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Philosophy and Public Affairs, Volume 24, Issue 1 (Winter, 1995), 64-79.

Stable URL:
http://links.jstor.org/sici?sici=0048-3915%28199524%2924%3A1%3C64%3AFOSAAR%3E2.0.CO%3B2-2

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Free expression has never lacked adversaries. Despite its impressive string of legal victories this century, there has recently emerged a revitalized opposition, bearing fresh political motivations and a fine academic pedigree. Yet the new wave of arguments favoring the regulation of speech and expression differs only sporadically from its predecessors. Its targets have not so much changed as been expanded. Campus speech codes target not only so-called "fighting words," face-to-face epithets that are supposed to lack cognitive content, but also "hate speech" that expresses substantive, albeit repugnant, ideas. And some feminists would challenge graphic depictions of sexuality—that hoary bugbear of the right—even when they are granted not to be obscene.[1]

Moreover, the two most venerable arguments for censorship are still very much in evidence. The first, a consequentialist argument, is simply that the dire consequences of allowing free speech outweigh its benefits. In response, Ronald Dworkin has argued that to take rights seriously precludes balancing them against consequences.[2] A second argument would meet this objection. It claims that the right to free speech conflicts with other rights or ultimate values, in particular, with equality. This intractable conflict would make some kind of ordering or balancing necessary, and hence justifiable. It is then claimed that in the conflict between liberty and equality, liberty—as manifest in the freedom of ex-

I would like to thank P. E. Bennett, Justin D'Arms, Heidi Li Feldman, David Hills, Brian Leiter, and two anonymous referees, for their helpful comments on an earlier draft.

1. Some other feminists distinguish between sexist and nonsexist pornography, or "erotica"; and some would not arttempt to censor even the former.

2. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978).

pression—should give way. Such liberals as John Rawls, however, argue that liberty should be given a lexical priority over other values.[3]

Civil libertarians have defended free speech—to my mind, persuasively—on both counts. But I do not want to enter those long-standing arguments, nor to consider the moral and political motives fueling the latest constraints on expression, embodied in campus speech codes and the like. Instead I want to focus on a startling new argument for censorship, directed at an old target, pornography.[4] This argument is quite remarkable and would be extremely powerful, were it cogent, because it purports to proceed from the civil libertarian's own premises. It thus circumvents the objections of both Dworkin and Rawls to traditional challenges. The claim is that *in order to promote free expression*, we ought to censor pornography.

By far the most prominent exponent of this argument is Catharine MacKinnon. It is attributed to her, but substantially developed, in Rae Langton's recent article, "Speech Acts and Unspeakable Acts."[5] As this is the most philosophically careful and sustained defense of these ideas I have yet seen, it will serve as a good focus of my discussion. The central claim is explicated in a passage that Langton quotes: " 'The free speech of men silences the free speech of women. It is the same goal, just other *people*,' says MacKinnon, arguing that feminist antipornography legislation is motivated by the very values enshrined in the First Amendment."[6]

Mention of the First Amendment serves to remind us that this is a legal as well as a philosophical debate. For the most part, though, I will try to avoid the thicket of relevant technical issues in the law. In particular, I will use the term "speech" in the everyday manner, not as a legal term of art. Another remark needs to be made at the outset. Langton writes that "free speech is a good thing because it enables people to act, enables people to do things with words: protest, question, answer" (p.

3. See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

4. Definitions of pornography are almost invariably tendentious or nebulous, although the plausibility of the many exigent empirical claims made about it seem to require considerable precision. However, as I will not be addressing those claims here, we can assume for the sake of argument that we know pornography when we see it.

5. *Philosophy & Public Affairs* 22, no. 4 (Fall 93): 292–330.

6. Catharine MacKinnon, from "Not a Moral Issue," in *Feminism Unmodified* (Cambridge: Harvard University Press, 1987), p. 156, quoted in Rae Langton, "Speech Acts and Unspeakable Acts," p. 297. Future references to Langton's article will be given in parentheses.

328). Such a pronouncement on the value of free speech threatens to beg what Lawrence Tribe pinpoints as the central question behind First Amendment debate: Is free speech good for its own sake, or only as a means to something else, such as truth or empowerment?[7] However, as the actions Langton has in mind are *speech acts*—performances made with words—the ability to perform them is arguably an intrinsic value of free speech. Indeed, Langton's argument is that if women cannot perform certain speech acts—even if they can mouth the right words—then they cannot be said to have free speech.

If by silencing women pornography violates their right to free speech, then there is a conflict between two liberty rights. Moreover, of all the proposed balancings, this is surely the scale most favorable to the antipornography side. Still, their major premise needs demonstration. One form of silencing that has received considerable attention from other quarters is how girls and women can, overtly or subtly, be discouraged from arguing or otherwise speaking their mind.[8] But this is most plausibly the result of teachers and parents who, knowingly or not, inculcate traditional gender roles. The empirical claims made about pornography (the strength of which we will not here assess) concern quite different effects, particularly violence against women. There is also the suggestion in MacKinnon's work that pornography does not just depict, or even cause, but *constitutes* the subordination and silencing of women. It is this idea that MacKinnon's opponents often find confused or incoherent. Indeed, Langton notes that the idea that women are silenced by pornography is taken to be problematic even by many sympathizers, who characterize the silencing as figurative or metaphorical.

Yet it seems that for the silencing argument to have anything like its purported force, it must be taken literally. The claim underlying the argument, which makes it so novel and philosophically interesting, is that it is motivated by the *very values* enshrined in the First Amendment, the *same goal* as free speech. This claim is significantly attenuated, if not simply breached, by the admission that this identity is only figurative. But if pornography silences women, clearly it does not do so in quite the

7. Lawrence Tribe, *American Constitutional Law*, 2d ed. (Mineola, N.Y.: The Foundation Press, 1988), p. 785.

8. See for example Carol Gilligan, *In A Different Voice* (Cambridge: Harvard University Press, 1982).

same way that book banning, blacklisting, or flag burning statutes silence their antagonists. It does not legislate against anyone's speech or otherwise overtly punish expression. What then does this silencing amount to?

Langton is admirably game to accept this argumentative burden. She declares her aim to be the demonstration that this silencing is literal, makes perfect sense, is not philosophically confused, and may well be true. Her ingenious explication of the silencing argument succeeds in making MacKinnon's claim both literal and coherent, which seems to me no small task. However, I will argue that there are two significant problems with this strategy: The argument that emerges does not, as purported, rest on civil libertarian premises. Nor is it cogent even when taken on less ambitious terms. In short, coherence is won for the silencing argument only at the cost of defensibility.

How can we evaluate the claim that the silencing argument has the "same goal" as arguments for the freedom of expression, without begging the question on the value of free speech? We need to look first at what the arch-defenders of free speech have been trying to defend, and on what grounds. J. S. Mill is surely one of the best exemplars of extreme civil libertarianism, one noted for his uncompromising defense of the freedom of thought and expression. Of course, Mill was also a utilitarian, and it is notoriously problematic to reconcile his conclusions with his justifications; but for our purposes we can ignore his underlying theoretical commitments.[9] The crucial point is that not even Mill thought that one should be permitted to say anything, anytime. The old canard that you cannot yell "fire" in a crowded theater should not bother him, nor any other defender of free speech. Mill is quite prepared to accept restrictions *of a certain sort* on what you can utter and where—as are all civil libertarians. This point is most clear when we consider phonetic acts, of producing sound orally, which are individuated by the particular sound made. Were free speech understood as the freedom to

9. C. L. Ten canvasses and criticizes attempts to reconcile Mill's views in "Mill's Defense of Liberty" in *J. S. Mill: On Liberty in Focus*, ed. John Gray and G. W. Smith (London: Routledge, 1991). I am not fully convinced that indirect utilitarianism cannot resolve Mill's difficulties, but for our purposes this is immaterial. For Mill, there is a trivial sense in which every moral principle has the same goal as free speech: that of maximizing happiness. However, the real question is whether the silencing argument can stand on premises a civil libertarian—not a utilitarian—must or should accept.

perform any phonetic act, anytime and anywhere, then libraries and hospitals (which prohibit loud noises) would restrict it. But this suggestion, I dare say, is obviously frivolous.

In fact, Mill offers an example which shows conclusively that he had no ambitions to protect every phonetic act, nor even every linguistic act, of uttering certain words. He held rather that, although no speech should be restricted on grounds of its content, still,

> No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, *when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act.* An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may incur just punishment when delivered . . . to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.[10]

Linguistic acts are not immune from restriction when they constitute a "positive instigation" or incitement. But just when does a linguistic act become an incitement and lose its protection? There are two simple answers to the crucial question, neither of which will do. The first inadequate answer is that the expression of an idea is an incitement to mischief when it is likely to have bad consequences; and the second, when it is intended to have them.

Granted, both these features are present in Mill's example, as it is most plausibly filled out. We can presume that the crowd is assembled outside the corn-dealer's house, all agitated, for a reason. In such circumstances, a riot seems a likely result of voicing the opinion in question; and it is reasonable to infer that someone voicing that idea just then has it in mind to precipitate violence. Even so, these features are not even jointly sufficient to make a linguistic act constitute incitement. The opinion that private property is robbery might, in certain climates, be likely to cause rebellion or disorder when it is simply expressed in the press; moreover, that might be the intention of the publisher. Furthermore, some ideas might be thought inevitably to have bad consequences; for instance, the claim that there is no God may have the (in-

10. See Mill, "On Liberty," reprinted in Gray and Smith, *J. S. Mill*, p. 72 (my emphasis).

tended) result of leading people to disbelief and, perhaps, perdition. Yet Mill never suggests that he is willing to compromise religious freedom, or freedom of the press, on the basis of direct utilitarian calculations (which is, indeed, the best reason to think him an indirect consequentialist). Moreover, as Dworkin has argued, the rights-based approach that most defenders of free speech favor requires precisely this unwillingness. Mill's program thus requires a subtler understanding of what constitutes incitement, and hence makes a linguistic act unprotected, than focus on the likely, or the intended, effects of speech can provide.

Mill's principle against content-based restriction is, of course, a matter of considerable debate in constitutional law. In particular, restrictions of commercial speech and libel are notoriously less tractable than are restraints on harassment and incitement. Lawrence Tribe notes that, while the Court has declared that content-based restrictions are almost completely prohibited, this position is ultimately untenable, at least as a description of its actual judgments.[11] Nevertheless, he adds, "if the constitutional guarantee [of free speech] means anything, it means that, ordinarily at least, 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . .'"[12] The reconciliation of these two points is the crux of First Amendment debate. But the controversy itself demonstrates that Mill's principle offers a good gloss of what arch-advocates of free speech have been defending. Consistency pressures can be raised, to suggest that their defense should be still broader; but any extension of free speech beyond this realm must be motivated. In particular, it will not do simply to appeal to a dubious picture of the absoluteness of the concept of freedom, to the effect that it is not really *freedom* if there are any limitations. Then there is no freedom of religion, unless we are free to sacrifice babies to Satan. Indeed, there could be no freedom of anything.

Consider an example used by MacKinnon: we do not think a professor should be allowed to offer a student an A for sleeping with him.[13] In propositioning his student, the professor need not be expressing any proposition, moral opinion, or sentiment. He may simply be making an

11. Besides libel and commercial speech, and most pertinent to this discussion, there is the obscenity formula of Miller v. California. However, Tribe plausibly thinks this formula likely to be as unstable as it is unintelligible.

12. Tribe, *American*, p. 790, citing Police Department of the City of Chicago v. Mosley.

13. See her dialogue with Floyd Abrams in *The New York Times Magazine* of March 13, 1994, p. 42.

offer, and no one suggests there is a free-speech right to offer anything—the purchase of slaves, for example. But it would be hasty to rule out the example on these grounds. Suppose the professor had somewhat more tactfully announced to his student that he has no problem with the idea of exchanging grades for sex. Mill's principle suffices to show that the professor's linguistic act is beyond the pale of free-speech protection. Freedom of expression does require that even such a pernicious normative claim—that it is acceptable to barter grades for sex—should be permissible when made, for instance, in a journal article. But it is not protected when made in a class lecture or during office hours, where it evolves from an obnoxious idea to a disgraceful (and illegal) proposition, and thus becomes sexual harassment.

While Mill's principle seems to handle neatly the most pertinent cases, some adversaries of free speech call into question the very notion of content upon which it is premised. This suggestion, I think, lacks the force necessary to unseat such a fundamental notion; but there are certainly real issues in the neighborhood. (In particular, it is problematic how to extend the notion of content to nonlinguistic expressive acts, such as flag burning—and much pornography. However, since MacKinnon's concept of pornography clearly extends to purely linguistic material, we can safely ignore this problem here.) At any rate, Langton takes quite another approach. Her argument trades on J. L. Austin's speech-act theory, which presupposes the notion of content, albeit in order to direct our attention elsewhere.

Langton understands MacKinnon to be fundamentally in sympathy with Austin's charge that philosophers are preoccupied with the content of speech, at the expense of its performative aspects—that is, what we *do* with words. One curious thing about invoking this complaint here, though, is that Mill's principle is designed specifically to draw attention to actions (such as incitement to riot) that are performed linguistically. Mill's concern was to protect the expression of any opinion at all, without having to allow all linguistic acts—in particular, acts of instigation or incitement. Hence the complaint against civil libertarianism cannot be that it *overlooks* the performative aspects of expression, but that—despite Mill's efforts—in protecting even offensive ideas it permits objectionable linguistic acts. MacKinnon's example of the harassing professor obscures this point, since his speech act is unprotected; but Langton, to her credit, attempts to uncover another sort of illicit action that civil libertarians misguidedly defend under the auspices of free speech.

Indeed, we have already canvassed a reason to hope that speech-act theory will be useful here: for Mill's principle against content-based restriction to be tenable, we needed a way to distinguish acts of incitement. As Langton suggests, it proves helpful to consider Austin's distinctions between locution, illocution, and perlocution. *Locution* refers to what is expressed in an utterance; locutionary acts are individuated by the content of what is said.[14] *Illocution* refers to the action performed with an utterance, for instance assertion, warning, or promising. The same locutionary act (for instance, of stating the proposition "It's three o'clock") can constitute different illocutionary acts, depending on its context—it can serve simply as an assertion, or also as a warning. Finally, *perlocution* refers to the effect of an utterance on its audience. The same perlocutionary effect can be achieved by a variety of locutionary and illocutionary acts.

Free speech, as glossed by Mill, is roughly the freedom of locutionary acts: any opinion, however repugnant, may permissibly be expressed, though not in any possible context.[15] This may seem a curious way of putting things, since all illocutionary acts are also locutionary acts—but, as we have seen, the same locutionary act will constitute different illocutionary acts in different contexts. Indeed, Mill's example is designed precisely to show that we can prohibit certain illocutionary acts (such as incitement to riot) without prohibiting the expression of any idea—not even the inflammatory idea that corn-dealers are starvers of the poor—since that opinion can be expressed, and the same locutionary act performed, unobjectionably in many circumstances. It may be that the conception of incitement as an illocutionary act will help provide

14. John Searle takes issue with Austin's concept of a locutionary act, on the grounds that the meaning of some statements—especially those made with "illocutionary verbs" such as promise, warn, etc.—already determines their illocutionary force. See his "Austin on Locutionary and Illocutionary Acts" in *The Philosophical Review* (Oct. 1968): 405–24. These issues cannot be treated here, but I think that everything I want to say can be expressed using Searle's alternative notion of a propositional act. (In fact, I think Searle's notion may work better for my purposes—see note 15.) However, as Langton uses the "locution" locution, so will I.

15. This is not quite right, because, as Searle argues, the meaning of some statements seems to commit them to a certain illocutionary force. For instance, to go back to MacKinnon's example, "I hereby offer you an A for sleeping with me" is not synonymous with "I think it's all right to exchange grades for sex"; hence they are different (type) locutionary acts. This suggests that Mill's principle is more limited than the slogan "freedom of locutionary acts" implies, since he does not want to protect expression of the offer, only of the opinion. I think this problem can be surmounted, along lines suggested by Searle (see note 14); but that would be a large undertaking, and it is not my task here.

the subtler understanding necessary to distinguish speech that is probably harmful from that which positively incites. It is not implausible to think that a similar ambition motivates the Court's requirement that, for an act of expression to be restricted because of what is said, the danger it poses must not only be *clear* (for what could be clearer to a fundamentalist or an anti-communist than the dangers of hell and collective ownership?), but also *present*—as in, this particular corn-dealer's house being looted right now.

What about extending free expression beyond locutionary acts? A doctrine of freedom of perlocutionary effects is dubiously coherent, as one can fancy one's utterances having no end of magnificent effect. Such a doctrine would seem to render it permissible to seduce, extort, and torture, so long as words are your only weapon. Hence it would be deeply suspect. This is not to deny that the ability to engender certain perlocutionary effects is of value—on the contrary, we want to do things with our words. But freedom of speech is not freedom from perlocutionary frustration, the inability to make our words have the effects we wish. We shall consider presently how a kind of silencing argument might trade on the ills of such frustration; however, this will not be an argument from free-speech values, but from other social goods. First, though, what about freedom of illocutionary acts?

Langton's ingenious gloss on MacKinnon's argument takes the silencing that pornography allegedly perpetrates upon women as "illocutionary disablement": it renders women incapable of performing certain acts by speaking. It is not merely that they are unable to bring about the desired effects of their speech, for that would be perlocutionary frustration. This is a delicate and a crucial point, on which Austin and some commentators are insufficiently precise. William Alston makes the straightforward claim that "perlocutionary, but not illocutionary, acts essentially involve the production of some effect,"[16] whereas Austin himself insists that an illocutionary act must *secure uptake*, which constitutes some sort of effect. He writes, "I cannot be said to have warned an audience unless it hears what I say and takes what I say in a certain sense. An effect must be achieved on the audience if the illocutionary act is to be carried out."[17]

16. William Alston, *Philosophy of Language* (Englewood Cliffs, N.J.: Prentice-Hall, 1964), p. 36.

17. J. L. Austin, *How to Do Things with Words*, ed. J. O. Urmson (New York: Oxford University Press, 1965), pp. 115–16.

Clearly, I can warn you about smoking, say, without getting you to quit or even to worry—which is presumably my purpose. Hence an illocutionary act need not produce what we might call any *primary* effect. Austin suggests, however, that a secondary, cognitive effect, which I also intend—namely, getting you to realize that I am trying to warn you—is essential. This is what he is getting at by insisting that an illocutionary act must secure uptake. However, on this point Austin seems to overstate matters. Surely I have warned you (or scolded, asked, promised, thanked, invited, et al.) even if, *for some purely idiosyncratic reason*, this fails to register with you. Suppose Bill, in the grips of some paranoid fantasy, thinks Sally has only sent him an invitation to her wedding in order to gloat—that she does not really want him to attend. Bill, we must imagine, does not conclude this from his cold reception at her other parties, but only because his dosage has been too precipitously reduced. We should say that Sally has invited Bill, despite the fact that he misconstrues her act.

I take this intuition to be quite forceful; but my conclusion is not uncontroversial among the heavyweights of speech-act theory. It conflicts with Austin's account but accords with P. F. Strawson's; and Searle's discussion seems unclear on this point. He writes, "In the case of illocutionary acts we succeed in doing what we are trying to do by getting our audience to recognize what we are trying to do."[18] But "succeeding in what we are trying to do" is crucially ambiguous, for Sally is trying to do several things: get Bill to come to her party (bring about a perlocutionary effect), invite him (perform an illocutionary act), and get him to recognize her act as an invitation (secure uptake). I do not see why Austin—or Searle, if he is—should be committed to the claim that Sally must succeed in securing uptake in order to have succeeded in tendering an invitation, a claim belied by similar intuitions about inviting, warning, and promising.

However, now imagine that Sally, cognizant of Bill's condition, sends him an "invitation" she knows he will interpret this way. Perhaps then she has not actually invited him. If this is right, we should adopt Strawson's suggestion that it is *the aim, not the achievement*, of securing uptake that is essential to an illocutionary act.[19] While I am inclined to accept Strawson's account, my argument in no way depends upon it; I

18. John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1994), p. 47.

19. See P. F. Strawson, "Intention and Convention in Speech Acts" reprinted in *Readings*

will use only the weaker claim that at most the aim of securing uptake, not its achievement, is required. To deny this would be to hold the performance of an illocutionary act hostage to the perversity of one's audience. This point about idiosyncratic auditors will prove crucial to whether pornography might plausibly bring about the illocutionary disablement of women.

It is no simple matter to determine when a given illocutionary act has been brought off; to do so, we need to determine what Austin calls the "felicity conditions" of the performance. Some generalizations are possible. For instance, whether the intention to invite is or is not necessary for an act to be an invitation, it clearly is not sufficient. (Suppose Sally forgot to mail the card.) Moreover, the insufficiency of intent seems to obtain quite generally. Yet we cannot hope to give a complete and general account of felicity conditions for the performance of illocutionary acts. We need to look closely at cases and, specifically, to consider various examples of illocutionary disablement, several of which Langton describes. Gay couples cannot be married by saying "I do," in any context. Laws forbidding same-sex marriage prevent them from performing the illocutionary act of marrying by saying these, or any other, words. Or, to take another of Langton's cases, in a country that practices apartheid, a black cannot perform the act of voting by checking a ballot, saying yea or nay, or anything else. These examples of illocutionary disablement are, I think, in good order.

However, the argument against pornography rests on quite a different scenario.[20] Langton wants us to suppose that, as a result of exposure to pornography, someone has come to understand that when a woman says no to sex (indeed, the claim must be, *whatever* she says), she means yes. "Pornography might legitimate rape, and thus silence refusal, by doing something other than eroticizing refusal itself. It may simply leave

in the Philosophy of Language, ed. Jay F. Rosenberg and Charles Travis (Englewood Cliffs, N.J.: Prentice-Hall, 1971), pp. 599–614.

20. Actually, two scenarios concern pornography. But the first, having to do with protest, although interesting for other reasons, has little to do with the argument at hand. It concerns someone's protest giving a certain audience sexual excitement, and hence allegedly becoming pornographic (for them). I think there is an interesting issue here about what the mere possibility of misreading portends; but I do not see how this bears on restrictions of free speech. Even were pornography illegal, explicit protests could be "taken the wrong way" so as to give a perverse audience sexual pleasure. Furthermore, the outraged woman succeeds in protesting (to some); so if she is disabled, it is in a limited and even more problematic way.

no space for the refusal move in its depictions of sex" (p. 324). Such pornography would, presumably, depict women consenting by saying "no" as well as by saying "yes." (In fact, little of the material MacKinnon deems pornographic—which includes, for example, *Playboy*—actually does this, but that is another matter.) Someone who learned the rules of what Langton characterizes as "the language game of sexual consent" from this kind of pornography might not even recognize an attempted refusal. Were this to happen, a woman's attempts to refuse sex would in a very important and obvious sense have failed. But would this be the failure of illocutionary disablement, or of perlocutionary frustration? I will ultimately argue that it is the latter; but first I want to suggest that in either case the silencing argument does not succeed as advertised.

While the concept of illocutionary disablement is an interesting one, there are two misleading features to Langton's application of it. In the first place, refusing sex is not necessarily an illocutionary act—one can also refuse by physically resisting. Of course, physical resistance is more costly than verbal resistance; and if women are prevented from refusing sex through purely verbal means, they are thereby significantly harmed. Still, we should not say that someone cannot refuse unless she cannot do so by any means. Only such a strong claim would render Langton's cases analogous, since gay couples in America, and blacks under apartheid, can do nothing—linguistic or otherwise—that counts as marrying or voting. Langton seems willing to defend this strong claim, though, by suggesting that pornography might not just make refusal more costly, but foreclose its very possibility; and in what follows I will understand her this way.

The second potentially misleading feature is that all Langton's examples are cases where a right-thinking person (by my lights as well as hers) would wish that the disabled speaker be capable of performing her intended act. This is most anomalous. There are plenty of circumstances in which—on just about any normative view at all—illocutionary disablement is a fine thing. Anyone who holds, for instance, that blacks should be allowed to vote and gays to marry, thinks that the institutions of voting and marriage ought to exist. These institutions themselves, however, require that there be felicity conditions which rule certain acts and people in, and others out. Convicted felons, bigamists, and twelve year-olds must therefore be recognized as standing among the illocutionarily disabled.

Of course, it is one thing to say women should be able to refuse sex, and quite another to think twelve-year-olds should be allowed to vote and marry. Indeed, that is precisely my point: What is so terrible about a woman's being unable to refuse sex is the disablement of her autonomy, the resulting violation of her body, and assault on her well-being. Perhaps she is also illocutionarily disabled, and in this case (unlike many others) unjustly so. Nevertheless, there is no tension in defending a woman's right to refuse sex and denying a child the right to marry, because freedom of expression is not the freedom of illocutionary acts. Illocutionary silencing is beyond the pale of what even arch-defenders of free speech have tried to protect. No one has or should seek a First Amendment right to be able to knight, to exonerate, and to canonize. One could, I suppose, support freedom of illocution (although I cannot see wanting to, or doing so consistently); but no more than phonetic or perlocutionary freedom does it embody the same goal or value as free speech. So Langton's gloss on MacKinnon's silencing argument does not, as claimed, proceed from the civil libertarian's own premises.

One could advance a version of the silencing argument without talking about illocutionary disablement at all. It can sensibly be argued that one pernicious effect of pornography is to make refusal not impossible but futile. While the futility of refusal, a form of perlocutionary frustration, does not legitimately fall under the auspices of free speech, it is no less important for that. This would be another version of the familiar consequentialist argument against freedom of expression; as such it becomes less philosophically interesting, but perhaps more cogent. Of course, it would then be subject to the familiar counterarguments and limitations, such as the Court's "least restrictive means" test. However, the notion of illocutionary disablement might be thought to bolster this argument, despite failing to live up to its billing. In what follows, I shall argue that it cannot help the consequentialist argument, because the claim that pornography plausibly contributes to illocutionary disablement rests on a confusion.

As Langton points out, some rapists eroticize refusal—they get off on their victims' protests. Others presumably just do not care about obtaining consent. Recently feminists have drawn our attention to murkier circumstances, where consent and coercion are less obvious. Some suggest that consent must, at every step, be explicit; others that in so sexist a society as ours, consent is impossible; and still others that such strict

criteria, however well intentioned, are themselves demeaning to women. Obviously, people disagree about what counts as consent, but surely under some circumstances there can be unintentional rape. Suppose then that exposure to pornography has, as Langton imagines, brought some man sincerely to think that a woman's saying "no" to sex is just another way of consenting. He neither eroticizes her refusal, nor ignores it. Quite the contrary—regardless of what she says and how she says it, he doesn't take her to be refusing at all.

I confess to thinking this particular scenario of unintentional rape unlikely, but never mind that; still, surely, by clearly and forcefully saying no, a woman *does* refuse.[21] Hence this is rape, albeit (bizarrely) unintentional. The strange and troubling consequence of the argument from illocutionary disablement, however, is that *Langton cannot call this rape.* Remember that what it is to be illocutionarily disabled is to be prevented from performing a certain illocutionary act—in this case, refusal. It's not just that, as in more standard cases, refusing was futile, in that its intended perlocutionary effect was frustrated; nor that internalized cultural forces served to inhibit locution, keeping her from saying no. According to Langton, there was no refusal at all. The only argument I can find for this conclusion is her (correct) observation that intending to refuse is insufficient. But the woman we are imagining does not just intend to refuse; she makes her intentions manifest in language and behavior that any competent auditor would take as unambiguous refusal.

This is the crucial point. A thoroughly obscure epigram, however portentously intended, is not yet a warning. Intent is insufficient. Yet what a competent auditor would take as an unambiguous warning *is* one, even if on some occasion the actual person being warned fails to recognize it, through some lapse of attention or sensitivity. Our success in performing an illocutionary act does not depend on our success in

21. Langton sometimes writes as if she takes sex to be an informally constituted cultural practice on the order of a game, like baseball. It could be that the sex game differs importantly from the meaning game. More might be required, to do something that counts as refusing sex, than even an unambiguous expression of disapproval. This is true, in a limited way, when the law fails to recognize that wives can be raped by their husbands, or that men can be raped by women. But, taken broadly, the idea that disapproval is not sufficient for refusal just gets the sex game wrong, because for one thing it misses the central role of seduction. Whatever one thinks of seduction, and however pernicious the game may be, it crucially involves granting the object of seduction veto power. I am indebted to David Hills on this point.

securing uptake, because it is not hostage to the idiosyncrasies of our actual audience. In general, to perform a given illocutionary act it is necessary that a *competent* auditor—where this will require more than purely linguistic competence—would recognize the illocutionary act as such.[22] What Langton must argue, then, is that competent auditors would not take a woman to be able to refuse sex by saying "no"—or indeed by saying anything else. It is not enough that pornography warp an individual's perception of consent for it to bring about illocutionary disablement.

One might try introducing a gendered notion of competence here, analogous to the reasonable man/woman/person standards in the debate over sexual harassment. Since men are the auditors in question, it would suffice to show that a competent man would not recognize any linguistic act as constituting a woman's refusal of sex. So perhaps Langton could herself in this scenario call it rape, even while holding that a competent man would not. But this, it seems to me, is little better. In fact, men versed in the "language game of sex"—rapists and decent men alike—manifest the conviction that the man we have imagined is not a competent player. There are plenty of men who know and care that, as the slogan goes, "no" means no. But, however repugnant it is to recognize, rapists who eroticize their victims' refusal, boys who report thinking it OK to rape, men who ply women with drink in hopes of making them more likely to consent or just less likely to refuse, all thereby tacitly recognize that women can refuse sex. Were women illocutionarily disabled from refusing sex, then—in the language game of sex—"no" would in fact mean yes.

What is true, of course, is that rape is a singularly difficult crime to prosecute, especially when the only evidence against a defendant is the victim's testimony of refusal. Moreover, the law has not always recognized a married woman's right to refuse sex to her husband; and it has made it difficult for women whose sexual history is deemed promiscuous to refuse sex, at least through words alone. The recognition that, in these respects, women have been illocutionarily disabled is available to all—to men and women alike, and even to those who support these unjust laws and pernicious attitudes—although, as I have already ar-

22. Strawson's demand that the speaker aims at securing uptake must be added to this requirement, in order to circumvent cases where the speaker deliberately capitalizes on the perversity of an actual auditor.

gued, this is a thoroughly inadequate way to characterize the wrongs being done. Yet it is much more difficult to argue that pornography is responsible for such illocutionary disablement as exists, than it is to claim that it contributes to other harms, such as violence against women.

The undeniable increase in the sexual permissiveness of American society over the last thirty years is routinely blamed for a variety of social ills—the rise of sexually transmitted diseases, the decline of the family, and so on. While many of these arguments rest heavily on *post hoc, ergo propter hoc* reasoning, they are not all equally fallacious. Some genuine causal relationships surely obtain, even if they are always more complex than ideologues make them out to be. Yet it is simply not true that as the availability of pornography has increased, it has grown harder to prosecute rape or for women to be recognized as refusing sex. To the contrary, reforms of marriage and domestic violence laws, and increased sensitivity to date rape, have happened contemporaneously. Perhaps it is too much to suggest that the availability of pornography (or erotica) that depicts women enjoying and freely participating in sex—like Molly Bloom, meaning yes by "yes"—might contribute to dispelling the idea that to express sexual desire makes one a "fallen" woman, or implies a blanket consent to sex. Perhaps this kind of pornography too is objectifying and degrading to women, and maybe it even causes violence and rape—none of my arguments speak to these questions.

But even were all this true, it would not follow that pornography (as opposed, say, to an institutionalized and archaic conception of marriage, or of female sexuality) has rendered women illocutionarily disabled from refusing sex. In the crucial case, where it is granted that exposure to pornography has resulted in some man's being unable to recognize that a woman's clear and forceful "no" constitutes refusal, the relevant question is not whether *he* understands her to be refusing, but whether *we* do. Notice that we were forced to agree that the gay couple did not succeed in marrying nor the black in voting, however much we lament the relevant laws. But clearly we need not and should not grant that the woman consented, even if the man sincerely misunderstood. So it was rape after all. However, the result is that even in Langton's scenario, pornography does not cause illocutionary disablement. To do that, it would have to make competent auditors think that women cannot refuse sex. Then rape (of women) would be impossible.