effects, including even true shouts of "fire."<sup>41</sup> He applies this theory to subversive speech<sup>42</sup> and labor picketing,<sup>43</sup> arguing that the semantic application of communicative and strategic action offers the best reason to exclude from protection expressions "that [are] undoubtedly speech, but which surely should not be protected."<sup>44</sup>

Solum's application of Habermas's concepts to free speech issues is useful, but it fails to make a necessary distinction between different types of strategic action. A more effective theory would address the speaker's purposes for deploying strategic action in order to protect true shouts of "fire." I therefore modify Solum's inquiry to focus on whether the purpose of the strategic speech is good or bad, even though Habermas does not distinguish between good and bad purposes. We must consider good and bad purposes because restrictions based on the strict strategic/communicative division will be overbroad. A test that forbids all strategic speech prohibits valuable speech and is therefore overinclusive.

For example, there is a positive value in shouting "fire" in a building which is actually burning, even though done intentionally to get everyone to rush out.<sup>45</sup> Although the exclamation is true factually and is sincerely believed to be so by the speaker, the manner in which the speech is delivered is strategic because the speaker's goal is to get her audience to react in a particular way.

Despite Solum's claim that this speech could be regulated successfully,<sup>46</sup> we would not want regulations that discouraged such speech. It would not be reasonable for this speaker to attempt to calmly communicate to each individual the progress of the fire and deliberate over the merits of exiting, in order to make sure that those who might prefer to be burned

40. *Id.* at 107.

41. *Id.* at 107 n.204.

42. "The right to engage in communicative action does not encompass a general right to prepare communicatively for the use of force or deception. . . . When communicative action by revolutionaries is likely to lead to harmful strategic action which cannot be prevented by other means, then government is justified in controlling revolutionary speech." *Id.* at 120-23.

43. Solum argues that "[a] labor picket that is designed to bring economic pressure to bear on the employer is a form of strategic action," but "informational picketing" about the "rightness of current social arrangements" would be protected by the First Amendment. *Id.* at 124-25.

44. *Id.* at 107.

45. Solum seems to recognize this point, see Solum, *supra* note 38, at 107, but nevertheless contends that even such well-intended strategic acts could be regulated consistently with his free speech theory. *Id.* at 107 n.204.

46. See *supra* notes 38-44 and accompanying text.

alive were not improperly swayed by the persuasive form of the exclamation "fire!" This good use of strategic action is justified because the speaker assumes that there is broad social consensus about the desirability of quickly exiting burning buildings. Such situations rightly call for strategic action, not reasoned debate. To the extent Solum's approach would permit regulation or prohibition of such expressions, it provides an inadequate reading of Habermas and a flawed protection for freedom of speech.

However, simply making an exception for good uses of strategic action does not help us to determine which uses are good. Shouting "fire" in a burning theatre is certainly a good use for the same reason we think that subliminal messages urging suicide are bad uses: there seems to be a general consensus about the value of life, a value which is protected by the former and endangered by the latter use of strategic action. However, there are muddier lines between the good and bad effects of pornography. For such expressions, even my modified test provides no nuanced and sophisticated defense.

### C. *Applying Solum's Theory to Pornography*

The lyrics of the rap group 2 Live Crew,<sup>47</sup> whose members were prosecuted in Florida in 1990 on obscenity charges,<sup>48</sup> exposes some troublesome flaws in the modified Solum system. The lyrics arguably have a communicative component and make certain validity claims in the singers' speech. For example, they imply that the singer is accurately describing one way

---

47. The complete lyrics to *Put Her In The Buck*, which represent the content of most 2 Live Crew songs from the album, are as follows:

There's only one way to have a good time - fuck that pussy and make it mine  
Lay the bitch on the bed flat on her back, hold her legs up high, make the pussy splack

You can put her in the buck by sittin' on the sink, wrap her legs around you,  
now take this dick, dick, dick, dick

Now PUT HER IN THE BUCK!

It's a position in sex that's done by the masses - it ain't the "sixty-nine" or  
what you learn in class

It increases the intensity of a fuck - legs up high known as the buck

It's the only way to give her more than she wants, like the doggie style to get  
all the cunt.

'Cause all men try real hard to do it, to have her walk in front and we try to  
abuse it.

A big stinker pussy can't do it all, so we try real hard just to bust the walls.

PUT HER IN THE BUCK!

I'll break you down and dick you long, bust your pussy and break your  
backbone

I'll go between them legs that's open wide - pushin' this dick from side to side

Legs to the ceiling, now I'm feelin' the feeling, when I bust a nut your ass will  
be screaming. PUT HER IN THE BUCK! (*sounds of sex and orgasm to music*)

2 LIVE CREW, *AS NASTY AS THEY WANNA BE* (Luke Records, formerly Skywalker Records, 1989).

48. See Clark, *supra* note 13, at 1499-1504 (describing in detail the history of the arrests and prosecutions of the members of 2 Live Crew and retailers who sold their albums).

that people have sexual relations ("It's a position in sex that's done by the masses"); that the singer enjoys the reduction of the female body to a sex object which can be dominated and possessed ("fuck that pussy and make it mine"); that such behavior is preferable to treating a woman with equality or respect and is an appropriate way to think about women ("There's only one way to have fun;" "all men try real hard to do it"); and that the singer means what he is saying.

Whether these lyrics are also strategic, and therefore subject to regulation or prohibition, will depend on a more complicated analysis. To determine whether pornography would be protected by the modified version of Solum's theory, one must ask three questions:

- (1) Does the material cause any manipulative effects?
- (2) Does the musician or artist intend such effects?
- (3) Are those intended effects bad?

Under the modified semantic analysis, an affirmative answer to each question means the speech is strategic action subject to regulation or prohibition. When applied to the hard case of pornography, however, this semantic approach proves vulnerable to uncertainties of proof and to the judge's bias. Consequently, too many legitimate representations may be left unprotected. The next three subsections will illustrate the problems with each stage of this three-part analysis when applied to pornography.

### 1. *Causation: Manipulative Effects*

Under step (1) of the modified semantic test, one must determine whether the pornographic material sexually arouses the audience,<sup>49</sup> as opposed to causing other manipulative effects such as disgust, anger, or laughter. The first problem is that the test allows a judge to be very subjective; she will only examine the causation (step one) of effects that she already thinks are bad (step three), such as sexual arousal (rather than laughter, for example). A second problem is one of degree: how much sexual arousal is required to justify regulation of the speech? Is awakening sexual ideas or physical desires in the listener enough? I will assume here that step one requires that the material *cause* either involuntary sexual arousal in the listener,<sup>50</sup> or (as some studies have alleged) an increased urge to rape or sexually abuse others.

Even this formulation presents problems for analyzing actual speech

---

49. This is not inconsistent with current obscenity doctrine. One of 2 Live Crew's expert witnesses testified at trial that "material is art if it causes a reaction in the audience perceiving it." The court argued that "[i]f that reaction is an appeal to the prurient interest . . . the law does not call that art—it calls it obscenity . . ." *Skyywalker Records v. Navarro*, 739 F. Supp. 578, 596 (S.D. Fla. 1990), *rev'd*, 960 F.2d 134 (11th Cir. 1992).

50. Part of 2 Live Crew's defense to obscenity charges was expert testimony to the effect that their album "did not actually physically excite anyone who heard it," but the court was more interested in the fact that the album "*appeals* to a shameful and morbid interest in sex." *Id.* at 592 (emphasis added).

acts. Experts dispute whether sexually oriented material causes an increase in rape or aggression.<sup>51</sup> Studies claiming that such material does so have been criticized on several grounds including the bias of volunteer sample populations and researchers, the methods used to measure arousal or aggression, unrepresentative laboratory settings, and the length of exposure and lag time between exposure and the measurement of aggression.<sup>52</sup> Several studies indicate depictions of violence against women, present in slasher movies as well as pornography, and not depictions of nudity or sexual activity *per se*, cause men to adopt negative attitudes towards women or make them more likely to rape.<sup>53</sup> In any case, it seems that the effects of

---

51. Compare SUBCOMM. ON POSTAL OPERATIONS OF THE COMM. ON POST OFFICE AND CIVIL SERV., THE REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY, S. DOC. No. 91-33, 91st Cong., 2d Sess. 107 (1970) (finding no causal relationship between sexual aggression and exposure to erotic material) with ATT'Y GEN. COMM'N ON PORNOGRAPHY, FINAL REP. VOL. 1, 1005 (1986): (finding a causal relationship between sexual aggression and exposure to erotic materials).

52. See, e.g., FRANKLIN M. OSANKA & SARAH LEE JOHANN, SOURCEBOOK ON PORNOGRAPHY 130-241 (1989) (providing a detailed description, analysis, and criticism of the most important studies in this field). For example, subjects rate material as more pornographic when they are hooked up to devices that measure arousal. *Id.* at 134. Females who are willing to volunteer for pornography studies "masturbated more frequently, were initially exposed to commercialized erotica at an earlier age, . . . and read more erotic literature than nonvolunteers." *Id.* at 138. Male volunteers "were more sexually experienced, reported greater difficulties with erection or ejaculation, were more sexually curious, . . . had been exposed to more 'erotica' and objected less to it, and had significantly higher masculinity scores than male nonvolunteers." *Id.* at 139. Many studies' failure to identify or adequately describe exactly what pornographic material is being shown to the subjects further frustrates independent analysis of the validity of the studies' findings. *Id.* at 140.

53. See, e.g., Daniel Linz & Edward Donnerstein, *The Effects of Counter-Information on the Acceptance of Rape Myths*, in PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS 259 (Dolf Zillmann & Jennings Bryant eds., 1989) (surveying experiments by various researchers). One study demonstrated that men who viewed large quantities of non-pornographic movies containing graphic depictions of violence against women were more likely to view a rape victim in a mock trial as "less injured and . . . less worthy" than those who did not view those films. *Id.* at 263. In a similar experiment involving female subjects, women who were exposed to non-pornographic violent movies were less likely to convict the defendant at a mock rape trial. *Id.* at 267. Another experiment demonstrated that subjects exposed to slasher movies had a greater "rape myth acceptance" and were more likely to find an accused rapist not guilty in a mock trial than those subjects exposed to a non-violent X-rated film that depicted sexual intercourse. *Id.* at 273. In one experiment where subjects viewed a pornographic film of a rape with a "realistic outcome" (i.e., the woman does *not* enjoy it), only those subjects who were angered as a testing condition displayed increased aggressive behavior against women. *Id.* at 262.

The violence/rape correlation has been questioned, because at least one study has shown that non-violent pornography depicting consensual sexual relations causes approximately the same impressions of women and rapists as does pornography depicting male-coerced sex. The study also indicates that sexual callousness actually increases when a woman is depicted as wanting sexual activity. Dolf Zillman & James B. Weaver, *Pornography and Men's Sexual Callousness Toward Women*, in PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS, *supra* this note at 95, 119-20. I am skeptical about the results of this study and the biases of the researchers, since female-instigated sexual activity was represented by a movie of a nymphomaniac. Zillman and Weaver claim that "[i]t is the

pornography on its audience may be reversible.<sup>54</sup>

The question of whether sexual stimulation can ever be truly involuntary is also an open matter.<sup>55</sup> It is clear that the same images and ideas are not sexually stimulating to everyone.<sup>56</sup> It can be plausibly argued that the person perceiving the communication (whether it is a painting, photograph, song, or lyric) must in a certain sense assent to and agree with the message being conveyed in order to become stimulated. Stimulation arises from a combination of the stimulus, the culture, gender preferences, and the individual tastes and desires of the observer.

Andrea Dworkin has argued that it is the supposed involuntariness of arousal that enables men to blame women for arousing them, while in fact it is men who place women in pornography and in the role of a sexual object: "He forces her to become that thing that causes erection, then holds himself helpless and powerless when he is aroused by her."<sup>57</sup> She also argues that male arousal is not caused by the sight or thought of a woman *herself*, but by the objectification of that image (or particular body parts), and the "intense sense of estrangement" he feels from the person of that object.<sup>58</sup> She suggests that it is not the pornographic materials, but the beholder's culturally influenced way of thinking about women, that excites.

If arousal is involuntary, then a theory of free speech should allow

---

powerful effect of exposure to nymphomania in the condition of female-instigated sex, however, that is most damaging to the claim that all is due to violence. This condition is characterized by the total absence of coercive or violent action." *Id.* at 120. Additionally, in a seemingly contradictory finding, it was found that males who viewed "eroticized violence" (represented by a film of a naked woman who offers herself sexually to a man who then executes her) were more likely to trivialize rape in a mock trial than those who viewed a pornographic film of male-coerced sex, which had no reliable effect, although the male-coerced sex film did inspire female viewers to trivialize rape. *Id.* at 119.

54. See *infra* note 241 and accompanying text for discussion of the effect of counter-speech on viewers of pornography.

55. Psychologists continue to debate whether perception of a stimulus, or physical reaction to the stimulus, occurs first. See, e.g., CAMILLE B. WORTMAN & ELIZABETH F. LOFTUS, *PSYCHOLOGY* 309-23 (1981) (comparing the James-Lange, Cannon-Bard, and Schachter's theories of emotion). The results of an experiment done by S. Valins, *Cognitive Effects of False Heart-Rate Feedback*, 4 *J. PERSONALITY & SOC. PSYCH.* 400 (1966), are especially relevant to the obscenity question. Male subjects were shown pictures of naked women from Playboy magazine and asked to rate each woman's beauty while they supposedly listened to their own heartbeat (they actually heard someone else's prerecorded varying heartbeat). The subjects rated most beautiful those women whose picture happened to be shown during an artificial change in heartbeat. This suggests that the *belief* that one is aroused is important in actually experiencing arousal.

56. The content of pornography ranges widely, from the soft-core verbal depictions or photographic pictures of partially or completely naked people alone or engaged in consensual sexual activity, as can be found in a typical issue of Playboy, to more hard-core or degrading forms. See, e.g., ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 51, at 75 ("[W]omen whose genitalia have been shaved to make them look like little girls, and men giving enemas or whippings to one another, . . . women having intercourse or performing oral sex with . . . pigs, dogs, donkeys, and horses.").

57. DWORKIN, *supra* note 7, at 22.

58. *Id.* at 120-22.

regulation of sexually oriented material in order to prevent its unwanted intrusion into citizens' lives.<sup>59</sup> The theory should allow private consumption of sexually oriented materials by those who desire such stimulation.<sup>60</sup> Regulations might include labeling<sup>61</sup> to warn the audience about the material and to avoid surprise. But the Habermasian semantic analysis may not permit such fine distinctions. Once speech produces manipulative or coercive effects, it is subject to regulation under the Solum thesis. Even inquiring about intention, and good or bad effects, may not save the semantic approach from undesirable overbreadth.

## 2. *Intent to Cause Manipulative Effects*

If a work causes manipulative effects, step two requires the examination of the artist's intent.<sup>62</sup> Because even communicative action may have unintended manipulative effects,<sup>63</sup> we must distinguish between three categories of intention:

- (a) speakers who intended from the outset to create a manipulative effect;
- (b) speakers who did not necessarily intend but could have foreseen manipulative effects; and
- (c) speakers who did not intend or foresee manipulative effects.

Category (a) is clearly strategic action, but it seems unlikely that direct evidence of intent will be available. Category (c) is clearly communicative action, and therefore would not be subject to regulation, even if the unintended effects are bad ones that society wants to control. The modified freedom of communicative action theory, then, asks whether it is fair to

59. *But see* RONALD DWORKIN, *Do We Have A Right to Pornography?*, in *A MATTER OF PRINCIPLE*, 335, 342-44 (1985), (arguing that the public nature of a performance of sexually oriented material or live sex acts might be an essential part of the artist's message).

60. Under current law, private possession of obscene materials is constitutionally protected. *Stanley v. Georgia*, 394 U.S. 557 (1969). However there is no right to distribute obscene materials to private persons. *United States v. Reidel*, 402 U.S. 351 (1971). Nevertheless, a man was arrested in North Carolina for playing a 2 Live Crew album in his house. *Rockbeat*, *VILLAGE VOICE*, Sept. 18, 1990, at 101 (citing *The Censorship Zone*, *ROCK & ROLL CONFIDENTIAL*, Sept. 1990, at 7).

61. For a description and history of the record industry's self-imposed record labeling scheme currently in place, see Clark, *supra* note 13, at 1484-95.

62. Current obscenity doctrine does not require a finding of intent to pander to the prurient interest. It need not be shown that the person producing the sexually oriented material knew that the material was legally obscene, but only that the person knew the nature of its contents. *Hamling v. United States*, 418 U.S. 87, 123 (1974). An alternative approach would look at the intent of the *distributors* of pornographic expression rather than the individual artist. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 253-64 (1990) (Scalia, J., dissenting) (focusing entirely on the method by which the material is marketed). *But see id.* at 238 n.1 (Brennan, J., concurring) (explaining that distributor's intent is presently only one component of the obscenity determination). This approach would take the courts out of the business of aesthetics and protect individual works of art, although it would leave communities free to severely restrict wide distribution of currently protected soft-core pornography.

63. *See supra* note 28 and accompanying text.

regulate a speaker's communication, given her intent, instead of concentrating solely on protecting listeners from the effects of speech.

A practical application of category (b) presents several problems. First, would liability result only if the material's effects were foreseeable from the outset? Or would liability attach to speakers who did not originally intend or foresee manipulative effects, but who later learned of the effects through scientific study or court findings? This problem is especially acute for artists and musicians who produce their materials rapidly in mass quantities. The uncertainty is similar to the chilling effect of the vague obscenity laws now in place: an artist often does not know whether her work is obscene until a court has found her guilty of violating the obscenity laws.<sup>64</sup> A process to evaluate the possible manipulative effects of art before its distribution reduces the risk of liability, but pre-approval would be the kind of prior restraint abhorred under our present constitutional framework.<sup>65</sup> There is also the problem of determining foreseeability. Aside from showing that the speaker had scientific proof of her speech's effects, it is unclear how she can be charged with foreseeing them.

### 3. *Good and Bad Effects of Speech*

The third step in Solum's modified test, determining whether the intended manipulative effects of speech are bad, would be vulnerable to both bias and uncertainties of proof.

A speaker may intend various effects. For instance, the musical speech of 2 Live Crew may be used either to convey an idea musically or to make the listener dance. A speaker also might use pornographic speech to stimulate the audience rather than to communicate any intelligible message.<sup>66</sup> 2 Live Crew has been accused of intending its lyrics and music to cause lewd dance movements and imitate sexual activity in the audience.<sup>67</sup>

Music can be used not only to convey musical ideas or stimulate dancing, but also to make money. For example, catchy melodies may sell commercial products, and patriotic anthems may encourage feelings of allegiance to one's country. In the case of the 2 Live Crew lyrics, for instance, allegedly pornographic speech might be used for commercial gain. The writer knows that such lyrics will generate controversy and therefore

---

64. See, e.g., *Pope v. Illinois*, 481 U.S. 497, 517 (1987) (Stevens, J., dissenting) (asserting that vague and uncertain laws fail to inform citizens of what is prohibited).

65. See, e.g., *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) (striking down motion picture censorship statute); *Lovell v. Griffin*, 303 U.S. 444, 450-51 (1938) (invalidating city ordinance that required city manager's permission to pass out literature); *Skyywalker Records*, 739 F. Supp. 578, 598-99 (S.D. Fla. 1990), *rev'd sub nom.* *Luke Records v. Navarro*, 960 F.2d 134 (11th Cir. 1992) (holding that a Florida State court order finding 2 Live Crew's album obscene was an unconstitutional prior restraint on the retail distribution of the record).

66. See *infra* notes 113-16 and accompanying text.

67. See, e.g., *Skyywalker*, 739 F. Supp. at 591 ("2 Live Crew itself testified that the *Nasty* recording was made to be listened and danced to. The evident goal of this particular recording is to reproduce the sexual act through musical lyrics.").

sell more records.<sup>68</sup> This is not just speech strategically employed for commercial purposes, but speech that is uttered to make *itself* a marketable product. As noted in the Introduction, we often evaluate the commercial motives of pornographers, asking whether they mean to make art or just to make a profit.

To answer this question, Solum's third step analyzes potentially good purposes for strategic action, distinguishing, for example, between songs that make the listener dance and those that compel the listener to rape. Material that causes good or neutral effects should be left alone; material that causes bad ones should be prohibited. But what of the judge who considers *all* sexually oriented effects morally bad? The hard question is whether this test would restrict materials that cause the listener to become sexually aroused or increase the listener's desire to engage in consensual sexual activity—activities on whose value reasonable people may disagree.

Some parties might argue, for instance, that encouraging sexual activity is a good goal of speech, whether for the purpose of procreation, subjective pleasure, intimacy, or improved character. On the other hand, those who consider the encouragement of any sexual relationships to be a bad effect of such speech would certainly object. Biases that might lead to censorship under this part of the test could range from the feminist—"heterosexuality itself [is] a beachhead of male dominance"<sup>69</sup>—to the religious fundamentalist:

Our tradition at its base recognizes that sex is good, and powerful, and therefore it has kept sex somewhat in the background of life. . . . Doors, privacy, modesty, chaperons, standards—all of these were restraints upon a drive which, when unrestrained, led to tragedy. . . . Pornography does two things: (1) It stimulates . . . and (2) it stresses the physical so much that it becomes difficult for some people to remember and recognize that behind all that flesh is a person, a soul, a human being to be honored and respected.<sup>70</sup>

Due to its high moral content, this final step opens the door to content-based tests similar to those currently used by the Supreme Court.<sup>71</sup> As

---

68. Under current obscenity doctrine, the fact that an artist profited from the distribution of her material is irrelevant in determining whether a work is obscene. However, the manner in which a work is marketed is relevant to the obscenity determination. *Ginzburg*, 383 U.S. at 472-473, *see also Skywalker*, 739 F. Supp. at 591 (giving "some, but not great weight to plaintiff's commercial motive").

69. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631, 633 (1980).

70. Rev. Richard S. Emrich, *A Message to the Church*, in THE CASE AGAINST PORNOGRAPHY 121, 123-25 (Donald E. Wildmon ed., 1986).

71. The *Miller* standard, *see supra* note 11, promotes subjective, biased judgements not only in the serious value component, but also in the prurient-interest component: if material appeals to "normal, healthy sexual desires" it will *not* meet this test. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985). The *Skywalker* court found 2 Live Crew's album,



such, although this step was designed to shelter speech that might have positive strategic effects, it invites a greater risk of repression by allowing subjective determinations about the value of speech effects.

Because a workable freedom of communicative action needs distinctions between good and bad speech, the outcome of such a test will be determined by the trier of fact's initial understanding of what harms are bad enough to justify regulation, rather than by its analysis of the strategic nature of the speech. The semantic analysis subjects too many desirable forms of communication to regulation, merely because the speaker may have some strategic intentions or because the speech is vulnerable to strategic interpretation by others.

In the next section, I contend that Solum's freedom-of-communicative-action theory is fundamentally flawed because it narrowly views the body of Habermas's work. A theory that operates simply on the semantic level of individual speech acts ignores Habermas's reason for studying speech in the first place. It also distorts his terminology, which is not intended to form a basis for regulating speech itself. The concepts of communicative and strategic action produce more useful insights about freedom of speech when applied to a structural analysis of democratic decision making.

## II.

### THE FREEDOM TO ADVOCATE

#### A. *A Broader View of Habermas's Project*

Habermas's writings are best understood within the context of an ongoing philosophical tradition. According to commentator Steven Seidman, Habermas believes that a healthy society needs a means by which people can appeal to common standards of reason.<sup>72</sup> Absent standards of right and truth, social action tends to devolve into a power struggle among competing interest groups who are unable to speak to one another. Habermas believes that this tendency leads society to hopeless uncertainty, which in turn creates a favorable climate for totalitarian government.<sup>73</sup> As Seidman explains,

Habermas's elaboration of a communicative theory of rationality is intended to counter trends toward subjectivist and contextualist thinking which, in his view, contribute to the enfeeblement of critical reason . . . . The defense of reason is, for Habermas, inseparable from the project of promoting a democratic social order.<sup>74</sup>

---

*As Nasty As They Wanna Be*, to satisfy the prurient interest test because it "appeals to a shameful and morbid interest in sex." 739 F. Supp. at 592.

72. Steven Seidman, *Introduction to JÜRGEN HABERMAS ON SOCIETY AND POLITICS*, *supra* note 5, at 1.

73. *Id.*

74. *Id.*

Habermas's analysis draws from Marxism in order to respond to Weberian assessments of modernity. Max Weber theorized that all aspects of modern society are increasingly influenced by instrumental rationality, a way of thinking that favors using things primarily as instruments to achieve goals.<sup>75</sup> Weber argued that instrumental rationality was beginning to occupy spheres formerly governed by practical reason, a reflective way of thinking that favors appreciating, and evaluating, the principles shared by a community.<sup>76</sup> He believed that this shift ultimately made the world irrational. Weber projects a thoroughly meaningless, bureaucratized society, an "iron cage," in which actors can only manipulate, not communicate. Without the ability to communicate or reflect, no escape is possible.

Habermas believes that practical reason can improve society, and defends Enlightenment ideals by focusing on modern achievements such as formalized democracy, the rule of law, civil rights, and cultural pluralism.<sup>77</sup> Like Weber,<sup>78</sup> Habermas recognizes that instrumental reason (what he calls strategic action and system logic) will colonize spheres of decision making that are best left to practical reason (an arena that Habermas calls the lifeworld).<sup>79</sup> This is not because reason is defective—Habermas posits that

---

75. See generally MAX WEBER, 'Objectivity' in *Social Science and Social Policy*, in *THE METHODOLOGY OF THE SOCIAL SCIENCES* 49 (Edward A. Shils & Henry A. Finch eds., 1949) (Weber's first methodological essay, discussing the normative judgments implicit in supposedly objective social science, including the data construction and manipulation necessary to create statistics, choice or topic by a scholar, and the formation of an ideal type through accentuating one point of view over many possibilities).

76. See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 181-83 (Talcott Parsons trans., 1958) (for example, the development of the Protestant ethical duty to work in a calling contributed in large part to the rise of capitalism and the consequent reframing of community relationships as transactions).

77. Seidman, *supra* note 72, at 6.

78. For an explanation of the influence of Weber's categories of social action on Habermas's categories, see MCCARTHY, *supra* note 2, at 28-30.

79. The lifeworld is made up of the common understandings or values of a society, which are a prerequisite to our ability to communicate. Traditionally, the lifeworld's locus has been the family. In a post-industrialized society, however, society develops systems to govern itself—systems that operate by treating all things as means to the system's ends. These systems (e.g., national economies and administrative institutions) then take on a life of their own. This specialization can be emancipatory, for it allows people to gain greater control over nature and leaves them freer to concentrate on communicative activities. The problem is that modern society, influenced by capitalism, has overemphasized the need to think about people as a means to an end, so that social consensus now values the ability to manipulate others. Society, now structured to manipulate its citizens, has become Weber's iron age, leaving individuals feeling helpless, meaningless, and unable to communicate. See, e.g., JÜRGEN HABERMAS, *2 THE THEORY OF COMMUNICATIVE ACTION (LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON)* 97-111 (Thomas McCarthy trans., 1987) [hereinafter HABERMAS, *2 COMMUNICATIVE ACTION*] (describing the process of individual psychological development in society generally and how the shift from traditional to modern rationalistic society came about and changed this process). It is important to remember, however, that Habermas recognizes that our systems may use instrumental reason in productive ways, so long as they are guided by decisions made from a basis of shared social values.

reason itself is neither instrumental nor strategic, but rooted in cooperation—but rather because concrete social structures give rise to oppression.<sup>80</sup> Consequently, modern society aims to overcome oppressive structures with reason, and requires the cooperation which allows reasoning between individuals.

Habermas grounds his proposition of emancipatory reason in the philosophy of language. He claims that speech itself has a practical reason aimed at cooperation, and he sees language as a paradigm for the structuring of society. He sees the possibility for agreement in the very fact that language exists: “[r]eaching understanding is the inherent telos of human speech.”<sup>81</sup> Therefore, language itself is the basis for criticizing dogmatic ideology,<sup>82</sup> an action which is necessarily reflective, and is essential to social progress.<sup>83</sup>

Communicative action takes natural priority over strategic action.<sup>84</sup> Speech is not a good model for “action oriented to reaching understanding” unless it is true that communicative speech “is the *original mode* of language use.”<sup>85</sup> Habermas’s most radical claim is not that communicative action should be primary, but that it already *is* primary, as it is imbedded in language and reason itself.<sup>86</sup>

To support this theory, Habermas reconstructs Marx’s historical materialism from a base of communication rather than labor. He criticizes Marx’s “reduction of the self-generative act of the human species to labor,” without reference to communication and reflection.<sup>87</sup> Habermas believes

80. Seidman, *supra* note 72, at 6.

81. Habermas, *Social Action*, *supra* note 5, at 158. See also RICK RODERICK, *HABERMAS AND THE FOUNDATIONS OF CRITICAL THEORY 157* (Theoretical Tradition in the Social Sciences Series, Anthony Giddens ed., 1986) (stating that Habermas seeks to shift the emphasis or radical theory from production to communication because social relations are paradigmatically linked to communication).

82. See RODERICK, *supra* note 81, at 158 (positing that the critique of ideology must arise from communicated ideas of freedom, truth, and justice).

83. See MCCARTHY, *supra* note 2, at 82-84 (claiming that such critical reflection is necessary to bring about emancipation).

84. HABERMAS, *Social Action*, *supra* note 5, at 159.

85. HABERMAS, 1 *COMMUNICATIVE ACTION*, *supra* note 5, at 288. For a discussion of the priority of illocutionary speech, see *supra* note 24 and accompanying text.

86. RASMUSSEN, *supra* note 24, at 28, 37.

87. HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS*, *supra* note 1, at 42. See also MCCARTHY, *supra* note 2, at 82-84. This view is criticized in RODERICK, *supra* note 81, at 156-57. Roderick defends Marx’s theory as incorporating two kinds of relations. It is true that Marx often focused on the relation of humans to processes of production through domination (which tends to affect relations between humans), but Marx also spoke of people’s relationships to their own inner selves and to nature, such as artistic expression, which are not influenced by capitalist goals. In fact, Marx’s distinction between the forces and the relations of production suggests the difference between the relationships that humans have with nature and those they have with each other. Roderick criticizes Habermas for focusing too much on the communicative side of human relations in constructing his theory. *Id.*

that Marx viewed “[t]he self-formative process of the species unidimensionally in terms of progress through productive activity.”<sup>88</sup> This approach ignores that communication, learning, and critical reflection are essential in creating and transforming the relations of production. Thus, Habermas contends that it is through language, not socially organized labor, that society reproduces itself.<sup>89</sup>

For Habermas, a critical theory of society must ask how and why society undergoes change.<sup>90</sup> He posits the “ideal speech situation,” in which discussion is unlimited and free from distorting influences, as a model for analyzing the value, truth, and validity of any consensus reached.<sup>91</sup>

---

88. McCARTHY, *supra* note 2, at 83.

89. JÜRGEN HABERMAS, *Toward a Reconstruction of Historical Materialism*, in JÜRGEN HABERMAS ON SOCIETY AND POLITICS [hereinafter, HABERMAS, *Historical Realism*], *supra* note 5, at 114, 115-17. Habermas has grounded his theory about freedom in positive science. He relies on anthropological findings and the psychology of human stages of development. This is seen in the following passage:

We certainly do reckon with anthropologically deep-seated general structures, which were formed in the phase of hominization and which lay down the initial state of social evolution . . . [t]hese basic structures correspond, possibly, to the structures of consciousness that children today normally master between their fourth and seventh years . . . .

*Id.* at 121. This method has been criticized as a return to evolutionism in Anthony Giddens, *Reason Without Revolution? Habermas's Theorie des kommunikativen Handelns*, in HABERMAS AND MODERNITY 95, 117-18 (Richard J. Bernstein ed., 1985), and as “robb[ing] social and political thought of its human and passionate content.” RASMUSSEN, *supra* note 24, at 7. Additionally, one might wonder why that which separates us from other animal life or our hominid ancestors should be the basis of how we construct a society. An alternative approach might look to what we have in common with other animal forms, such as family units and sexual reproduction. Of course, such an approach would be based on something other than reason, which is precisely what Habermas seeks to defend as emancipatory.

90. HABERMAS, *Historical Materialism*, *supra* note 89, at 127. Habermas has argued that society undergoes transformations through a series of “legitimation crises” in which the state must justify the competing demands of capitalists to foster profit and production, and of the population at large for reasonable living conditions. Ironically, the state’s needed intervention causes new rationality crises because regulation conflicts with the private ownership of property which is central to capitalism’s operation (a crisis played out in constitutional law in the period between *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a state law that limited the hours of bakery employees) and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a state minimum wage law)). However, Habermas argues that states have become so skilled at avoiding these economic crises that such crises will no longer prompt social change. More general motivation crises still hold out the possibility for sparking social change. Habermas sees the new social movements of the twentieth century (women’s, gay, African-American, ecological, and peace movements) as evidencing a trend of increasing demand for rationality. HABERMAS, *Social Action*, *supra* note 5, at 21-23. For a broader analysis of the concept of a legitimation crisis, see generally JÜRGEN HABERMAS, LEGITIMATION CRISIS (Thomas A. McCarthy trans., 1975) [hereinafter HABERMAS, LEGITIMATION CRISIS]; JÜRGEN HABERMAS, *What Does a Crisis Mean Today? Legitimation Problems in Late Capitalism*, in JÜRGEN HABERMAS ON SOCIETY AND POLITICS, *supra* note 5, at 266. In *The Theory of Communicative Action*, Habermas conceives of the crisis of modernity as lying in the taking over of the domain of practical reason by instrumental reason. See McCARTHY, *supra* note 2, at 323 (quoting Habermas).

91. See McCARTHY, *supra* note 2, at 306-10 (describing theory behind “ideal speech situation” and applicability to actual discourse).

Habermas refuses to accord arguments and outcomes equal weight. The ideal speech situation serves as a benchmark against which we measure how and under what conditions arguments were made, in order to assess what degree of validity should be accorded to the acceptance of these arguments. As such, the ideal speech situation helps us gauge how free the marketplace of ideas is.<sup>92</sup> The ideal speech situation also clarifies why communicative action is more desirable than strategic action, as true consensus exists only if agreement is based on the force of a better argument (communicative action), rather than the coerciveness of the speaker's speech (strategic action).<sup>93</sup> Additionally, participants must have an equal opportunity to engage in communication, and must be motivated solely by cooperation and communicative aims.<sup>94</sup>

Habermas compares the ideal speech situation to legislative decision making. Whether laws are valid in "demanding terms of practical reason depends on the rationality of the legislative praxis. Statutes could lay claim to exhibiting such rationality only to the extent that they emanate from a democratic legislative procedure which would guarantee rational political will-formation."<sup>95</sup> Morality is integrated deeply into legislation, rather than "[resting] suspended above the law as a layer of suprapositive norms."<sup>96</sup> The essential question is "how far legal procedures make room for the logic of [moral] argumentation."<sup>97</sup>

Accordingly, legislative procedures must be guided by the model of communicative action and the ideal speech situation, which will allow for rational will-formation and fair bargaining.<sup>98</sup> Laws created by such a process may be universalized in the true Kantian procedural sense (i.e., that all concerned interests would desire a law), rather than simply in the semantic sense of being formulated in facially neutral language.<sup>99</sup> Once a legitimate

---

92. Although Solum makes this point, *see* Solum, *supra* note 38, at 100, he does not argue that it renders inappropriate the use of the communicative/strategic distinction to decide which speech is to be protected.

For a discussion of the free marketplace of ideas metaphor as a justification for free speech, *see* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that the best test of a proposition's truth is its ability to gain acceptance in a competition of ideas).

93. Jürgen Habermas, *Law and Morality*, in *THE TANNER LECTURES ON HUMAN VALUES* 219, 246 (Sterling M. McMurrin ed., 1988) [hereinafter Habermas, *Law and Morality*].

94. *See* McCARTHY, *supra* note 2, at 303-10 (interpreting Habermas in precisely the same way); Solum, *supra* note 38, at 67, 96-97 (arguing that for Habermas "participants must have an equal opportunity to engage in communication and be motivated by a search for right or truth").

95. Habermas, *Will-Formation*, *supra* note 31, at 151.

96. Habermas, *Law and Morality*, *supra* note 93, at 219, 246. *See also* Habermas, *Will-Formation*, *supra* note 31, at 149.

97. Habermas, *Law and Morality*, *supra* note 93, at 247.

98. *Id.* at 276. Procedures which mirror how consensus is achieved in communicative action include majority rule, parliamentary business procedures, and election laws. *Id.* *See also* HABERMAS, 1 COMMUNICATIVE ACTION *supra* note 5, at 152.

99. Habermas, *Law and Morality*, *supra* note 93, at 275. Judicial decisions must be

consensus<sup>100</sup> has been reached through such procedures, it is necessary for a legislature to enact the will of the people into positive law.<sup>101</sup>

Most importantly, Habermas has observed that the rationality of political outcomes depends on the levels of participation, the degree of publicly available information, and the availability of "opportunity structures that the media and the institutions of the public sphere actually open up."<sup>102</sup> Representative bodies must accept feedback from the public itself, feedback that is often formed spontaneously and formed in nonlegal structures. Therefore, in order for the institutionalized collective will (representative bodies) to remain rational, it must be limited by negative civil rights (including, presumably, the freedom of speech). These negative civil rights foster needed spontaneous discussion and re-evaluation.<sup>103</sup>

### B. Further Problems With the Freedom of Communicative Action

Given this broader reading of Habermas, it seems clear that communicative *and* strategic action should be part of the paradigm of language that forms the building blocks of Habermas's larger theory. We ask whether speech is communicative or manipulative in order to determine whether listeners are free to accept the statement as true. The analysis tests whether listeners' *acceptance* is valid, not whether the speaker should be allowed to *speak* in the first place. Since Habermas believes that most instances of speech contain mixed motives,<sup>104</sup> some strategic speech must be

---

desired by all as well, so that a judge's task in applying law to specific cases is not mechanical, but is "interwoven with constructive interpretation in [Ronald] Dworkin's sense." *Id.* at 277, 276-77.

100. Habermas rejects the view that law can be legitimized by "promoting the mere appearance of general acceptance," arguing instead that for law to be legitimate law-making procedures must actually produce consensus. *Id.* at 253-54. Habermas does not clearly define what would constitute a consensus, but he seems to mean something like Kant's formulation of "the 'united will of the people,'" *Id.* at 275, when he argues that:

In legislative procedures, a morality that has migrated into positive law manifests itself to the extent that policy-oriented discourses operate under the constraints of the principle of the universalization of all interests involved—and thus of the moral viewpoint we must observe in the process of *justifying* norms. By contrast, in the context-sensitive *application* of norms, the conditions for impartial judgment are not satisfied by asking ourselves what all could will but by whether we have appropriately taken into consideration all relevant aspects of a given situation. . . . [described] complete[ly] with respect to all concerned interests.

*Id.* at 277.

101. *Id.* at 245. Habermas states, "[l]egal norms must absorb the contingencies that would emerge if matters were left to strictly moral guidance . . . . [I]f a practically effective bindingness cannot be generally expected from moral insights, adherence to corresponding norms is reasonable, from the perspective of an ethic of responsibility, only if they are enforced, that is, if they acquire legally binding force." *Id.*

102. *Id.* at 249.

103. HABERMAS, *Law and Morality*, *supra* note 93, at 154. A similar observation was made by Thomas Emerson. Emerson argues that "suppression of discussion makes a rational judgement impossible, substituting force for reason . . . ." THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970).

104. Which means that both strategic and communicative action are goal-driven in

allowed in order to preserve its communicative components.

Of course, strategic speech can and should be criticized as manipulative, but not all manipulation is socially undesirable. Habermas's distinction between society's governing system and its shared values (in the lifeworld) recognizes that well-placed manipulative action (e.g., in economic or administrative systems), guided by decisions based in social consensus, may give us greater freedom to concentrate on communicative activities.<sup>105</sup>

The modified theory's third test for good and bad manipulative purposes attempts to protect positive uses of strategic action, but is so vulnerable to bias as to become useless. A better test should distinguish between the source of decision making (governing system or value consensus), rather than the purposes of speech *per se*. The most fruitful analysis will be structural and procedural, as opposed to a semantic analysis at the level of individual speech acts.

### C. *The Framework Reformulated: Freedom to Advocate*

Habermas's belief in the legitimacy of consensus-based legislation in matters of personal autonomy, and the illegitimacy of stopping discussion necessary to formulate legislation, suggests two components of a free speech theory that can be applied to the pornography issue. First, while it may be legitimate to prohibit *sexual conduct* about which there is genuine consensus,<sup>106</sup> it is never legitimate to prohibit *speech about such conduct*, because only the give-and-take of speech allows a consensus to form.<sup>107</sup> For example, it is theoretically possible to reach a consensus that adult-child sexual contact should be prohibited; yet it would be illegitimate to cut off discussion on the merits of such activity even after a consensus had been formed against it. This freedom to advocate would protect at least all verbal obscenity including speeches, books, and song lyrics, in so far as all

---

practice, or used to achieve some purpose. See HABERMAS, *Social Action*, *supra* note 5, at 142-43 (elaborating on the mixed motive nature of speech).

105. See *supra* note 79 and accompanying text.

106. I doubt, however, that Habermas would favor legislating private sexual conduct among consenting adults. See *infra* note 117 and accompanying text.

107. Justice Brandeis recognized a comparable right to advocate that does not amount to an expectation of "immediate and serious violence," in the context of revolutionary speech.

Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. . . . But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement. . . . The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. . . . Among freemen, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly.

Whitney v. California, 274 U.S. 357, 376-78 (1927) (Brandeis, J., concurring).

pornography advocates certain attitudes about sexuality and women.<sup>108</sup>

Second, Habermas's discussion of rational legislative structures suggests a distinction between speech acts which merely advocate a way of life, and those that actually commit some act in their expression which is prohibited by a rational consensus. For example, expressions whose creation requires performance of a prohibited act (e.g., adult-child sexual contact<sup>109</sup> or rape<sup>110</sup>), involve more than mere advocacy of the act. These expressions, and purchase of them, would not be protected.<sup>111</sup> Expressions that do not require commission of a prohibited act (e.g., music, lyrics), or that merely take advantage of a spontaneous act (e.g., a news photograph), would be protected. Photography that does not involve illegal acts would be protected as the speech of the photographer.<sup>112</sup>

---

108. Andrea Dworkin argues that in pornography, sexuality is reduced to the act of penile intromission, see DWORKIN, *supra* note 7, at 23, and that "[t]he most enduring sexual truth in pornography—widely articulated by men to the utter bewilderment of women throughout the ages—is that sexual violence is desired by the normal female, needed by her, suggested or demanded by her." *Id.* at 166.

109. It should be noted that child pornography may be one case of inherently illegal activity, since problems of the child's free will persist in a special form not as clearly present in photographs of naked adults, even if the children are not engaged in physical contact with other children or adults. The Supreme Court has recognized the special problems involved with photography of naked children. See *New York v. Ferber*, 458 U.S. 747 (1982) (upholding conviction for pornographic representations of children, even though jury found pictures otherwise not obscene); *Osborne v. Ohio*, 495 U.S. 103 (1990) (finding child pornography an exception to *Stanley v. Georgia*, 394 U.S. 577 (1969) (striking down criminalization of mere possession of obscene materials)). In addition, the purchase of photographs or films of illegal acts should not be protected because the transaction is no abstract encouragement of these activities, but a concrete monetary reward for those who commit such acts.

110. Rape is another inherently illegal activity. For example, Linda Marchiano ("Linda Lovelace") explained in her book *Ordeal* that the popular movie *Deep Throat* is not acting; it is a film documenting the actual rape of her, sometimes under hypnosis. LINDA MARCHIANO & MICHAEL McGRADY, *ORDEAL* 84-85, 99-104, 109-137 (1980); MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 10-11, 128-29 (discussing the making of *Deep Throat* and how consumers of pornography perceive such conduct). Another example is the conduct of the late G.G. Allin, who makes the furor over 2 Live Crew's lyrics seem misplaced. Allin, a relatively unknown rock musician whose albums can be found locally in downtown Manhattan, allegedly raped and sodomized members of his audience as part of his performances. Kimberly Seals, *Naked Performer Kicked Out of Loeb*, WASH. SQUARE NEWS, Nov. 8, 1991, at 1 (New York, N.Y.). Allin was thrown out of New York University's student center in 1991 for performing naked, placing a banana in his anus, and throwing a chair at a woman in the audience. *Id.*

111. In *Skywalker*, the court failed to make the distinction between words of advocacy and photographic acts of commission: "The recording depicts sexual conduct in graphic detail. The specificity of the descriptions makes the audio message analogous to a camera with a zoom lens, focusing on the sights and sounds of various ultimate sex acts." *Skywalker Records v. Navarro*, 739 F. Supp. 578, 592 (S.D. Fla. 1990), *rev'd*, 960 F.2d 134 (11th Cir. 1992). "The depictions of ultimate sexual acts are so vivid that they are hard to distinguish from seeing the same conduct described in . . . pictures in periodicals or films." *Id.* at 591.

112. It is unclear what Habermas's view might be on how photography may be speech that advocates or expresses an idea. The Supreme Court provided a useful discussion of this matter in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), the first case holding that it was within the power of Congress under the Constitution to provide that photographs are copyrightable. The Court rejected the claim that "a photograph being a



A general claim can be made that pornography is speech that is not merely read, viewed, or heard, but often becomes an object used for personal sexual gratification: “[P]ornography conditions male orgasm to female subordination.”<sup>113</sup> This observation forms the basis for an argument that pornography conveys ideas in a noncommunicative manner, through “means that bypass the process of conscious deliberation,” and for this reason pornography does not contribute to self-government or a reasoned search for the truth.<sup>114</sup> The argument that pornography can bypass rational thought by appealing directly to an audience’s sexual impulses seems to lie at the heart of the Supreme Court’s obscenity jurisprudence.<sup>115</sup> If this argument is valid, then perhaps pornography does not advocate anything and would not be protected under a freedom-to-advocate theory of free speech.<sup>116</sup>

---

reproduction, on paper, of the exact features of some natural object, or of some person, is not a writing of which the producer is the author.” *Id.* at 56. The Court agreed with the photographer’s argument that “by posing the [subject] in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, . . . and from such disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture,” *id.* at 55, thereby qualifying the photograph as the “original intellectual conceptions” of the photographer. *Id.* at 58. One implication of *Miller v. California*, see *supra* notes 11-12, which itself involved photographs of persons “with genitals often prominently displayed,” 413 U.S. 15, 18 (1973), is that photographs are protected speech if they meet the tests of *Miller*. See *id.* at 24-25. For a general discussion of Habermas’s view on how aesthetic representations communicate important ideas, see *infra* notes 129-33 and accompanying text.

113. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 190. MacKinnon claims that because pornographic magazines such as *Playboy* often feature articles about the freedom of speech that support the magazine’s own existence, “[m]asturbating over the positions taken by the women’s bodies associates male orgasm with the positions expressed in the articles. Ever wonder why men are so passionate about the First Amendment?” *Id.* at 138. See also *id.* at 209. (*Playboy’s* editorial enthusiasm for the first amendment has turned it into a “sexual fetish”).

114. *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 472 (1984). See also T. M. Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 547 (1979) (considering whether pornography affects “changes in one’s tastes and preferences through a process that is, like subliminal advertising, both outside of one’s rational control and quite independent of the relevant grounds for preference”).

115. Kathleen Sullivan has commented that a legally obscene work allegedly “stimulates bodily sexual arousal that the higher faculties recognize as base. In other words, obscenity initially bypasses the brain and heads straight for the groin, but the brain quickly recognizes what has happened and overrides arousal with shame. This is the psychological dynamic the Supreme Court suggests when it seeks to define ‘prurient’ interest in sex as ‘shameful or morbid’ rather than ‘normal and healthy.’” Sullivan, *supra* note 12, at 590. This method was adopted by the *Skywalker* court. “[2 Live Crew’s album] is an appeal directed to ‘dirty’ thoughts and the loins, not to the intellect and the mind.” *Skywalker Records*, 739 F. Supp. at 591.

116. Similarly, under Solum’s model, pornography can be viewed as strategic action if the seller’s intent is not to communicate the message of pornography, but rather to produce sexual excitement in the audience. This argument fails to recognize the extent to which the sexual stimulation of an audience is voluntary, see part II.B., and therefore that pornography might not have a truly manipulative effect. Indeed, much visual pornography is purchased for the purpose of becoming aroused. Stimulation is neither an accident nor a reaction imposed on the audience.

This challenge resembles the familiar claim that pornography is not speech, and it must be rejected for several reasons. Because all speech acts are impure, one risks throwing out the baby with the bathwater; even where the intent of the creator of the material is to cause sexual stimulation, she advocates an attitude about sexuality which must be protected from governmental interference. Pornographic expression has a high level of communicative content and advocates basic attitudes about how to live one's life.

One might conceive of pornography as speech which advocates and encourages sexual stimulation, and not as speech which (only) represents women as sex objects. Whether acts performed by the audience (including masturbation and acting out scenes with one's partner) may be prohibited raises the different question of whether a community can legitimately regulate such activity. These are not free speech issues, but questions of bodily privacy.<sup>117</sup> As long as no illegal activity takes place in creating pornographic speech, it should be protected from regulation. It is not inconsistent to protect rape-advocating pornography while maintaining that rape itself is illegal and punishable with harsh sanctions.

#### D. *Protection for Aesthetic Forms*

The issues considered thus far are the easy cases. We must further explore the problem of aesthetic, non-photographic representations of sexual activity. These include visual forms (paintings, sculptures, cartoons) and, of special concern here, auditory representations (song lyrics as sung or rapped, and the instrumental portions of songs). It is important to include music itself in the discussion of free speech protection for aesthetic creations. Where a song lyric is challenged as allegedly pornographic or obscene, it is important to protect the melodic and rhythmic components of the song and its instrumental accompaniment. These include melody, rhythm, tonal color and arrangement, and the relations between all of these elements as orchestrated by the artist. It is hard to see how music itself could be obscene. However, it is necessary to include musical composition in discussing protection for aesthetic works because there is a disturbing trend for lawyers to implicate, and for courts to evaluate, the musical composition of popular recordings when determining civil or criminal liability.

---

117. It must be noted that, in the liberal tradition, Habermas does not think that *all* subjects may be legitimately legislated. The embodiment of moral consensus into law is appropriate only "[i]n all spheres of action where conflicts and pressures for regulation call for unambiguous, timely, and binding decisions." Habermas, *Law and Morality*, *supra* note 93, at 245. This is important for any application of this theory to obscenity issues because the subject of private intimate sexual acts probably does not meet this test, absent a showing of actual harm (however defined). Furthermore, the more general concept of the lifeworld, *see supra* note 79 and accompanying text, and Habermas's concern that it is being colonized by the system, which includes the rules of law, seems to recognize a sphere of private action that should be free from governmental regulation.

For example, District Judge Jose A. Gonzalez, Jr., analyzed the distinctive characteristics of rap music and how they affected his determination in declaring obscene the 2 Live Crew album, *As Nasty As They Wanna Be*:

It is true that it would be difficult, albeit not impossible, to find that mere sound without lyrics is obscene . . . [the] music of the 'rap' genre focuses on verbal messages accentuated by a strong beat . . . the *Nasty* recording was made to be listened and danced to. The evident goal of this particular recording is to reproduce the sexual act through musical lyrics.<sup>118</sup>

. . . The particular work here, although belonging to the general category of music, however, is to be distinguished . . . [R]hythm is stressed over melody, not for its own sake, but to accentuate the words of the song. The pounding beat and the presence of near continuous lyrics support this conclusion.<sup>119</sup>

Perhaps an operatic version of the 2 Live Crew album would produce different judicial results. Judge Gonzalez suggests a cultural or racial bias against a form of music which originated in the African-American community—a bias that calls to mind white culture's historical association of African-American music and culture with sexuality. Earlier in this century, fear of this music helped inspire cabaret laws that made it difficult for clubs to feature live jazz music, often purely instrumental. Jazz was called "the impulse for wildness that has undoubtedly come over many things besides the music of this country . . . traceable to the negro influence," and blamed for the "'downfall' of one thousand women in Chicago."<sup>120</sup>

Similarly, Florida's Broward County Prosecutor Jack Thompson commented on the alleged synergistic role of music in his assessment of the 2 Live Crew album, claiming that

there's a more compelling, more disturbing message when you actually hear it on the record than when you see it [written]. There's a power to music: Music wedded to sexually explicit material that calls for the brutalization of women is even more dangerous than if it were on a printed page and distributed to children.<sup>121</sup>

---

118. *Skywalker Records*, 739 F. Supp. at 591.

119. *Id.* at 595.

120. PAUL CHEVIGNY, *GIGS* 57 (1991). "The music was considered a naughty novelty—the word 'jass' referred to sexual intercourse . . ." *Id.* at 40.

121. Frank Owen, *Fear of a Black Penis*, *SPIN*, Sept. 1990, at 35, 37. Thompson said that he wanted Luther Campbell, 2 Live Crew's lead singer, to spend "a lot of time" in prison. *48 Hours: Going Too Far* (CBS television broadcast, June 27, 1990). Thompson also suggested the possibility of bringing criminal charges against Bruce Springsteen, who gave 2 Live Crew permission to use the melody from one of his songs, *Born In The U.S.A.* Thompson sent Springsteen a letter that read "Re: Your Facilitation of the Sexual Abuse of Women . . . I would suggest 'Raped in the U.S.A.' as your next album. . . Mr. Springsteen, you're now harmful to the women and children who have bought your albums." Owen,

In a case involving heavy-metal singer Ozzy Osbourne, plaintiffs alleged that “[i]n addition to the lyrics, . . . Osbourne’s music utilizes a strong, pounding and driving rhythm. . . .”<sup>122</sup> Plaintiffs alleged that the combination of the lyrics, music and sound waves produced caused the deceased to commit suicide.<sup>123</sup> The plaintiffs in another case also based one initial theory of liability on “the lyrics in combination with the beat of the music.”<sup>124</sup>

This judicial conflation of lyrics and other musical components may be justified by the notion that those contributing melody or rhythm to an obscene musical work are engaged in a conspiracy, or, by the Supreme Court’s holding in *Ginzburg v. United States*, that a court may consider the context in which materials are presented in determining whether they are obscene.<sup>125</sup> For instance, a finding of pandering, which is “an appeal to the erotic interest,”<sup>126</sup> can convert otherwise non-obscene materials into obscenity.<sup>127</sup> This has traditionally been applied to challenge marketing of such materials.<sup>128</sup> However, it seems that the *Skywalker* court argued, and plaintiffs in *McCullum* and *Vance* tried to argue, that the *musical* context is relevant to the issue of criminal or civil liability for obscenity. The move from the context of marketing or presentation to musical context is not a difficult one to make within the *Ginzburg* framework, but it should be resisted.

Aesthetic materials need a defense that would apply to both verbal

*supra* this note, at 37. It turns out that the resulting song, “Banned in the U.S.A.” (Luke Records 1990) was not sexually explicit, but was rather a commentary on the band’s troubles with the law. The ambiguity surrounding the role of music in obscenity is evident by comparison of Too Much Joy. Almost all of this band’s members were arrested in Miami for playing 6 songs from 2 Live Crew’s *As Nasty As They Wanna Be* album at a concert. According to the Broward County Sheriff’s Office, the drummer was not arrested because he was not singing. John Lannert, *Too Much Joy Too Much For Broward County Cops*, BILLBOARD, Aug. 25, 1990, at 6.

122. *McCullum v. CBS, Inc.*, 202 Cal. App. 3d 989, 997 (1988).

123. *Id.*

124. *Vance v. Judas Priest*, Nos. 86-5844, 86-3939, 1990 WL 130920, at \*1 (Nev. Dist. Ct. Aug. 24, 1990). The court, however, only allowed plaintiffs to proceed on the basis of the theory that subliminal messages caused the teenagers’ deaths. *Id.*

125. *Ginzburg v. United States*, 383 U.S. 463. See also *Pinkus v. United States*, 436 U.S. 293 (1978) (holding that juries may consider the methods of the creation and distribution of erotic materials in determining whether they are obscene); *Splawn v. California*, 431 U.S. 595 (1977) (same); *Hamling v. United States*, 418 U.S. 87 (1974) (same).

126. *Ginzburg*, 383 U.S. at 467 (quoting *Roth v. United States*, 354 U.S. 476, 495-96 (1957) (Warren, C.J., concurring)).

127. *Id.* at 487-90.

128. In the *Skywalker* case, for example, the court found that the combination of the cover of *As Nasty As They Wanna Be* (which portrays the members of the band looking out from between the legs of women whose buttocks are almost completely exposed), the title of the album, and the titles of the songs on it constituted “pandering” within the meaning of *Ginzburg*. *Skywalker Records*, 739 F. Supp. at 592. The song titles include “Me So Horny,” “Put Her In the Buck,” “The Fuck Shop,” “If You Believe in Having Sex,” “Get the Fuck Out of My House,” and “Bad Ass Bitch.”

and nonverbal communications. Non verbal speech deserves special attention because it is considered subrational or irrational communication.<sup>129</sup> Musical and visual works then would not deserve absolute protection, even under the freedom to advocate, because the protections seek to further rational discourse, not to encourage irrational expressions. In his earlier writings, Habermas adopted a similar view towards aesthetic judgement, which he considered largely intuitive and the result of a purely subjective expression of needs, desires, and feelings, viewed as distinct from the rationality of practical reason.<sup>130</sup> However, more recently he has recognized that aesthetic expressions are an essential part of practical reason in that they are “instances of discursive interpretations of the good life”<sup>131</sup> which have communicative content.<sup>132</sup> Both language and art are a “semantic store of original subhuman forms of communication [which represent] a potential [for interpreting needs] that cannot be augmented.”<sup>133</sup>

Habermas recognizes, however, that the knowledge objectified in art is different from that which is objectified in theoretical and practical expressions. Art requires competence in areas quite different from verbal speech, such as an ability to paint in perspective and the use of harmony in the musical arts.<sup>134</sup> Art also embodies the artist’s values in a different way than ordinary language reveals them:

There is an unmistakable indicator for the fact that a certain type of ‘knowing’ is objectified in art works, albeit in a different way than in theoretical discourse or in legal or moral representations: these objectifications of mind are also fallible and hence criticizable . . . the work of art calls for interpretation, evaluation and even “linguistification” (*Versprachlichung*) of its semantic content.<sup>135</sup>

Acceptance or rejection of a work of art is not a matter of personal preference, but a judgment about the claims of validity that the artist raises in the work.<sup>136</sup> Aesthetic criticism attempts to bring forth claims of authenticity, unity, and harmony in a work of art “so that the work can ‘take the place of

---

129. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). “[E]xplicitly and predominantly political speech . . . [is] the only form of speech that a principled judge can prefer to other claimed freedoms. All other forms of speech raise only issues of human gratification . . . . [C]onstitutionally, art and pornography are on a par with industry and smoke pollution.” *Id.* at 26, 29.

130. INGRAM, *supra* note 28, at 73.

131. *Id.* at 21.

132. Jürgen Habermas, *Questions and Counterquestions*, in HABERMAS AND MODERNITY 192, 202 (Richard J. Bernstein ed., 1985) [hereinafter Habermas, *Questions*].

133. INGRAM, *supra* note 28, at 183 (quoting JÜRGEN HABERMAS, PHILOSOPHICAL-POLITICAL PROFILE 48-49 (Fred Lawrence trans., 1984)).

134. *Id.* at 180.

135. Habermas, *Questions*, *supra* note 132, at 200.

136. *Id.*; see also INGRAM, *supra* note 28, at 181 (stating that Habermas argues that works of art embody the adequacy of culturally established standards of value as authentic expressions of experience).

an argument and promote the acceptance of precisely those standards according to which it counts as an authentic work."<sup>137</sup>

By combining Habermas's conceptions of politics and aesthetics, the freedom to advocate can protect artistic expression as essential to an informed and legitimate process of social decision making. If rights such as the freedom of speech are to guarantee the openness of spontaneous sources of feedback from the public to the democratic process,<sup>138</sup> then they must be construed as broadly as possible to include the unique insights provided by aesthetic expressions.

Habermas recognizes that art has a "potential for 'truth'" which is a validity claim distinct from those raised by communicative action.<sup>139</sup> As such, art can expand people's expressive opportunities.<sup>140</sup> Aesthetic expression captures unique types of authentic, subjective experiences which may nevertheless be generalized because they "are possible only to the extent that the categories of the patterned expectations of organized daily experience collapse. . . ."<sup>141</sup> David Ingram explains that the role of aesthetic expression is crucial to Habermas's project and rounds out his theory of collective will-formation:

[O]ne wonders whether the restriction of rationality to the province of formal discourse is not purchased at the cost of practical reason. . . .<sup>142</sup> [There is a] need to ground a holistic critique of reification in a global form of rationality. Such a rationality could not be adequately compassed by a procedural model of argumentation . . . . For what was needed was . . . a form of rational teleology that would show what no form of ideal speech possibly could

---

137. INGRAM, *supra* note 28, at 181 (quoting HABERMAS, 1 COMMUNICATIVE ACTION, *supra* note 5, at 20). Ronald Dworkin holds a similar view of art: "The artist can create nothing without interpreting as he creates; since he intends to produce art, he must have at least a tacit theory of why what he produces is art." However, Dworkin envisions a more creative role for the critic than does Habermas: "The critic, for his part, creates as he interprets . . . [he] decide[s] which way of seeing or reading or understanding that work shows it as better art." RONALD M. DWORKIN, *How Law Is Like Literature*, in A MATTER OF PRINCIPLE, *supra* note 59, at 146, 158.

138. See *supra* note 103, and accompanying text. Although Habermas seems to have in mind spontaneous nonlegal sources such as social movements, see Jürgen Habermas, *New Social Movements*, 49 TELOS 33 (1981), one can appropriately read Habermas broadly on this point, given his position that artistic expression has a potential for truth.

139. Habermas, *Questions*, *supra* note 132, at 203. "The one-to-one relationship which exists between the prescriptive validity of a norm and the normative validity claims raised in regulative speech acts is not a proper model for the relation between the potential for truth of works of art, and the transformed relations between self and world stimulated by aesthetic experience." *Id.*

140. *Id.* at 201: "Art becomes a laboratory, the critic an expert, the development of art the medium of a learning process . . . advancing exploration of a realm of possibilities structurally opened up with the autonomization of art." See also INGRAM, *supra* note 28, at 58 (explaining that Habermas believes art to be a learning process based on reflection of a realm of possibilities).

141. *Id.* at 200.

142. INGRAM, *supra* note 28, at 42.

show—namely, complete realization of a life of freedom and happiness at the level of individual and collective life. We have now located in the corpus of Habermas's writings a conception of aesthetic rationality that satisfies this last condition.<sup>143</sup>

Although art "can have a structure-building effect for society as a whole,"<sup>144</sup> not all art has this potential. For Habermas, the forms of art which can best contribute to a rational discourse in society are those which "communicate authentic experiences,"<sup>145</sup> and accordingly, Habermas assesses the relative value of different kinds of art. In particular, he criticizes avant-garde art for withdrawing into "the unconscious, the mad, the fantastic, and the corporeal. It ceases to communicate, and its claim to authenticity is detached from any shared fund of values."<sup>146</sup> It has the potential to degenerate into "propagandistic mass art" or "the esoteric expressions of an elite counterculture."<sup>147</sup> However, the value of modern art lies in its critical intention to destroy the aura of the "illusion of beauty projected by bourgeois art."<sup>148</sup>

I will not attempt to fit pornographic expressions or modern forms of music into any of these categories; I hope merely to suggest that the state should be careful when passing judgment on any linguistic or purely aesthetic expression, with legal sanctions as the punishment for a bad review. The state needs to remain open to aesthetic expression in order to retain legitimacy. We would abuse Habermas's categories to assess the value of art by using them to test the value of a particular expression.

The uniqueness of values and ideas embodied in aesthetic expression suggests that law cannot competently consider only the purely musical or artistic aspects of a work in deciding whether it is obscene. The most carelessly taken snapshot of a naked body says something about sexuality, in terms of its form as a cheap photograph which makes implicit claims about the authenticity of the work, beyond its content.<sup>149</sup> The state may legitimately examine aesthetic speech only to determine whether the creation of the expression broke a valid law, as in the case of certain photography. Only such cases justify prohibition.<sup>150</sup>

If we use Habermas's conception of aesthetics as part of the basis for the protection of art and music within a freedom-to-advocate theory, we must recognize that we protect art not for its own sake, but as a means to achieve valuable social discussion on the good life. Habermas analyzes all

143. *Id.* at 184.

144. *Id.* at 182.

145. *Id.*

146. *Id.*

147. *Id.* (quoting HABERMAS, *LEGITIMATION CRISIS*, *supra* note 90, at 86).

148. *Id.*

149. *See supra* text accompanying notes 131-33, 136-37.

150. *See supra* text accompanying notes 109-12.

categories of art, including *l'art pour l'art* and the shock value of surrealism, in terms of their ability to speak in a nonsubjective way.<sup>151</sup> Similarly, the freedom to advocate, as it relies on consensus-based decision making, grounds the protection of verbal speech in its value as an instrument. This defense of pornographic materials contrasts starkly with traditional liberal arguments, which view the right to access pornography as itself a part of the good life.

For example, Ronald Dworkin claims that

No one, I think, is denied an equal voice in the *political process*, however broadly conceived, when he is forbidden to circulate photographs of genitals to the public at large, or denied his right to listen to argument when he is forbidden to consider these photographs at his leisure.<sup>152</sup>

Dworkin sees the question of whether to prohibit pornography as a struggle between those who claim a personal right of moral independence<sup>153</sup> to view pornography, and those who claim that it harms people who "are disgusted by the bare knowledge [that] pornography [exists],"<sup>154</sup> or who want to cultivate a nondegrading attitude towards sexuality.<sup>155</sup> In contrast, the defense of pornographic art and music offered in this Article rests not on the individual liberty of the person creating or viewing the offending material, but on the contribution of aesthetic expression to societal discourse.

Although music may embody and convey unique concepts, the manner in which those concepts are communicated is problematic. The message and the medium are inextricable in music, as in any art. Musical expression involves actions beyond mere speech: it involves creating musical tones, harmonic combinations, and rhythms through such physical actions as striking a drum with a stick, plucking a string, and singing. Because the freedom to advocate allows for regulation of conduct which is not speech (such as taking a photograph), musical acts are theoretically open to regulation. Regulation, however, should be limited to the non-speech components of music, such as the act of conveying musical speech subliminally and playing music at volumes that cause pain to listeners or prevent others from speaking. Both noise ordinances<sup>156</sup> and broadcast regulations that organize the airwaves to prevent interference with one speaker's message by

---

151. Habermas, *Questions*, *supra* note 132, at 200-01.

152. DWORKIN, *supra* note 59, at 335-36 (emphasis added).

153. The "right to moral independence" is defined by Dworkin as "the right not to suffer disadvantage in the distribution of social goods and opportunities . . . just on the ground that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong." *Id.* at 353.

154. *Id.* at 345.

155. *Id.* at 347. Ronald Dworkin concludes that a choice to prohibit pornography infringes on the egalitarian principle of utilitarianism by weighing people's personal preferences unequally. *Id.* at 364.

156. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding regulation on speech projected by soundtrack); *Ward v. Rock Against Racism*, 492 U.S. 781 (1989) (upholding



another<sup>157</sup> would be justified under this framework.

### III.

#### DEAFENING SPEECH?

The basis for noise ordinances and broadcast regulations can help explain why it might be legitimate, under a freedom-to-advocate theory, to limit yet another type of expression, which I will call “deafening” speech. Deafening speech prevents someone else from speaking or from being heard. In a theory based upon the freedom to advocate, which seeks to maximize both participation and speech opportunities, actions which prevent individuals or groups from participating in discourse should be controlled. Can pornography have this effect? If so, pornography’s deafening effect may justify some type of regulation.

Andrea Dworkin and Catharine MacKinnon have described pornography in a way that might place it in the deafening category. They argue that pornography prevents women as a class from speaking and being heard: “[P]ornography keeps women from exercising the rights protected by the First Amendment,”<sup>158</sup> and “the free speech of men silences the free speech of women.”<sup>159</sup> They claim that anti-pornography laws are not censorship but rather protect the civil rights of women and “expand the speech of women by taking the pornographers’ gags out of our mouths.”<sup>160</sup> Under this view, pornographers are the censors and anti-pornography laws represent the speech of women.<sup>161</sup> Pornography as speech silences women and thereby deafens society to what women would be saying if they were able to speak more.

While this characterization squarely meets the conditions for speech that could be regulated under a freedom-to-advocate theory, the Dworkin and MacKinnon arguments for this conclusion resemble those in Solum’s flawed theory. In this section, I argue that they improperly count the communicative component of pornography as a manipulative harm. Similarly, I argue that the notion that pornography is silencing, as well as the belief

---

requirement that performers in park band shell use sound system provided by city in order to prevent the disturbance of nearby residents).

157. See, e.g., *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 387 (1969) (holding that right of free speech of radio broadcaster “does not embrace a right to snuff out the free speech of others”).

158. DWORKIN, *supra* note 7, at xli.

159. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 193.

160. DWORKIN, *supra* note 7, at xxxiv. Both MacKinnon and Dworkin also make more traditional arguments that the actual physical violence against women is caused by pornography, see, e.g., *id.* at xviii-xxv (describing “women who are brutalized by the use of pornography on them”); MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 130, 147 nn.8-9, 185 n.107, 188-89 (criticizing studies finding no harm, collecting studies finding harm, and collecting cases). My focus will be on their silencing argument.

161. DWORKIN, *supra* note 7, at xxx.

that it causes specific instances of abuse and negative attitudes about women, arise from a failure to distinguish pornography from other sexist speech or more generally from our whole culture. By comparing Dworkin and MacKinnon's concepts of justice with those of Habermas, I will introduce the possibility of applying a concept of affirmative action to speech.

#### A. *The Dworkin/MacKinnon Perspective on Pornography*

Pornography depicts a male-centered sexuality<sup>162</sup> in which the female is an object to be used solely for gratification.<sup>163</sup>

Pornography makes women into objects by converting their sexuality into a commodity, "something any man who wants to can buy and hold in his hand for three dollars and fifty cents. His access to her sexuality is called freedom. . . ."<sup>164</sup> Pornography eroticizes this dominance through its common themes of rape, prostitution, and other sexual violence. Allegedly, both men and women take the portrayal of sexuality in pornography as accurate depictions of the erotic which shape our definition of women and sex.<sup>165</sup> However, Dworkin calls the "meanest theme of pornography" the appearance that the women photographed in it

are doing what they want to do willfully and for themselves. . . . the knowledge that the models posed for money provides confirmation that they are whores and then the photographs are a simple expression of a general truth.<sup>166</sup>

This analysis applies to lyrical representations as well. For instance, two songs by 2 Live Crew, "Me So Horny" and "Put Her In The Buck," explicitly send a message of willing participation.<sup>167</sup> Both include the sounds of a woman's voice moaning along with the music, as if there were a woman actually enjoying the acts described in the lyrics. Along the same

162. See MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 171-72 (arguing that pornography constructs an image of women in which they enjoy submission to, and sexual violation by, men).

163. In pornography, the woman "is the pinup, the centerfold, the poster, the postcard, the dirty picture, naked, half-dressed, laid out, legs spread, breasts or ass protruding. She is the thing she is supposed to be: the thing that makes him erect. . . . [S]he is a thing to be used." DWORKIN, *supra* note 7, at 128.

164. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 138. MacKinnon contrasts this use of women with the Kantian notion that persons should be treated with respect, as ends in themselves. *Id.* at 158.

165. DWORKIN, *supra* note 7, at 201.

166. *Id.* at 136-37. Dworkin points out that "[m]en have created the group, the type, the concept, the epithet, the insult, the industry, the trade, the commodity, the reality of woman as whore. Woman as whore exists within the objective and real system of male sexual domination." *Id.* at 200.

167. See *supra* note 47 (lyrics of "Put Her in the Buck").

lines, MacKinnon points out that men's access to women through pornography is commonly equated with sexual freedom for both men and women,<sup>168</sup> but that

[i]nequality is its central dynamic; the illusion of freedom coming together with the reality of force is central to its working. . . . [T]he victim must look free, [and] appear to be freely acting. Choice is how she got there. Willing is what she is when she is being equal.<sup>169</sup>

The only difference between hard-core and soft-core pornography is that the former depicts women who want to be tortured, battered, or killed, while the latter shows women who want to be "merely taken and used."<sup>170</sup>

Because men create and believe in pornography, when women do act or speak out against the model of sexuality that it embodies, they are not believed. The voices of women are silenced altogether—they are absent from the cultural dialogue, emerging only as annoying or exceptional whispers. Such whispers, when heard, are discounted as lies.<sup>171</sup> Pornography has the effect of discrediting women's speech because the audience generalizes the woman represented in the photograph, story, or song into every woman.<sup>172</sup>

MacKinnon's belief that pornography constructs a subordinate role for women is closely tied to her belief that "pornography is more act-like than

168. MACKINNON, FEMINISM UNMODIFIED *supra* note 7, at 139.

169. *Id.* at 172.

170. *Id.* Some hold soft-core pornography such as *Playboy* to be worse than other pornography because its use of more realistic, legitimate settings makes the coercion of the women seem less obvious. *Id.* at 152 & n.36.

171. *Id.* at 166, 169-70.

172. The Dworkin/MacKinnon perspective is by no means the only feminist view on this subject. For example, Sallie Tisdale has argued that the anti-pornography feminists "are themselves prurient . . . [t]hey look down on [women] and shake a finger," and that by telling women that the very act of viewing sexually explicit material is a male act, and that it is the man in them who is aroused by pornography, "[t]hey have made women into objects." Sallie Tisdale, *Talk Dirty To Me*, HARPER'S, Feb. 1992, at 37, 44-45. Like MacKinnon and Dworkin, Tisdale describes the experience of identifying with the female subjects when viewing pornography, but reports an enjoyment and a positive learning experience about her own character and sexuality out of that sensation. *Id.* at 42. She remarks, "Pornography tells me . . . that none of my thoughts are bad, that anything goes." *Id.* at 44.

Members of Feminists for Free Expression, including Betty Friedan and Adrienne Rich, have opposed the recent Pornography Victims' Compensation Act. S. 1521, 102 Cong., 1st Sess. (1991). The Act would implement that part of the Dworkin/MacKinnon ordinance, *see supra* note 9, which allows victims of sex crimes to bring civil suits against the producers, distributors, exhibitors, and sellers of pornography if the pornography is proved to be a "substantial cause of the offense." A similar group, the Feminist Anti-Censorship Taskforce, filed an *amicus* brief in the *Hudnut* case, discussed *infra* note 192, opposing the Dworkin/MacKinnon ordinance that had been passed in Indianapolis. C. Carr, *Porn Wars*, VILLAGE VOICE (New York, N.Y.), Mar. 31, 1992, at 24. For other feminist positions opposing restrictions on pornography, see WOMEN AGAINST CENSORSHIP (Varda Burstyn ed., 1985).

thought-like."<sup>173</sup> According to MacKinnon, pornography is an act, rather than mere speech, in that it "is not a distortion, reflection, projection, expression, fantasy, representation, or symbol . . . . It is a sexual reality . . . . The process that gives sexuality its male supremacist meaning is the same process through which gender inequality becomes socially real."<sup>174</sup> Ultimately, then, pornography, for MacKinnon and Dworkin, is a means by which power is distributed.<sup>175</sup>

*B. Distinguishing Communicative Action from Strategic Action and Deafening Speech*

Ironically, this analysis of pornography reveals the communicative content of pornographic speech, a content both MacKinnon and Dworkin would deny. Their discussion unintentionally exposes pornography's claims to factual truth and normative rightness: pornography claims to represent sexuality and women as they are in real life and should be. This view is evident in the lyrics of 2 Live Crew<sup>176</sup> and in the many pornographic movies, magazines, and novels that Dworkin has analyzed.<sup>177</sup> No matter how heinous the view, such speech nevertheless entails a communicative component. The Dworkin/MacKinnon argument also points out that pornography makes claims to subjective honesty and sincerity, since the women depicted appear to perform completely of their own free will. This claim concerning the autonomous nature of sexual submission is the greatest lie of pornographic speech and creates the generalizing effect for all women.

However, the Dworkin/MacKinnon argument conflicts with the freedom to advocate framework because it views the popular success of pornography's communicative act as justification for regulation. Their claim that pornography is an *act* of power distribution erases the line between persuasion and coercion. (Persuasiveness is used here not in the sense of that which appeals to rationality, but in the sense that the values embodied in pornography have gained wide acceptance, for whatever reason.) This view of pornographic images as action suggests that our society, or most of it, simply *will* accept the message of pornography if exposed to it. For MacKinnon, the continued existence of pornography necessarily negates the possibility that opposing conceptions of gender will gain wide acceptance:

---

173. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 7, at 204.

174. MACKINNON, FEMINISM UNMODIFIED, *supra* note 7, at 172-73. See also MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 7, at 204 regarding MacKinnon's distinction between the concreteness of pornography and the moral abstraction of the legal concept of obscenity.

175. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 7, at 214.

176. See *supra* note 47 and accompanying text.

177. See, e.g., DWORKIN, *supra* note 7, at 25-30 (HUSTLER), 71-100 (writings of Marquis de Sade), 138-43 (PLAYBOY), 167-78 (STORY OF THE EYE by Georges Bataille).

The situation in which women presently find ourselves with respect to the pornography is one in which more *pornography* is inconsistent with rectifying or even counterbalancing its damage through speech, because so long as the pornography exists in the way it does there *will not be more speech by women*.<sup>178</sup>

Thus, MacKinnon believes that the public existence of pornography necessarily means public acceptance of pornography. This suggestion implicitly rejects Habermas's deep belief in the potential for human reason to discriminate among claims and to tend toward cooperation. Owen Fiss has criticized this rather deterministic view of the consequences of pornography in MacKinnon's theory. He is reluctant to use the mere presence of ideas that women should not speak or be taken seriously in pornography as a sufficient basis for prohibiting such expressions.<sup>179</sup> His "reluctance in part stems from doubt that the plea or demand will be effective—*saying something does not make it so*."<sup>180</sup> Fiss' remarks accord with a Habermasian conception of human rationality, under which advocacy for particular gender roles would be insufficient to convert such views into social reality.

Fiss also recognizes that MacKinnon's claim about the silencing effects of pornography has radical implications which cannot be limited to pornography, and which have the potential to threaten self-government. "It would create a realm of functionally 'false ideas,' that is, ideas not allowed to enter or become part of public debate, and as such the commitment to popular sovereignty would be betrayed or at least compromised."<sup>181</sup>

This criticism is consistent with the requirements for freedom to advocate in that it recognizes that popular sovereignty is advanced by allowing all views, without regard to substantive content, into the public debate—the process by which public decisions are made. One cannot dispute that pornography can affect or cause changes in the attitudes of those who consume it.<sup>182</sup> While pornographic speech may persuade people that it represents an appropriate way of living, the speech itself is not coercive in the strategic way that other speech, such as subliminal messages or deceptive advertising, are. This is true even if the speech advocates a coercive attitude towards women. Under the freedom to advocate, it may be legitimate

178. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 193.

179. Owen Fiss, *Freedom and Feminism*, Address Before the Colloquium on Law and Philosophy at New York University School of Law 20-21 (Nov. 14, 1991) (transcript on file with *New York University Review of Law & Social Change*).

180. *Id.* at 21 (emphasis added).

181. *Id.*

182. Clinical studies have shown various effects of pornography on audience attitudes. Men who were exposed to pornographic films reported faithfulness to one's mate and good family relations as less important, and sex without emotional attachment as being more enhanced than those subjects not exposed to pornography. OSANKA & JOHANN, *supra* note 52, at 177. In another experiment, 100% of virgin women who were exposed to a sexually explicit movie reported that they were interested in coital activity, as opposed to only 15% of those exposed to a nonexplicit movie. *Id.* at 171.

to prohibit the *behaviors* successfully encouraged by pornography, but not the pornography itself, as long as none of the acts done in making the pornography are themselves illegal.<sup>183</sup> The reader is free to accept or reject what is advocated by pornography, just as she is free to accept the arguments of Dworkin and MacKinnon.

### C. *Problems with the Silencing Effect and Causation*

Furthermore, the global nature of the MacKinnon/Dworkin critique does not justify the singling out of pornography as the silencing of women. In fact, part of Dworkin's and MacKinnon's point is that we live in a pornographic world.<sup>184</sup> "The liberal's slippery slope is the feminist totality. . . . Pornography converges with more conventionally acceptable depictions and descriptions just as rape converges with intercourse because both express the same power relation."<sup>185</sup> Dworkin criticizes the prevailing culture's conception of beauty as embodying the principle of objectification, the basis for domination by men over women.<sup>186</sup> Likewise, MacKinnon criticizes *Playboy's* claim that it is merely displaying the "natural beauty of women's bodies" because *Playboy* and liberals generally assume "that a natural physical body exists, prior to its social construction through being viewed . . . ."<sup>187</sup>

Both are right that the messages of pornography pervade our culture, since it is sexist to the core. But if pornographic themes are pervasive in our society, it is unclear why pornography alone, as opposed to other sexist speech or practices, has been targeted for restriction. The only really distinctive thing about pornography in a pornographic world is not its message, but how it is consumed by its audience.<sup>188</sup>

The fact that pornography is so explicit in its depiction of domination<sup>189</sup> may actually make it less harmful than other cultural expressions or beliefs which have a more concealed sexist content, such as religion.<sup>190</sup>

183. See *supra* text accompanying notes 106-12.

184. See, e.g., MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 154 ("Women live in the world pornography creates. We live its lie as reality"); DWORKIN, *supra* note 7, at 202 ("In the male system, women are sex; sex is the whore. . . . Being her means being pornography.").

185. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 154. "[T]he inability to draw a line between pornography and everything else . . . exposes the pervasiveness of the value system Andrea analyzes, its presence in literature, in advertising, in daily life." *Id.* at 131.

186. DWORKIN, *supra* note 7, at 115 (analyzing Keats' Ode on a Grecian Urn, in which "objectification is raised to its highest aesthetic level").

187. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 136.

188. See *supra* notes 162-67 and accompanying text.

189. "[T]he directions [for the abuse of women] are found in pornography, and, frankly, they are not found anywhere else." DWORKIN, *supra* note 7, at xxvi. As such, pornography is "the blueprint of male supremacy." *Id.* at xxxix.

190. For example, Linda Gordon has argued that Christianity embodies a belief in the superiority of men. "In describing the ideal woman, Mary, the Gospels made her physiologically impossible: what is good about Mary is that she is a virgin mother. Since no other

Also, the barrage of commercial images representing women scrubbing floors and washing dishes is arguably more instrumental to their subordination than pornographic images, which are much less visible or widely disseminated. The familiar question about pornography is expanded: should we prohibit the Bible and detergent commercials as well as *Playboy*, or should we criticize them?

The global nature of this critique seemingly forms the basis for MacKinnon's arguments for a broad notion of harm and causation. She claims that the harm of pornography is difficult to perceive because it is so pervasive in constructing a pornographic world. She questions the concept of legal causation itself:

First Amendment logic, like nearly all legal reasoning, has difficulty grasping harm that is not linearly caused in the "John hit Mary" sense. . . . Words work in the province of attitudes . . . . [Pornography] does hurt individuals, not *as* individuals in a one-at-a-time sense, but as members of the group "women."<sup>191</sup>

However, this is problematic given her convincing claim that we live in a "pornographic" culture; there is no reason to believe that pornography is more responsible for causing this kind of harm than all other sexist expression in our culture.

The group harm MacKinnon discusses should be distinguished from the harm typically considered in clinical studies because it affects attitude formation. Without a more direct or legal causation, a legal solution for eliminating such harm is misconceived. I do not doubt that attitudes are damaged, at least in part by pornography, but this harm should be confronted on its own plane—at the level of social or political discourse. Pornography fosters an attitude of disrespect and inequality, but a society that values persuasion as causing the best social outcomes cannot subject its advocates to liability.

#### *D. Reconciling Substantive and Procedural Justice: Affirmative Access to Speech*

MacKinnon and Dworkin would solve the problem of pornography through prohibition, or by imposing liability upon anyone who produces a specific piece of pornography that harms another.<sup>192</sup> This subscribes to a

---

woman can be a virgin mother, she represents an attack on, a criticism of woman's very nature." LINDA GORDON, *WOMAN'S BODY, WOMAN'S RIGHT* 9 (1976).

191. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 156.

192. MacKinnon and Dworkin were responsible for drafting an anti-pornography statute conceived as a civil rights law that defines pornography. See *supra* note 9. The statute imposes civil liability on those who force others into being in pornography, or viewing pornography, and on those who traffic in pornography. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 183 & n.78, 186 & n.109. Another formulation extends liability only to those pornographers who produce a specific piece of pornography that causes an assault. DWORKIN, *supra* note 7, at xxxii. The statute was enacted in various forms in Indianapolis,

different conception of justice than our Habermasian framework. Habermas's goal is perfect *procedural* justice. He believes that the right procedures are self-validating, and analyzes only the conditions that bring about a result (i.e., how closely they approximate an ideal speech situation).<sup>193</sup>

Dworkin and MacKinnon, conversely, seek *substantive* equality, and they reject the traditional liberal notion of state neutrality.<sup>194</sup> MacKinnon argues that the First Amendment was not drafted with women in mind because they do not have the same social capacity to speak as men,<sup>195</sup> that it serves to perpetuate the conditions of domination that existed prior to state action,<sup>196</sup> that it helps pornography survive,<sup>197</sup> and prevents women from using the state to combat the social and cultural conditions of power in which men control speech.

However, there is a way to reconcile MacKinnon's arguments about focusing on *substantive* conditions (especially with regard to deafening speech) with Habermas's conception of *procedural* justice. MacKinnon's silencing argument assumes that pornography and sexist speech generally have gained wider acceptance than other speech about women. MacKinnon essentially states pornography is too persuasive in a strategic sense. This argument gives too much credit to pornography and is impermissible in a framework that protects persuasive speech. This argument holds that anti-sexist speech cannot be more persuasive than sexist speech. To foster an ideal speech situation in Habermas's terms, deafening speech

---

*see* Indianapolis and Marion County, Ind., Ordinance 35, (June 11, 1984), and in Minneapolis (where it was vetoed by the mayor). *See* DWORKIN, *supra* note 7, at xxviii-xxxiv (giving a personal account of her work on the Minneapolis anti-pornography law); OSANKA & JOHANN, *supra* note 52, at 340-80. The Seventh Circuit held the Indianapolis statute unconstitutional and the Supreme Court summarily affirmed without any briefing or argument. *American Booksellers v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986). In February 1992, Canada's Supreme Court upheld an anti-pornography law that criminalizes pornography that is "harmful to women." Carr, *supra* note 172, at 24; Tamar Lewin, *Canada Court Says Pornography Harms Women*, N.Y. TIMES, Feb. 28, 1992, at B7. Meanwhile, the Pornography Victims' Compensation Act, which adopts the civil penalties formulation of the Dworkin/MacKinnon ordinance, was passed by the United States Senate Judiciary Committee in June, 1992, but never reached the Senate floor. *See* S.1521, 102d Cong., 1st Sess. (1991).

193. In contrast, the approach taken by John Rawls to perfect procedural justice examines the content of outcomes for validity. This is accomplished by comparing actual results in society to that to which participants in a hypothetical presocietal "original position" would agree. *See* JOHN RAWLS, *A THEORY OF JUSTICE* 11, 136-42 (1971) (further elaborating on the concept of an original position). While Rawls believes it is possible to identify certain common needs and interests that must be satisfied in any outcome, Habermas's framework requires a continuous critical analysis of needs. Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883, 898 & n.40 (1989).

194. DWORKIN, *supra* note 7, at xxxi, xxxiii; MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 14, 137, 140-41, 155-56.

195. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 195, 207.

196. *Id.* at 157-58.

197. *Id.* at 15-16, 139, 148, 151.



should be reconceptualized as speech that dominates the field, and reduces the opportunity for other persuasive speech. MacKinnon argues that women's silence results from their powerlessness.<sup>198</sup> Complete neutrality perpetuates domination by treating the speech of men and women as if both groups are equally empowered. But neutrality towards sexism is like neutrality towards racism: it ignores real substantive harms that need to be addressed. For example, *Brown v. Board of Education*<sup>199</sup> was premised on a finding that segregation harms Blacks by stigmatizing them as inferior and causing damage to their "hearts and minds."<sup>200</sup> MacKinnon wonders how the harm of segregation on blacks differs from the harm of pornography on women.<sup>201</sup> This analogy suggests the need for affirmative action in the field of speech.

An affirmative action theory is not part of our existing First Amendment jurisprudence, but it is not inconsistent with a Habermasian freedom to advocate. Current obscenity doctrine gives no positive entitlements to counterspeakers, but instead requires individual prosecutions and incarceration of those who produce pornography. Ultimately, the solution proposed by Dworkin and MacKinnon merely seeks to expand the category of materials that can be considered illegal by the law. However, it does little to promote conditions for effective counterspeech.

In the context of speech, I would point out that calling the prohibition of someone else's speech "affirmative" reverses the very meaning of the word. Affirmative action aims to provide positive entitlements and opportunities for disadvantaged groups, not deprive the majority of opportunity. Although deprivation of opportunities for some may result where resources are limited, as is the case with the job market, this condition may not hold in the speech market. As applied to speech, affirmative action should not require the prevention of majority speech, but rather requires a greater opportunity to speak and hear minority speech.

MacKinnon seems to recognize this when she argues that granting access to an arena of speech works like affirmative action.<sup>202</sup> She also describes the ineffectiveness of the First Amendment in advancing women's speech goals in this way:

The situation of women suggests that the urgent issue of our freedom of speech is not primarily the avoidance of state intervention as such, but getting affirmative access to speech for those to whom it has been denied.<sup>203</sup>

---

198. *Id.* at 39.

199. 347 U.S. 483, 494 n.11 (1954).

200. *Id.* at 494.

201. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 202.

202. *Id.* at 208.

203. *Id.* at 195.

Women's lack of access to meaningful avenues of communication contributes to their powerlessness.<sup>204</sup> Those who rebel against sexist images of women often have problems conveying or disseminating their dissent, including Andrea Dworkin, who has had difficulty having her work published.<sup>205</sup> At the same time, in a free market economy, more money buys more speech.<sup>206</sup> Men, and an ethic of domination embraced by both men and women, control the mass media; sex which objectifies women *does* sell. The pornography industry itself is estimated to generate billions of dollars annually.<sup>207</sup>

MacKinnon's concerns about access resonate strongly with a Habermasian approach that attempts to create an ideal speech situation. When avenues of discourse are controlled or dominated by a particular ideology, voices of dissent are literally not heard and often fail even to develop. An ideal speech situation requires not only freedom to communicate, but also an equal opportunity to engage in communication.<sup>208</sup> Habermas points out that the mass media create the risk that a controlling body will disseminate ideology by means of one-way communication, but at the same time create an opportunity to widely disseminate minority views and "concentrate processes of reaching understanding."<sup>209</sup> As part of the speech arena, the mass media must be analyzed critically in terms of its accessibility.

#### E. Comparing Affirmative Action for Speech to Kantian Theories of the Marketplace of Speech

To demonstrate just how radical an affirmative action approach can be, it is useful to compare the freedom to advocate with the "persuasion principle" that David Strauss puts forth as a justification for much of the

204. *Id.* at 181.

205. Andrea Dworkin's book *Pornography* was published only "after two separate publishers reneged on contractual agreements to publish it (and a dozen more refused outright), [and it was] out of print in the United States for . . . several years." DWORKIN, *supra* note 7, at xxxvii.

206. MACKINNON, FEMINISM UNMODIFIED, *supra* note 7, at 140.

207. *Id.* at 223 n.9.

208. *See supra* text accompanying note 92.

209. HABERMAS, 2 COMMUNICATIVE ACTION, *supra* note 79, at 390. *See also* HABERMAS, 1 COMMUNICATIVE ACTION, *supra* note 5, at 372 (noting that the one-way flow of current media technology neutralizes its potential for expanded communication); INGRAM, *supra* note 28, at 164-65. Strangely, Habermas does not appreciate the role mass media plays in teaching majority cultural ideals and its power to shape public opinion; he feels that its programs "do not only, or even for the most part, reflect the standards of mass culture." HABERMAS, 2 COMMUNICATIVE ACTION, *supra* note 79, at 391. He suggests everyday communication outweighs the influence of the mass media: "it is people talking with people more than people listening to, or reading, or looking at the mass media that really causes opinions to change." *Id.* at 391 n.41 (quoting C. WRIGHT MILLS, *POLITICS, POWER AND PEOPLE* 590 (Irving L. Horowitz ed., 1963)). However, it does not seem that this oversight is central to his conception of the emancipatory potential of the mass media, or to his theory generally.

Supreme Court's current First Amendment jurisprudence<sup>210</sup> and C. Edwin Baker's "liberty theory" of the First Amendment.<sup>211</sup> At first glance, Strauss' persuasion principle is quite similar to the semantic freedom of communicative action. A speaker is potentially subject to regulation if she lies or intends "to gain an advantage by using her superior resources . . . instead of just offering the arguments for what they are worth on the merits."<sup>212</sup> It is also similar to the freedom to advocate: "[t]he government may not suppress speech on the ground that it is too persuasive."<sup>213</sup> However, while Strauss acknowledges similarities between his theory and Habermas's strategic/communicative distinction,<sup>214</sup> he rejects a Habermasian justification for the theory.<sup>215</sup> Instead, he grounds his argument for a persuasion principle on a Kantian concept of autonomy—an individual's right to be treated as an end, not a means. Lies amount to "a denial of autonomy in the sense that they interfere with a person's control over her own reasoning processes."<sup>216</sup> Similarly, strategic speech is wrong because it is "a form of manipulation. . . . [The] speaker is trying to take over the mind of the listener, to make her pursue the speaker's ends instead of her own."<sup>217</sup>

Strauss rejects the Habermasian theory of procedural justice on the ground that it fails to explain why one should "accept the outcomes of *this*

---

210. Strauss argues that his persuasion principle finds its home in Justice Brandeis's concurring opinion in *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (arguing that free speech is indispensable to democratic discussion). Strauss, *supra* note 15, at 336. He also argues that this principle has guided decisions such as *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (protecting speech advocating unlawful conduct as long as it does not "incit[e] or produc[e]" that unlawful conduct), Strauss, *supra* note 15, at 338-39 n.10; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (protecting statements of opinion in defamation case), Strauss *supra* note 15, at 339-40; and the Court's commercial speech cases, with the exception of *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), Strauss, *supra* note 15, at 343-45.

211. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989).

212. Strauss, *supra* note 15, at 362.

213. *Id.* at 334. This principle is qualified in a way that has an impact on the pornography question. Strauss argues that despite its persuasive character, speech might be suppressed if the consequences of allowing it are "too severe." *Id.* at 335. Accordingly, the psychic wounds caused by sexist and racist speech may justify their suppression. *Id.* at 340 n.14. However, Strauss distinguishes between types of sexist speech. When speech constituting sexual harassment is "spoken directly to the victim . . . there is little chance that any [protected] persuasion is occurring," *id.* at 343, but there is a special danger that the government's motive in regulation of sexist speech directed to wide audiences (such as pornography) is due to the ability of that speech to persuade its audience. *Id.* at 343 & n.23. It seems that because of this problem, Strauss prefers to base an argument for prohibiting pornography on the ground that it appeals to nonrational elements and produces "ill-considered reaction." *Id.* at 345-46 n.35. However, Strauss seems to recognize the serious personal autonomy issues raised by this argument: "there are occasions when a rational person would want to be moved to spontaneous or impulsive action." *Id.* at 366-67.

214. *Id.* at 362 n.73.

215. *Id.* at 362-63.

216. *Id.* at 354.

217. *Id.* at 362.

process—instead of some other process.”<sup>218</sup> This ignores Habermas’s claim that his model of procedural justice is derived from the ethic of cooperation and rationality which is imbedded in speech itself. Notwithstanding that this is a controversial foundation for social theory,<sup>219</sup> the theory does have philosophical justification.

The liberal Kantian basis for Strauss’ theory seems to distract him from the insights about access to speech opportunities that a Habermasian freedom to advocate provides. Strauss argues that the “inclinations and resources of potential speakers . . . are arbitrary factors” and that the listener’s inability to seek out all counter-arguments is limited by such resources as time and money. This situation makes listeners vulnerable to manipulative private speech.

However, Strauss does not take a critical position on the arbitrary distribution of resources itself. Rather, his solution is to suppress manipulative private speech; it would be too costly to provide affirmative access to resources or those who lack them.<sup>220</sup> It seems that Strauss’ uncritical approach to the given distribution of resources stems from an economic individualism that often accompanies liberal political theory.<sup>221</sup>

C. Edwin Baker has developed a free speech theory that is similar to Strauss’ in that it relies on Habermasian concepts, but ultimately rests on Kantian justifications. Baker agrees with Habermas’s social analysis of the system and lifeworld, and assigns to free speech the task of attacking the modern separation of means and ends.<sup>222</sup> Baker rejects a marketplace-of-ideas model<sup>223</sup> and, like Strauss, grounds free speech in a Kantian liberty theory that guarantees rights to self-fulfillment, autonomy, and freedom from coercion.<sup>224</sup> This analysis leads Baker to allow regulation of any speech that is either coercive or “cannot be attributed to the speaker’s manifestation of her substantive values.”<sup>225</sup> This formulation justifies regulation of all commercial speech.<sup>226</sup>

Baker’s singling out the profit motive as justification for regulation has been criticized for reaching too broadly and potentially encompassing all forms of commercial entertainment.<sup>227</sup> Baker fails to recognize that

218. *Id.* at 353.

219. *See supra* notes 72-74, 81-83, 93-103, and accompanying text.

220. Strauss, *supra* note 15, at 363-64.

221. *But see* RONALD M. DWORKIN, *Liberalism, in A MATTER OF PRINCIPLE, supra* note 59, at 181, 184-85 (suggesting that liberals’ favoring of free enterprise may be merely a derivative strategy that does not arise from core liberal values of equality).

222. BAKER, *supra* note 211, at 117-22.

223. *See supra* note 92 and accompanying text.

224. BAKER, *supra* note 211, at 59.

225. *Id.*

226. *See, e.g., id.* at 197-98 (arguing that the overriding purpose of commercial speech is to create and manipulate values in order to increase profit, which is contrary to the concepts of human self-determination and autonomy).

227. Jordan M. Steiker, *Creating a Community of Liberals*, 69 TEX. L. REV. 795, 804-05 (1991) (reviewing C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989)).

“speech ‘dictated’ by the market . . . enhance[s] the capacity of listeners to choose their values and to further their life plans.”<sup>228</sup> This failure stems from Baker’s rooting free speech in autonomy values, which only require “freedom from restrictions on expressive activity, not freedom to receive expressive communication.”<sup>229</sup> Again, this flaw demonstrates how a Kantian justification for free speech theory can only provide *negative* freedoms for individuals, whereas the freedom to advocate allows for *positive* entitlements by concentrating on the process of discourse as a whole.

The Habermasian approach, by employing the ideal speech situation as the standard of legitimacy, critiques the given distribution of access to speech media. The freedom to advocate, insofar as it recognizes positive entitlements as a way to improve the speech market, would certainly support campaign finance reform as well as regulation of access to private speech. This would adjust for the kinds of speech-market failures that Strauss assumes cannot be corrected. The freedom to advocate would not subject all speech motivated by profit to regulation, as might Baker’s theory. It would instead provide increased opportunities for speech that is not commercially successful. Commercially motivated speech like 2 Live Crew’s lyrics can be criticized on that basis, but should not be subject to regulation or prohibition.

#### F. Implementing Affirmative Action for Speech

Effective pornography counterspeech requires improved access to the media or to other structures of socialization such as our educational system. Affirmative counterspeech measures might include warning labels, equal air time, debriefing, or a right to respond. However, such an approach faces difficulty in a free market economy that creates social speech arenas regulated by supply and demand, and profit, rather than by fairness and equality. Accordingly, the freeness of the marketplace of ideas may only come about by using positive entitlements to level the ideological and economic playing field.<sup>230</sup> This might lead one to the extreme position that

Every sponsor . . . of every page of magazine copy, foot of movie film, inch of videotape, second of recording time, of each billboard, of every ad which uses a female as a sexual object, should be required to provide equal time and space for uncensored responses.<sup>231</sup>

---

228. *Id.* at 805.

229. *Id.* at 804.

230. C. Edwin Baker has also recognized that the marketplace of ideas is far from free, but his analysis does not look to the fact that it is driven by the irrationality of a profit-seeking economic market. He rejects the marketplace model because he asserts that we can no longer accept the myth that objective truth is obtainable, but rather must concede that it is culturally bound. BAKER, *supra* note 211, at 12-17.

231. Judith Baat-Ada (Reisman), *Freedom of Speech as Mythology, or “Quill Pen and Parchment Thinking” in an Electronic Environment*, 8 N.Y.U. REV. L. & SOC. CHANGE 271,

A less radical measure to promote equal access would require governmental sponsorship of substantive views that are systematically under-represented in the free marketplace, a view supported by Owen Fiss:

It would be sad if the First Amendment became captured by the economic system and if we thus allowed free speech to be compromised by our desire to protect private property. The revenues collected by the state constitute a public resource, to be used for public purposes, and I can think of no higher purpose for these funds than the preservation of democracy, bringing before the public viewpoints and options that otherwise might be slighted or ignored.<sup>232</sup>

This might entail the reconceptualizing of institutions like the National Endowment for the Arts (NEA), which through its selective funding process has unfortunately become a political tool for disapproving some of the most important counterspeech to the prevailing morality. For example, due to the Helms amendment, an anti-obscenity restriction enacted in 1989,<sup>233</sup> the NEA refused to fund artists like Karen Finley, whose radically feminist performances often use nudity, masturbation, and images of human excrement.<sup>234</sup> While the anti-obscenity restriction eventually expired,<sup>235</sup> the agency's future in supporting sexually oriented works of art, or indeed any works of art, is uncertain.<sup>236</sup> However, a revitalized NEA

279 (1978-79). Baat-Ada argues that such measures are justified because an expansive reading of the First Amendment has changed "the 'ground rules' by which our culture function[s]" and thus the power of mass media expanded. "One of these rules was that there existed a free marketplace of ideas in which good words battled bad words, and in which truth was expected to triumph," *id.* at 275, but that now, the "language skills and techniques with which to address the citizenry . . . are owned by the mass media." *Id.* at 277.

232. Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2106 (1991).

233. Pub. L. No. 101-121, § 304, 103 Stat. 741, 741-42 (1989) (codified at 20 U.S.C. § 954 (1994)).

234. Steven Holden, *Finley Mocks Her Critics In Her Art*, N.Y. TIMES, July 24, 1990, at C13.

235. Karen DeWitt, *New Fiscal Year Ends Anti-Obscenity Pledge*, N.Y. TIMES, Oct. 30, 1990, at C16.

236. The NEA Authorization Act, 20 U.S.C. § 954(d), which was struck down as violating First Amendment rights in *Finley v. NEA*, 795 F. Supp. 1457 (C.D. Cal. 1992), was actually more vague and potentially broader than the earlier anti-obscenity standard. The court required the agency to be "sensitive to the general standards of decency and respect for the diverse beliefs of the American public." See William H. Honan, *Finding Fault With New Arts-Grant Law*, N.Y. TIMES, Nov. 10, 1990, at 13. Despite this, NEA chairman John E. Frohnmayer declared that he would not be a "decency czar." William H. Honan, *Arts Council Rejects Decency Rules for Advisers*, N.Y. TIMES, Dec. 15, 1990, at 19. He approved grants to Karen Finley and Holly Hughes, both performance artists whose work is sexually explicit. Barbara Gamarekian, *Arts Endowment Reverses a Stand*, N.Y. TIMES, Jan. 5, 1991, The Arts, at 9. Frohnmayer was apparently forced to leave his post after Presidential candidate Patrick J. Buchanan attacked President Bush's support of Frohnmayer, who had recently approved grants for sexually explicit performance artists and publications, including two books entitled *Queer City* and *Live Sex Acts*. William H. Honan, *Head of Endowment for the Arts is Forced From His Post By Bush*, N.Y. TIMES, Feb. 22, 1992, at 1. For an

might promote equal access and counterspeech in ways consistent with the Habermasian goal of the ideal speech situation.

These proposals do not exhaust the ways to implement the ideal of equal access to speech arenas. The key to understanding the pornography issue is an understanding that, because pornographic speech takes place outside state action, in the field of commerce, a major cultural transformation is necessary to bring about a change in the way we think about sexuality and women.

#### CONCLUSION: IS COUNTERSPEECH POSSIBLE?

MacKinnon's and Dworkin's arguments demonstrate that it is possible to rationally dispute and respond to the validity claims of pornography or other sexist speech. They argue that pornography's model of sexuality is not natural but socially constructed, that pornography is improper behavior, that the pornographer coerces the cooperation of women in such representations, and that women themselves are not speaking through representations. Other examples of counterspeech to pornography attack the messages it seeks to communicate. Throughout history, women have provided a special perspective on sexuality through their often-secret writings.<sup>237</sup> Even in the field of music there are counter-lyrics from various female rappers to dispute objectionable representations of women.<sup>238</sup>

---

extended discussion and criticism of the NEA's anti-obscenity restrictions, see Fiss, *supra* note 232, at 2092-2106. Two bills have been recently introduced to abolish the NEA. H.R. 579 and H.R. 209, 104th Cong., Reg. Sess. (1995).

237. See, e.g., *EROTICA* (Margaret Reynolds ed., 1990). *Erotica* is an extensive anthology of writings by women dating from the mid-seventh century B.C. to the present which provides a woman's perspective on sexuality. "[A]lthough [men] may pleasure a woman, they do not become the focus of the piece. Whilst men are removed from the central role they so covet, they are not objectified or humiliated. . . . It is not necessary to devalue half of the species in order to manufacture pleasure." Jeanette Winterson, *Foreword* to *EROTICA*, *supra* this note, at xxii-xxiii.

238. Much of this counterspeech is not directly responsive to the sexist lyrics of rap groups such as 2 Live Crew. Its defiance is rather expressed by women rappers' lyrics that are strong, independent, sensitive, intelligent, and express meaningful relationships with men. Two rappers who have more directly responded to sexist portrayals of women are Queen Latifah and M.C. Lady "D":

"R-E-S-P-E-C-T

I do it so you do it for me  
So basic that old time bottom line  
Once again defending my sex with a rhyme  
Like an Uzi takin' out that bullshit  
Sexism sucks and I won't live with it . . . ."

- M. C. Lady "D"

"Its my rap that rocks this party  
I'm gonna hijack and jack your body  
This is not an erotic interlude  
Keep in mind I move in multitudes  
The Asiatic Black Woman, hard core beat drummin'  
It's hard to keep a good woman down so I keep comin' . . . ."

- *Come Into My House*, Queen Latifah

Any prohibition on pornography might even tend to deprive women of the right to engage legally in some of the most effective counterspeech to pornography: non-sexist depictions of sexuality. Karen Finley's performance art and writings are an example. Finley appropriates the language and images of obscenity to describe the horror of being a victim in a man's world.<sup>239</sup> "Feminist pornography," despite its oxymoronic label, includes magazines and movies of a distinct genre which "portray women as intelligent human beings with the freedom to choose to make love when and how they want to, with complete satisfaction and no guilt."<sup>240</sup>

Counterspeech is not only possible, but has proven effective in various clinical studies. Daniel Linz and Edward Donnerstein have surveyed the results of clinical studies of pornographic and violent materials where the subjects were debriefed after viewing. Various studies by different researchers, using various filmed stimuli have been conducted. Those subjects who were told that the films they had watched contained themes of "rape myth" (where rape is depicted as desired by women and a natural behavior of men), or told of the tendency for such material to desensitize them to violence against women, tended to be less inclined to believe such rape myths. This counterspeech affected subjects as late as six or seven months after participation in several studies.<sup>241</sup> This suggests that even the most direct form of clinically demonstrated causation is not irreversible, but is more the product of persuasion than of an involuntary process.

MacKinnon claims that it is vicious to suggest that counterspeech will change women's position because pornography so discredits women as to

Dominique DiPrima, *Beat The Rap*, MOTHER JONES, Sept.-Oct. 1990, at 32, 36, 80.

239. "Joanne sleeps with a gun under her pillow because every time she has intercourse with her husband he defecates uncontrollably as he has an orgasm. . . . So she takes her gun and sticks it up her husband's asshole just as he is about to cum. The gun up his ass gives her such a sense of power, and for a few fleeting moments the tables are turned as she forgets the time when she was forced to perform fellatio at gunpoint in front of her own children and pets." KAREN FINLEY, *Two Stories*, in SHOCK TREATMENT 11, 11-12 (1990). For a description of one of Finley's live performances, "We Keep Our Victims Ready," in which Finley smears her body with chocolate to represent a woman who "thinks of herself as nothing more than excrement," see Holden, *supra* note 234; Laura Shapiro, *A One-Woman Tour of Hell*, NEWSWEEK, Aug. 6, 1990, at 60, 60-61.

240. Laura Fraser, *Nasty Girls*, MOTHER JONES, Feb.-Mar. 1990, at 32. Annie Sprinkle, feminist porn star, performer, producer, and writer says "[w]omen have something really special to offer in terms of helping our society grow sexually." *Id.* at 50. Important comparisons can be made within the feminist porn genre. For example, in Candida Royalle's *Femme Productions* movies, the women "never end up just servicing the men. The love making is egalitarian. . ." *Id.* at 34. On the other hand, the work of Susie Bright ("Susie Sexpert"), editor of *On Our Backs* magazine and featured in movies by *Fatale Films*, emphasizes "leather, chains, dildos, and butch-femme relationships," and "depict[s] unrestrained sex to make a political point about how women have been 'protected' from exciting sex and satisfaction—for far too long." *Id.* at 35. The work of Sprinkle, Bright, Finley, and others can be sampled in *ANGRY WOMEN* (Andrea Juno & V. Vale eds., 1991).

241. Linz & Donnerstein, *supra* note 53, at 267. The Linz & Donnerstein article analyzes the results of seven different studies where subjects were debriefed.



make their speech impossible<sup>242</sup> and, thus far, more free speech has not unearthed any truths, but has created more lies about women.<sup>243</sup> I believe that MacKinnon underestimates the human capacity for reason. The critique that she and Dworkin level against pornography, and their description of its horrific consequences, are analytically and morally persuasive. If enough men heard and understood these kinds of arguments, many would probably stop consuming pornography or reassess their attitudes towards sexuality and women generally. The alternative, a forced result, is unacceptable under a Habermasian framework which strives to reach right outcomes through persuasive reasoning. A Habermasian critique of the freeness of the marketplace of ideas, which embraces the concept that open deliberation is the best way to self-government and emancipatory change, leads to the conclusion that counterspeech within structurally fair institutions is the only legitimate way to deal with the sexism and objectification encouraged by pornography. While this may be unsatisfying to those who would not hesitate to remove substantively unfair views from the speech marketplace, I will admit that my agreement with a Habermasian approach to free speech depends on my faith in people's ability to be or become rational, a concept that is central to Habermas's arguments. The alternative is a shortcut to "right" results that suggests women will never have the power to correct sexism through speech. If a forced right result is all we can hope for, then only power can prevent a reversion to a wrong result. Allowing the wrong ideas to be advocated, however, reminds us of why we come to hold the right ones.

---

242. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 181. "My work is considered not law by lawyers, not scholarship by academics, too practical by intellectuals, too intellectual by practitioners, and neither politics nor science by political scientists." *Id.* at 132.

243. *Id.* at 155.

