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SPEECH AND ACTION:

*Replies to Hornsby and Langton**

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The fundamental tenet of the liberal conception of free speech is the principle of content neutrality, which Mill espoused in claiming that "there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered."[1] On this view, the immorality, the falsity, and even the harmfulness of an opinion are not good reasons to censor it. "However positive any one's persuasion may be, not only of the falsity but of the pernicious consequences" of an opinion, Mill writes, its expression cannot legitimately be prohibited.[2] Nevertheless, in certain limited circumstances, particular acts of assertion or expression must "lose their immunity" from interference, as Mill puts it, so that we may proscribe incitement to riot, harassment, and the like. Just how to specify those circumstances consistently with content neutrality is a challenge for the liberal program. Of course, this principle and the liberal conception of free speech it embodies are controversial. It can be questioned whether the principle succeeds in protecting the class of speech and other expression that liberals aspire to protect. And even if it does cover the right class, the principle's justification can be doubted. But I will not discuss these issues, on which there is already an immense literature, any further here.

Instead, I want to consider—or, rather, to reconsider—a recent argument which purports to use liberal principles to argue for the restriction of pornography. It is claimed that pornography silences women, that this silencing is a violation of their speech rights, and hence that pornography

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1. J.S. MILL, ON LIBERTY 36, n. 1 (John Gray and G.W. Smith eds., Routledge 1991) (1859). Note that content-neutrality as a principle of free speech is a different and less ambitious principle from neutrality among conceptions of the good.

2. *Id.* at 43. I am claiming that Mill does not consider harm prevention per se to be even a good (much less a sufficient) reason to censor an opinion or sentiment. This claim is admittedly in tension with some glosses of the so-called harm principle; but, as I have argued elsewhere, the role and content of Mill's principle of liberty is often fundamentally misconstrued. *See* Daniel Jacobson, *Mill on Liberty, Speech, and the Free Society*, 29 PHIL. & PUB. AFF. 276 (2000).

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can legitimately be restricted *on grounds of freedom of speech*. This argument would be uniquely powerful were it to succeed as advertised, since it purports to proceed from the liberal's own premises. Moreover, it would disarm the most prominent liberal objection to the censorship of pornography: that such censorship violates speech rights.[3] If, as the silencing argument claims, someone's speech rights must be infringed in either case, then, even granting the priority liberalism traditionally gives to free speech, it must be conceded that there is a strong prima facie case for censorship.

Jennifer Hornsby and Rae Langton have developed versions of the silencing argument that utilize speech-act theory, in a series of independent articles and a collaborative paper which will be my focus here, "Free Speech and Illocution."[4] There the authors respond to criticisms raised in an earlier paper of mine about Langton's argument from *illocutionary disablement*.[5] This argument relies upon the fundamental distinctions of speech-act theory between locution, illocution, and perlocution. A locutionary act is characterized by J.L. Austin, the theory's founder, as being "roughly equivalent to uttering a certain sentence with a certain sense and reference, which again is roughly equivalent to 'meaning' in the traditional sense."[6] Locutionary acts are thus type-identified by their content. But two locutionary acts of the same type can, in different contexts, constitute different types of illocutionary act; we can perform different actions by saying the same thing. For instance, what is simply an assertion under certain circumstances can be a command in others. P.F. Strawson explains the distinction between locutionary and illocutionary acts as follows: "A locutionary act is an act *of* saying something; an illocutionary act is an act we perform *in* saying something. It is what we *do*, *in* saying what we *say*."[7] Austin himself put forward several related criteria, including Strawson's, for differentiating illocutionary acts. Since he deemed each to be imperfect, Austin also relied heavily on ostension, focusing primarily on such paradigm illocutionary acts as warning, promising, marrying, and (as performed by an umpire in the context of a baseball game) calling a batter out.

In addition to performing locutionary and illocutionary acts, we also perform perlocutionary acts by speaking: these acts can be characterized as "what we bring about or achieve *by* saying something."[8] As John Searle explains, "[c]orrelated with the notion of illocutionary acts is the notion of the consequences or *effects* such acts have on the actions, thoughts, or

3. There are other liberal arguments against the censorship of pornography, of course, including arguments from a right to privacy and from more general liberty rights.

4. *See* Rae Langton and Jennifer Hornsby, *Free Speech and Illocution*, 4 LEGAL THEORY 21 (1998). *See also* Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 293 (1993). *See also* Jennifer Hornsby, *Speech Acts and Pornography*, *reprinted in* THE PROBLEM OF PORNOGRAPHY (S. Dwyer ed., 1995).

5. *See* Daniel Jacobson, *Freedom of Speech Acts? A Response to Langton*, 24 PHIL. & PUB. AFF. 64 (1995).

6. J.L. Austin, HOW TO DO THINGS WITH WORDS 109 (2nd ed., 1962).

7. P.F. Strawson, *Intention and Convention in Speech Acts*, 73 PHIL. REV. 439, 441 (1964).

8. AUSTIN, *supra* note 6, at 109.

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beliefs, etc. of hearers. For example, by arguing I may *persuade* or *convince* someone, by warning him I may *scare* or *alarm* him, by making a request I may *get him to do something*, by informing him I may *convince* him. . . ."[9] The italicized expressions denote types of perlocutionary act. One way to distinguish the illocutionary from the perlocutionary is that someone properly situated often can explicitly declare, "I hereby X," *thereby* performing the illocutionary act X; but this cannot be done with perlocutionary acts. For example, by saying "I warn you of P," one can thereby warn someone; whereas one cannot, by saying "I hereby convince you of P," thereby convince someone.[10] Perhaps the clearest way to state these distinctions is as between what is said (the locutionary act), what is done *in* saying it (the illocutionary act), and what is done *by* saying it (the perlocutionary act).

To be illocutionarily disabled in Langton's sense is to be rendered unable to perform some illocutionary act, such as promising, marrying, voting, and so forth. For instance, twelve-year-olds and same-sex couples are illocutionarily disabled from marrying by current American law. Whatever one thinks of the relevant laws, one might wonder what this issue—which ostensibly concerns the right to marry or some more general liberty right—has to do with *speech* rights in the first place. This prima facie skepticism will prove well founded, but for the moment I will simply register it and move on. Of course, in addition to and independent of the argument from illocutionary disablement, there are more straightforward ways to claim that pornography silences women. It might contribute to a hostile social climate in which women are reluctant to speak and, therefore, perform fewer locutionary acts; or it might make women's speech less effective, which Langton calls perlocutionary frustration. But such locutionary and perlocutionary forms of silencing are granted to be outside the purview of free speech protection. One's speech rights are not infringed whenever one is made reluctant to speak, for instance because of the social stigma attached to one's views; otherwise fascists would be deprived of free speech not only when the advocacy of fascism is outlawed but also whenever their ideology is widely despised. Nor are one's speech rights infringed whenever one's speech is prevented from having the effects one wishes—as when someone else's philosophical argument undermines one's own, rendering it unpersuasive. But things are supposed to be different with illocutionary disablement. This is claimed, by Langton and (in somewhat different terms) by Hornsby, at least in some cases to constitute the infringement of speech rights. Henceforward, by 'the silencing argument,' I will be referring to these arguments that focus specifically on illocutionary acts.

9. JOHN SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 25 (1969). The italics are his.

10. This is notwithstanding the fact that people sometimes cause others to believe something simply by asserting it. Another closely related mark of the illocutionary is that someone properly placed can say "I X you that . . ."—as in "I warn you that," but not "I convince you that." Finally, Austin makes much of the conventional nature of illocution: "Illocutionary acts are conventional acts: perlocutionary acts are not conventional" *(supra* note 6, at 121).

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In my earlier paper, "Freedom of Speech Acts? A Response to Langton," I argued that: (1) Illocutionary disablement won't do the work required of it by the silencing argument because, even in the scenario Langton imagines, pornography does not render women incapable of refusing sex, as she claims. (2) There is an absurd consequence to the claim that women have been illocutionarily disabled in this way, which can be taken as a *reductio* of the argument: it makes rape impossible in this hypothetical scenario. (3) Illocutionary disablement isn't even wrong per se, much less is it an infringement of speech rights on anything resembling the liberal conception. (4) Hence, despite its pretensions, the silencing argument does not rest on liberal premises; it is not truly a free speech argument for the restriction of pornography.

There are other grounds for defending censorship. It is often claimed that pornography harms women, and that this harm justifies restricting the speech of its producers and the liberty of its consumers. It can also be claimed that pornography isn't, or shouldn't be, protected speech in the first place.[11] But the singular philosophical interest and rhetorical force of this Austinian version of the silencing argument lies in its claim to rest on liberal premises. Langton thus refers to pornography as liberalism's "unfinished business," asserting that those liberals who resist advocating the censorship of pornography are failing to apply their own arguments consistently; and Hornsby claims that advocates of free speech ought to favor "stopping pornographic publication" for the same reasons that they oppose drowning out speakers.[12] However, I remain unpersuaded. In this paper I will defend my previous claims against Hornsby's and Langton's criticisms. I conclude that their responses to these claims, and the revision of Langton's original argument which they propose, fail to support their contention that liberals should be amenable to the prohibition of pornography.

Finally, Hornsby and Langton have claimed Mill, the quintessential liberal defender of free speech, as an ally of the silencing argument. Although considerations of space require that the details of my argument be given elsewhere, I will contend that their appropriation of Mill is misguided.[13] Mill's liberal conception of free speech is in fact antithetical to the Austinian approach developed by Hornsby and Langton. I also want to clarify an earlier argument of mine, concerning the nature of the liberal conception, which they have misrepresented. But I should stress at the outset that I am not denying the value of speech-act theory in other philosophical domains. Nor am I committed to a view on how Austin himself

11. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982). On the broad conception of pornography given by MacKinnon and accepted by Hornsby and Langton, however, much that clearly counts as speech must be included.

12. Hornsby, *supra* note 4, at 229. *See also* Rae Langton, *Pornography: A Liberal's Unfinished Business*, 12 CAN. J. L. & JURIS. 109 (1999).

13. *See* Jacobson, *supra* note 2.

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should be interpreted on these issues; I will simply accept my opponents' reading of Austin, which seems exegetically plausible even where I find it philosophically mistaken. I will say, however, that I am now even less inclined to think that the tools of speech-act theory can be usefully applied to issues of free speech than was the author of my earlier paper.

A DILEMMA FOR THE SILENCING ARGUMENT

Austin drew a distinction between two kinds of *infelicity* or defect which can infect attempted speech acts: two fundamentally different ways that "things can be and go wrong on the occasion of such utterances."[14] He writes, "we shall call [those infelicities] which are such that the act . . . is not achieved, by the name MISFIRES: and on the other hand we may christen those infelicities where the act *is* achieved ABUSES."[15] Consider, for example, the case of promising, which both Austin and Searle take as a paradigm illocutionary act. "The essential feature of a promise," writes Searle, "is that it is the undertaking of an obligation to perform a certain act."[16] Typically the person making a promise intends, at least when the promise is made, to fulfill this obligation. Yet we sometimes make insincere promises which we never intend to keep. Of course—and this is crucial—Searle and Austin agree that "insincere promises are promises nonetheless"[17] which create genuine obligations, albeit obligations that the promiser merely purports to intend to fulfill. Still, the illocutionary act, the promise, is performed (alternatively, 'carried off' or 'achieved'), even though something is wrong with it. Hence, in Austin's terms, insincerity is an abuse of the act of promise-making rather than a misfire; or, as Searle puts it, while an insincere promise is *defective*, it is nonetheless genuine.

By contrast, when an attempt at promising misfires, no genuine promise is made and no obligation thereby created. Austin offers an example that presupposes, plausibly enough, that one cannot make a promise to a donkey. Were someone to purport to do so—whether by uttering the words "I promise" or in any other way—this *faux* promise would misfire. Similarly, since one cannot be married to two people simultaneously, someone who is already married cannot marry again, whatever linguistic and non-linguistic behavior is performed. As Austin writes, "lots of things will be done—we shall most interestingly have committed the act of bigamy—but we shall not have done the purported act, viz. marrying. Because despite the name, you do not when bigamous marry twice."[18] The attempted illocutionary act of marrying misfires if one is already married.

14. AUSTIN, *supra* note 6, at 14.
15. *Id.* at 16. The italics and capitalization are his.
16. SEARLE, *supra* note 9, at 60.
17. *Id.* at 62.
18. AUSTIN, *supra* note 6, at 17.

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These elements of speech-act theory are brought to bear on the issue of pornography via a scenario described by Langton. Sometimes this scenario is presented hypothetically, as a way in which pornography might possibly violate women's speech rights; elsewhere this is presented as if it were a *fait accompli*, which could only be undone through censorship and re-education. In this scenario we are to imagine that exposure to pornography, specifically pornography that depicts women saying "no" to sex but meaning yes, has caused some man sincerely to believe that *whatever* women say (or, it seems, do) when propositioned counts as consent. At times Langton can be read as making the substantially weaker claim that for an agent to be illocutionary disabled (with respect to A) is for him to be unable to perform A *by speaking*. But, as we shall see, her argument requires the stronger claim; moreover, to focus on the means by which an illocutionary act is performed would be contrary to the spirit of speech-act theory.[19]

The central claim of Langton's argument from illocutionary disablement is that this woman is unable to perform the speech act she attempts: that of refusing a sexual proposition. She is unable to do so because her auditor does not even recognize the intended illocutionary force of her speech—that is, what kind of illocutionary act it is or attempts to be (in this case a refusal)—and this recognition is a prerequisite for the very performance of an illocutionary act. Pornography is thus claimed to have rendered the woman incapable of refusing sex under such circumstances. I have argued to the contrary that what the woman is, by hypothesis, incapable of doing is rather to secure the perlocutionary aim of her refusal: she does refuse the proposition, but her illocutionary act is futile. I will show that nothing in Hornsby's and Langton's response challenges this claim. Instead, their collaborative paper changes the terms of the argument. The central claim of their subsequent argument from *illocution as communication* is that the woman in this scenario is unable to perform "the illocutionary act of refusal"—where this phrase is understood in a technical sense which is neither synonymous with, nor extensionally equivalent to refusal in its ordinary sense.

My argument here will take the form of a dilemma for the advocates of the silencing argument. One horn of the dilemma is to stick with the claim that refusal is impossible in such circumstances. But this argument from illocutionary disablement fails on its own terms, since its central claim is false. The other horn of the dilemma is to retreat from the claim that refusal is impossible, by taking up the view of illocution as communication. But this

19. On the former point, *see infra* note 24. On the latter, notice that what is crucial for Austin is that illocutionary acts are performed by conventional but not necessarily verbal means. He thus writes: "we can for example warn or order or appoint or give or protest or apologize by non-verbal means and these are illocutionary acts" (*id*. at 119); at the very least, non-verbal warnings are "acts equivalent to the illocutionary act of warning" (*id*. at 121). Moreover, "[s]trictly speaking, there cannot be an illocutionary act unless the means employed are conventional, and so the means for achieving it non-verbally must be conventional" (*id*. at 119).

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argument fails to capture the putative force of the silencing argument. What is more, neither version of the silencing argument actually rests on liberal premises, as purported.

A. Illocutionary Disablement

It is crucial to differentiate between Langton's scenario and another with a similarly ugly consequence. We are not to imagine that this man has come to eroticize women's refusal—that he is aroused by rape *qua* rape—or that he simply does not care about securing their consent to sex. Such men deprive a woman's speech of its intended effect; as Langton puts it, "she fails to achieve the goal of her refusal."[20] These cases of rape are granted to be examples of perlocutionary frustration and, hence, to be irrelevant to issues of free speech. In the scenario we are to imagine, by contrast, the man sincerely takes "no" to mean yes, when spoken by a woman in what Langton refers to as the language game of sex.[21] He really believes this is consensual sex, because he does not recognize the woman's attempted refusal as such; she thus fails to secure what Austin calls *uptake* in her hearer. This case, Langton claims, is not perlocutionary frustration, but the fundamentally different phenomenon of illocutionary disablement:

> Sometimes "no," when spoken by a woman, does not *count* as the act of refusal. The hearer fails to recognize the utterance as a refusal; uptake is not secured. In saying "no" she may well intend to refuse. By saying "no" she intends to prevent sex, but she is far from doing as she intends. Since illocutionary force depends, in part, on uptake being secured, the woman fails to refuse. . . . She says "no." She performs the appropriate locutionary act. She means what she says. She intends to refuse. She tries to refuse. But what she says misfires. Something about her, something about the role she occupies, prevents her from voicing refusal. Refusal—in that context—has become unspeakable for her. In this case refusal is not simply frustrated but disabled.[22]

Langton offers four other examples of illocutionary disablement besides the pornography scenario, which involve warning, marriage, voting, and divorce. (1) The warning case is derived from an example of Davidson's (which was coined for other purposes entirely). An actor is playing a scene where he is supposed to be warning of a fictional fire, when a real fire breaks out backstage. "Fire!" he screams, trying his best to warn the audience, but they think he is still acting; nothing he says or does, we are to imagine, can convince them otherwise. Langton concludes that the actor's speech mis-

20. Langton, *supra* note 4, at 321.

21. One problem with portraying sex as a *language* game is that so much of the "game" is non-verbal. I use Langton's term with substantial reservations, as this point is relevant to the issues at hand.

22. Langton, *supra* note 4, at 321. The italics are hers.

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fires, "prevent[ing] him from warning the audience."[23] Her other examples are drawn from real life. (2) Homosexual couples are currently unable to marry, regardless of what ritual is performed. (3) Black South Africans under apartheid were by law incapable of voting. (4) In certain Islamic countries a man can divorce his wife simply by saying "divorced" three times, but a woman cannot do the same. Hence, Langton writes, "no matter how hard she tries, a woman cannot succeed in divorcing her spouse by making that or any relevantly similar utterance. Divorce of that kind is an act that is unspeakable for women."[24]

Langton's examples are explicitly contrasted with cases where speech is silenced by order or by threat, or where it is prevented from having its intended effect. The contrast is drawn as follows: "A black who makes marks on the ballot paper does not *disobediently* vote; he does not vote. A homosexual who says "I do" does not *disobediently* marry; he does not marry. These actions . . . really have been made unspeakable."[25] The term 'unspeakable' is a curious one, which may amount to rather more than a clever turn of phrase invoking both so-called "unspeakable acts" such as rape, and speech acts that cannot be performed by an illocutionarily disabled agent. I will ultimately suggest that this term plays a more substantial and problematic role in Langton's argument. For now, though, it suffices to note the implication that for an act of an illocutionary kind to be unspeakable for an agent is for her to be rendered *incapable* of performing the action she attempts—not merely unable to do so obediently, effectively, or with social approval. In the relevant analogies, the black South African was unable to vote and the gay couple to marry. Langton thus notes that "the act of marriage is not speakable for homosexual couples. The power to marry, an important power available to other citizens, is not available to them."[26] Likewise, for the woman in Langton's scenario, the claim is that her "refusal is not simply frustrated but disabled."[27] As Langton expressly states and these examples illustrate, the silencing of illocutionary disablement makes some type of action (such as marrying, voting, or refusing sex) literally impossible to perform.

Langton's argument thus overtly and crucially assumes that the woman's failure to secure uptake is a misfire, which makes her speech fail even to

23. *Id.* at 321.

24. *Id* at 317. This example is more problematic than Langton acknowledges. She grants in a footnote that "there are other means of achieving divorce, some of which are available to women in special circumstances" (*id.* at 317, note 46). But surely the force of this example would be greatly diminished if a woman could divorce her husband simply by reciting some other phrase—or by equally easy non-verbal means. It would be odd to say that a woman's speech rights are infringed just because only the male-initiated divorce ritual is verbal. Of course, if divorce is more difficult for women than for men to secure, that seems like a rights violation; but surely the right being violated has to do with equal protection generally and with marriage rights specifically. It is not a matter of free speech.

25. *Id.* at 318-9.

26. *Id.* at 317.

27. *Id.* at 321.

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"count as the act of refusal." In "Freedom of Speech Acts?," I argued that the claim that failure to secure uptake always constitutes a misfire—and, more specifically, that it counts as a misfire in this case—rests on a confusion. If uptake is claimed to be a necessary condition for the performance of an illocutionary act, then there must be some sort of constraint on the competence or reasonableness of the audience. When a woman clearly and unambiguously says "no" to a sexual proposition, *she does in fact refuse*, regardless of any eccentric misunderstanding committed by her actual auditor. This is a matter of the actual rules of the so-called language game of sex, not of what some idiosyncratic player takes them to be. The crucial question is not whether *he* (the man who takes "no" to mean yes) understands her to have refused, but whether *we* (competent judges of the relevant rules) do so. And surely we do. Her refusal therefore does not misfire, although there is a defect or infelicity in her illocutionary act, as well as a terrible perlocutionary consequence.[28] Just as an insincere promise is a promise nonetheless, when enough of the other felicity conditions for promising are met, so a refusal is a genuine refusal despite its being horribly misconstrued. Hence, refusal is not an "unspeakable act" for the woman in Langton's scenario; she would not be illocutionarily disabled by pornography, even were it to cause her actual auditor to have a perverse understanding of the rules of the language game of sex; and the argument from illocutionary disablement is a non-starter.

This contention about uptake apparently departs from Austin's account as well as from Langton's, as I have previously acknowledged.[29] Nevertheless, the claim that it is a necessary condition for the performance of an illocutionary act that one not just aim but actually succeed at securing uptake is simply false, as ordinary language and practice clearly testify,

28. In this case (unlike Langton's other examples), where the failure lies in the auditor's grasp of the linguistic and extra-linguistic rules in play, Austin's term 'abuse,' which he uses to encompass all those infelicities that are not misfires, is potentially misleading. To say that this is an abuse of the act of refusal—as an insincere promise is an abuse of the act of promising—seems deeply inapposite, since that term seems to lay the blame for the infelicity with the speaker. If this implication is explicitly abjured, however, we can say that this is an abuse rather than a misfire.

29. In my earlier paper, I acknowledged that the opinion of experts—whom I rather informally referred to as the "heavyweights of speech-act theory"—is divided on this point. Although Austin seems to think that the failure to secure uptake prevents an illocutionary act from being performed, Strawson holds more plausibly that it is the *aim*, not the achievement, of securing uptake that is necessary. (*See* Strawson, *supra* note 7, at 448.) Hornsby and Langton respond as if this acknowledgment was some kind of sexist slight to Langton. "Jacobson's allegation of confusion is actually quite puzzling: Austin supposes that uptake is necessary, is quoted as saying so, and is applauded as a 'heavyweight of speech-act theory'; Langton supposes that uptake is necessary, and is said to be confused. What is fair for the gander, one might hope, is fair for the goose" (Hornsby and Langton, *supra* note 4, at 29). I should have thought that it was a demand of intellectual honesty, when alleging that Langton was guilty of a fundamental confusion, to admit that Austin seems to make the same mistake. Even so, it hardly seems fair to leave the inventor of speech-act theory off the list of its heavyweights; nor does it seem unfair to Langton to leave her off this extremely short list, which included only Austin, Searle, and Strawson.

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across a wide range of cases. Indeed, Hornsby and Langton come close to conceding this point outright in their response, albeit in an extremely understated manner. "It must be acknowledged," they write, "that a speaker might sometimes be said to have gone in for an act of a kind that Austin would have classified as illocutionary even though there was actually no uptake."[30] They then suggest, however, that this is a minor semantic point; and they urge that we "follow Austin in treating uptake as a mark of illocution, thereby preserving the idea of illocution as communication"—since communication surely does require uptake. We shall presently take up the argument from illocution as communication, but before doing so we need to examine two other issues more closely. It will then become evident that this is no minor point, but the heart of the matter.

First, consider just how much Hornsby and Langton need to acknowledge on this score, although they say no more than the highly qualified admission I have just quoted. What must be admitted is, quite simply, the central claim of my earlier paper: that, in the given scenario, the woman has in fact refused sex; that she has refused by performing a locutionary act (of saying "no"); and that refusal is what she does, in saying what she says. (Alternatively, in saying "no" she thereby refuses.) Recall furthermore that these are precisely the hallmarks of an illocutionary act, whereas the perlocutionary effects of one's speech are what one does *by* speaking. Thus, in saying "no" clearly and unambiguously, the woman seems in a very straightforward way to perform the relevant illocutionary act: she refuses the proposition. Nevertheless, due to her auditor's misunderstanding of the illocutionary force of her words, she fails to secure uptake or to achieve her perlocutionary aims.[31] In crucial but unacknowledged contrast to Langton's other examples, where the relevant agents cannot vote, marry, or divorce, in this case the woman can and does in fact refuse sex.[32] Hence they are, but she is not, illocutionarily disabled.

Given the understated manner of their acknowledgment, it might be doubted whether Hornsby and Langton are really prepared to concede this point. Indeed, it is rather hard to tally the qualifications in their admission that "a speaker might sometimes be said to have gone in for an act of a kind that Austin would have classified as illocutionary." Yet, in the first place, they allow that one person can warn another even though uptake of the warning is not secured. And they grant this point more generally about "doing such things as warning"—which presumably includes promising, ordering, and refusing. Second, they cannot exclude the central case without contradiction by common sense and ordinary practice. To do so would render their argument vulnerable to a *reductio ad absurdum*, as I have previously claimed

30. *Id*. at 26.

31. As all parties to the debate allow, the risk of perlocutionary frustration is always present when one performs an illocutionary act, no matter how felicitously.

32. Davidson's warning example is also disanalogous with the central case on this point, but the issue is somewhat more complex and will be discussed later. *See infra* note 35.

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and will presently reiterate. Finally, they suggest that when Langton claims that the woman does not refuse, she means that there is no *illocutionary act of refusal*, where that phrase is glossed in a technical sense.[33] This term of art, which is explicitly adopted in their collaborative paper and in Langton's subsequent work, serves precisely to construct an action that, by stipulation, the woman in the hypothetical scenario truly cannot perform. Were she really unable to refuse, there would be no need for this move.

In their collaborative paper, Hornsby and Langton imply that Langton never put forward the view of illocutionary disablement that I have attributed to her. "Interpreting her remarks in their context," they write, "Langton, when she says that the speaker does not refuse, can easily be read as meaning that there is no illocutionary act of refusal (in the sense we give that here)."[34] But Langton did not introduce this term of art in "Speech Acts and Unspeakable Acts," and her argument in that paper cannot easily or even plausibly be read as they suggest.[35] I should resist the temptation to indulge in a discussion of interpretative fairness and rhetorical temperance, which would inevitably be of more interest to the authors than to most readers. The crucial point is that Hornsby and Langton grant that "Langton herself sometimes used just 'to X'," rather than 'the illocutionary act of X-ing'[36]—as if this were simply another way of saying the same thing. But in fact *this way of speaking is precisely what their terminological stipulation forbids*, because on their gloss of the "illocutionary act of X-ing," this act is not equivalent to X-ing. Since one can promise without performing the so-called illocutionary act of promising, for instance, failure to perform the former act cannot be inferred from failure to perform the latter.

Hence there is confusion here on either interpretation of Langton's argument from illocutionary disablement. The first and more plausible reading makes her guilty of Austin's error by assuming that the failure to secure uptake is a misfire which nullifies the woman's attempted refusal. As

33. *See* Hornsby and Langton, *supra* note 4, at 29, n. 18.

34. *Id*. at 29, n. 18.

35. The evidence that the author of Langton's earlier paper did not hold the view that Hornsby and Langton read back into it and that Langton explicitly endorses in her later work is (to put it mildly) substantial. First, Langton consistently speaks of speaks of the woman's attempted refusal *misfiring*, which in Austinian terminology means that she did not refuse. Second, in the putatively analogous examples, the relevant agents (the homosexual couple, the black South African, the Muslim woman) cannot perform the acts they attempt. Moreover, Langton draws a direct analogy to the Davidson case, which is disanalogous on exactly this point. The woman in her scenario, she writes, "is in the position of the actor in Davidson's story, silenced as surely as the actor is silenced" (Langton, *supra* note 4, at 321). In Davidson's example, however, we are to imagine that even competent auditors do not recognize the actor's warning as such—this is the point of the stipulation that the actor had previously been pretending to warn the audience. Hence, even if Davidson's actor is illocutionarily disabled, Langton's woman is not. Finally, Langton repeatedly claims that the woman in her scenario fails to refuse—that her locutionary act (of saying "no") "does not *count* as the act of refusal" (*id*. at 321; her italics).

36. Hornsby and Langton, *supra* note 4, at 26, n. 14. In fact, Langton uses this locution not just occasionally but consistently; and, more important, she draws upon it illicitly in her argument.

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we shall see, this seems to be the claim that the silencing argument requires. The other possibility, suggested by Hornsby's and Langton's subsequent remarks, is that by implicitly adopting the illocution-as-communication view, Langton illicitly equated their technical gloss of "the illocutionary act of X-ing" with the ordinary act of X-ing. That would be a confusion of another kind: a form of equivocation.

Nevertheless, Hornsby and Langton claim that their admission that one can perform acts of the standard illocutionary kinds without securing uptake is consistent with another version of the silencing argument on which communication (and hence uptake) is held to be an essential feature of illocution. Whatever may be the virtues of this account of illocution, I will argue that it undermines the force of their argument. This presents the advocates of the silencing argument with an intractable dilemma.

B. Illocution as Communication

Rather than claim illocutionary disablement—where that is understood as entailing that the disabled party is unable to perform the relevant at all—one can instead build the condition of successful uptake into one's conception of an illocutionary act. Hornsby and Langton adopt this strategy in their collaborative article. They write:

> If we are to follow Austin in treating uptake as a mark of illocution, thereby preserving the idea of illocution as communication, then we need . . . to focus upon what is necessary for doing such things as warning *fully successfully*, as one might put it. . . . We can allow, then, that the verb "warn" might apply to someone who is not recognized as having warned. But we should insist nonetheless that there is a point in saying that no *illocutionary* act of warning—no "fully successful" act of warning—is performed unless there is uptake on the hearer's part.[37]

As noted, this proposal implicitly concedes that the woman in the imagined scenario really has refused sex, despite failing to secure uptake of her refusal. But Hornsby and Langton stipulate that the 'illocutionary act of X-ing' has been performed only when uptake has been secured and the act is fully successful. Hence, the woman does not perform the illocutionary act of refusal, so defined. As they say, she does not refuse fully successfully.

It is important to note that even a "fully successful" illocutionary act can be disastrously unsuccessful with respect to the speaker's perlocutionary aims. A warning is fully successful, *qua* illocutionary act, when it is performed correctly and is understood as such—even if it goes unheeded. Similarly, when a rapist eroticizes his victim's refusal, her illocutionary act of refusing is fully successful, although her perlocutionary aim in refusing

37. *Id.* at 26. The italics are theirs.

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is disastrously thwarted. Furthermore, although Hornsby and Langton are less forthright on this point than one might wish, full illocutionary success cannot require that *all* the felicity conditions of the illocutionary act be satisfied. So stringent a requirement would have bizarre implications: for instance, an insincere promise would not count as an illocutionary act of promising. Yet both Searle and Austin hold that an insincere promise is nevertheless a promise, and surely they are correct; moreover, for both philosophers, promising is a paradigm illocutionary act. It would thus follow that sometimes the act of promising isn't an illocutionary act of promising, even though it is both an illocutionary act and a promise. Surely this would be an uncharitable reading of Hornsby and Langton's position. Yet we shall see that similar problems arise on any reading of their view.

To demonstrate this, we must interpret the illocution-as-communication view in the most modest way compatible with its central claim that no illocutionary act of X-ing is performed unless uptake is secured. Suppose, then, that what is required for a fully successful illocutionary act of X-ing is simply: (1) that the act does not misfire and (2) that uptake is secured. Now consider again the case of promising. An insincere promise does count as an illocutionary act of promising on this reading of the view, despite its glaring defect, because both conditions are met. Yet, I will argue, it must be granted that there are cases where a genuine promise does not secure uptake. In such cases there is no illocutionary act of promising in Hornsby's and Langton's sense. It is therefore an unavoidable implication of this view that promises can be made, via conventionally associated locutionary acts, without the illocutionary act of promising thereby being performed. Unless, that is, no promise can be made without uptake being secured. But this suggestion would be at odds with much of what Austin himself claims, and we all know, about promising.

The institution of promising would be very different indeed if, *simply in order to determine whether a promise has been made*, one needed to ascertain whether the auditor has some idiosyncratic understanding of the rules of promising. Austin in fact contradicts this suggestion not only about promising but about illocutionary acts in general. He claims to the contrary that: "A judge should be able to decide, by hearing what was said, what locutionary and illocutionary acts were performed, but not what perlocutionary acts were achieved."[38] This is because, on his view, it is a matter of convention or rule whether a given locutionary or illocutionary act is performed. While this aspect of Austin's view is in tension with the claim that uptake is a necessary condition for the very performance (not just the felicity) of an

38. AUSTIN, *supra* note 6, at 122. In fact, he is being a bit hasty here, since the judge would not merely have to hear what was said; Austin's considered view is that the judge must consider "the total speech act in the total speech situation" (*id.* at 52). But the crucial point is that the speech situation does not include the state of mind of the auditor—or, for that matter, the speaker. A judge could have no access to the mental states of either party, of course, except through the behaviors in which they are expressed.

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illocutionary act, I am granting *ex hypothesis* my opponents' interpretation of his position.[39] However Austin's view is best understood, the point is that examination of ordinary practice demonstrates conclusively that one need not ascertain either the speaker's sincerity or the auditor's uptake in order for an obligation to be conferred—that is, for there to be a genuine promise.

To illustrate, imagine such an eccentric auditor: one who honors the children's convention that a putative promise misfires, and hence creates no obligation, when the promiser's fingers are crossed. We are to imagine an otherwise competent adult who has somehow sincerely failed to realize that this juvenile convention—well known, at least in my neighborhood—does not hold in the adult world of promise-making. Call him Johnny, on the further supposition that he has failed to secure an adult name. Suppose furthermore that, when I promise to meet Johnny for lunch, I *happen* to be crossing my fingers—not because I myself honor the childish convention, nor because I realize that Johnny does, but just coincidentally. Johnny notices this, takes me to be making a *faux* promise, and consequently does not expect me to make good on it. That is to say, I (inadvertently and unwittingly[40]) fail to secure uptake of the illocutionary force of my putative promise. By stipulation, then, I have not performed the illocutionary act of promising, because the communication requirement has been breached. Yet surely I have made a promise and undertaken an obligation nevertheless, and I have done so by performing the sort of locutionary act (in the sort of speech situation) that conventionally constitutes promising. Again there is a promise and an illocutionary act without an illocutionary act of promising, so-called.

Once it is seen that one can perform an act X, of an illocutionary kind, without performing the "illocutionary act of X-ing" in the technical sense introduced by Hornsby and Langton, it becomes apparent just how misleading their argument is. Though the woman in Langton's scenario is incapable of performing the illocutionary act of refusal in their sense, she can nevertheless refuse; moreover, she can refuse by speaking; indeed, she can refuse by performing exactly the sort of locutionary act conventionally associated with this illocutionary act. Yet in order to land their conclusions about the significance of illocutionary silencing, Hornsby and Langton require true illocutionary disablement (*inter alia*), which their arguments cannot secure.

This point is evident when we consider an absurd consequence which, I

39. It has been suggested to me by William Taschek that the most charitable reading of Austin would retain the view that a primary difference between the illocutionary and the perlocutionary is that the former and not the latter is typically a matter of convention. This would require his forgoing the claim about uptake which is central to the silencing argument.

40. It is a further question as to what to say about a case where the speaker deliberately capitalizes on his auditor's idiosyncrasies. This case is not relevant to the question at hand, and I will not comment on it further, as my brief speculation about it in the previous paper engendered a red-herring objection (about the felicity conditions of invitation).

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argued in my earlier paper, follows from Langton's view. My contention was that the claim that a woman in this scenario is illocutionarily disabled—that refusal is unspeakable for her and, hence, that she does not in fact refuse the sexual advance by saying "no"—would, if true, have the absurd consequence that she is not raped. Hornsby and Langton take issue with this claim, accusing me of conflating the failure to refuse sex with consent to it. Certainly these are different things: a woman who has been drugged unconscious cannot refuse sex but surely she does not consent. At any rate, this is true on any plausible conception of consent, though not on every possible conception. This qualification will prove important. Just what constitutes consent is currently a matter of great contention, of course, and some philosophers even deny that women can *ever* consent to sex in so sexist a society as ours—a claim I find as implausible as it is offensive (primarily to women). Were consensual sex impossible, women would be unable to consent, no matter what they say, do, or intend. Thus, ironically, were this claim true, women would indeed be illocutionarily disabled (from consenting to sex).

Although she does not elaborate a theory of consent, Langton consistently portrays the language game of sex as if there were only two moves open to the propositioned player: refusal and consent. The reason that refusal is supposedly impossible is that everything a woman can say (or do) counts as consent. But a consequence of this claim is that the distinction between refusing sex and not consenting to it—which is in perfectly good order as things actually stand—would become a distinction without a difference. Thus Langton suggests that because pornography is supposed to have authoritatively set the rules, "consent is the *only* thing a woman can do with her words in this game,"[41] regardless of her intentions. Notice that on Langton's own description of the case, the woman does not merely fail to refuse but actually consents by saying "no." Hence the charge of conflation strikes me as being uncharitable, even unfair. It is Langton's account of the rules of the "language game of sex," not mine, which implies absurdly that this is not rape. Moreover, it does not help the silencing argument to appeal to the distinction between refusing sex and not consenting to it, as I will now show.

Consider the significance that the alleged illocutionary disablement of women by pornography is claimed by Langton to have:

41. Langton, *supra* note 4, at 324. The italics are hers. This is the point at which Langton puts forward the idea that the illocutionary silencing of women by pornography might be a *fait accompli*. The crucial premise, which she attributes to Catharine MacKinnon, is that: "The felicity conditions for women's speech acts are set by the speech acts of pornography"; hence pornography "determines the kind of speech there can be" (*id.* at 324). While Langton does not go so far as to affirm this claim, she seems to regard it as plausible. Had pornography indeed authoritatively set the rules of the language game of sex, such that "no" (and every other act or locution) is just another way for a woman to make the consent move, then rape (of women) seems impossible. Moreover, it would be a Pyrrhic victory for Langton to claim merely that consent is the only thing women can do with their *words*, though they can refuse sex—or withhold consent—in other ways (*see infra* notes 19 and 24).

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> A woman who prohibits sexual advances also has authority within the local domain of her own life, her own body. If she cannot prohibit, cannot refuse, it is a sign that her body is, in a sense, not her own. If pornography prevents her from refusing, then pornography destroys her authority as it twists her words."[42]

Whatever one's account of consent, either the woman in Langton's scenario is capable of not consenting to a sexual proposition or she is incapable of it. If she is incapable, the absurd consequence follows immediately: she is not raped. And that is precisely what Langton implies by claiming that to say "no" is just another way to make the consent move. But if the woman is capable of not consenting to sex, despite (*ex hypothesis*) being incapable of refusing it, then her authority over her life and body *is* still her own, in just the relevant sense. Of course, the ability actually to prevent or to parry unwanted sexual advances—where this is understood as a perlocutionary ability to achieve certain ends—is crucial to one's autonomy, security, and well-being. But perlocutionary success is not what is supposed to be at issue in the silencing argument. Possession of the illocutionary authority required to refuse sex, which is what pornography is claimed to have destroyed, is compatible with the inability to enforce that authority. One can refuse and yet be coerced.

This discussion illustrates the relative insignificance of the technical sense of illocutionary action—the sense in which one can promise or refuse without thereby performing such an act. What is so bad about illocutionary silencing, so understood? It initially appeared that agents thus silenced are rendered incapable of performing some significant type of action available to others by right. Langton's analogies concern the capacity to vote, marry, and divorce; and she claims that the woman in her hypothetical scenario is incapable of refusing sex. On examination, though, we have seen that this woman is not incapable of refusing a sexual proposition or even of refusing it with words. What she is incapable of doing, by stipulation, is to secure uptake in her auditor. But this incapacity does not imply that she has lost authority over her body; hence the claim that she "cannot prohibit, cannot refuse" sex is doubly false. She can refuse. And, even if she could not refuse sex without securing uptake, she would still possess the authority to prohibit it *in the only sense that having the ability to perform the illocutionary act of refusal ensures*: she can prohibit *consensual* sex. One does not need the ability to secure uptake to do this; nor does having that ability make one secure from the danger of having one's rights (and one's body) violated. In this larger sense, unfortunately, our bodies are never our own.

Of course, when communication is impossible, it is less likely that one's perlocutionary aims in speaking will be met, and this can be a significant harm. That is why the capacity to secure uptake is an important capacity:

42. Langton, *supra* note 4, at 325.

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because it is a crucial means to achieving one's ultimate end (in this case, avoiding an unwanted advance). But to appeal to this fact would be to make the silencing argument into another argument that pornography is harmful to women—and hardly the most compelling of them. Recall that, in considering the hypothetical scenario, we granted two crucial stipulations for the sake of argument. First, that some man sincerely believes that *whatever* a woman says to a sexual proposition counts as consent. Second, that he has been caused to have this ludicrous belief by exposure to pornography.[43] Put forward as actual occurrences rather than as mere possibilities, both suppositions are unlikely, to say the least. The philosophical interest of these possibilities was rather that they were supposed to open up logical space for a free speech argument for the censorship of pornography.

This ambition proves to be illusory. The trouble with the revised version of the silencing argument is that its advocates trade on the technical sense of an illocutionary act of refusal in order to land the claim of disability (by stipulation); they then trade on the ordinary sense of refusal in order to argue that this is a significant disability and a violation of rights. But the more significant actions are not impossible, and the impossible actions are much less significant (both theoretically and practically[44]) than their rhetoric suggests. Moreover, for the silencing argument to be an argument from free speech, as purported, this disability must be claimed specifically to be a violation of speech rights. Yet even as applied to those examples of illocutionary disablement that are in good order, this suggestion is farfetched. Again the rhetoric seems to overreach the argument. We must not let talk of "unspeakable acts" charm us into assuming that, if one has the right to do X and can perform X by speaking, then one therefore has a speech right to do X. I will take up this last point, and the conception of speech rights underlying the silencing argument, in the final section of the paper.

AUSTIN AND MILL ON SPEECH AND ACTION

I noted earlier that there was something strange about the suggestion that when same-sex couples are legally prohibited from marrying, for instance, their *speech* rights are being violated—or, for that matter, even merely infringed. Surely if a legal or moral right is being breached here (and I would agree that there is), it is a right of some other kind. The right to vote and to marry are important rights, whether or not they are as fundamental

43. Recall too that the more plausible suggestion that men might be made less sensitive to women's attempts to refuse sex by some social factor—whether it be pornography or alcohol—is insufficient for the silencing argument, which requires that some speech act be rendered impossible to perform.

44. This inability is less theoretically significant because the technical sense of illocutionary action cannot sustain the ambitions of the silencing argument, and it is less practically significant because the requisite assumptions are so implausible.

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as the right to free speech, but they are not speech rights. Hence, on the face of things, the suggestion that same-sex couples in America and blacks under apartheid are illocutionarily disabled by laws preventing them from marrying or voting—where this is understood to imply that their speech rights are being infringed—seems to be a misplaced criticism of admittedly unjust laws. I have argued that the silencing argument does not succeed on its own terms, whether glossed as an argument from illocutionary disablement or from illocution-as-communication. In this final section of the paper I will argue that even were the silencing argument sound, it would not rest on liberal premises, as purported; and that speech-act theory obscures rather than clarifies issues of free speech.

Austin ultimately rejected the distinction between constantives and performatives (that is, sayings and doings), in favor of the more complex set of distinctions associated with speech-act theory. This rejection was motivated partly by such thoughts as: "after all, 'doing something' is a very vague expression. When we issue any utterance whatsoever, are we not 'doing something'?"[45] Surely this is true, in one ordinary sense of 'doing' or 'action'; yet, as Austin acknowledged, there is another, equally familiar notion of action which pulls in the opposite direction. This is the sense implicit, for instance, in the charge that someone failed to act on his opinions. Obviously, one cannot defend oneself against this charge merely by pointing to one's willingness to advocate those opinions. Thus, 'action' has at least two senses: the wide sense appealed to by Austin, on which every saying is a doing; and a narrow sense, on which stating, discussing, advocating, arguing for, and similar *expressive acts* do not yet count as action proper.[46] The animus of speech-act theory is thus to traduce the distinction between acts of speech and other forms of action. From the perspective of the theory, expressive acts are an unilluminating subset of the class of illocutionary acts, a class that also encompasses such more deeply performative sayings as promises, threats, propositions, and the like.

Liberals have not aspired to defend the freedom of these more performative acts of speech, however, just because they are done with words. Not even the most capacious and general conception of liberty rights includes the liberty to order an execution, for instance. The fact that such an order can be given by words, or even that in certain circumstances it can only be done verbally, is simply irrelevant. This is because the liberal conception of speech rights trades crucially on the narrow sense of 'action,' or, as Mill puts it, on the distinction between action and *opinion*—where opinion is understood to include both thought and its expression (discussion, advocacy,

45. AUSTIN, *supra* note 6, at 92.

46. Schauer thinks there is an equivocation on 'expression' needed in order to extend speech rights from political and moral contexts to such things as art and pornography. *See supra* note 11. Be that as it may, this question is not my concern here. By an 'act of expression' I do not mean any act about which one could say that it expressed some sentiment or idea (as the assassination of Lincoln expressed Booth's anger, his loyalty to the erstwhile confederacy, etc.). I simply mean an act of stating, discussing, arguing for, depicting, etc.

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etc.). Mill argues in *On Liberty* that it is a prerequisite for human development and flourishing that "human beings should be free to form opinions, and to express their opinions without reserve." However, he continues, "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."[47]

Notice that in this passage, as elsewhere, Mill expressly trades on the narrow notion of action. To act on one's opinions is to carry them out in one's life; the distinction between opinion and action is drawn specifically so as to contrast expressing an opinion with acting on it. Nevertheless, he acknowledges that in certain contexts even opinions can legitimately be interfered with. Indeed, he goes on immediately to offer a famous example of a token act of speech where such interference is legitimate. "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 justly incur punishment when delivered orally 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."[48] At the beginning of this paper I quoted Mill's remark supporting the "fullest liberty" of expressing or advocating any opinion, however immoral or even harmful it may be. Obviously this fullest liberty is not the absurd, anything-goes attitude toward speech sometimes attributed to liberalism, which would bar even restrictions on its volume. Mill certainly doesn't hold this untenable view, which might be termed the freedom of verbal acts, since he offers the corn-dealer example precisely as a case where *even an opinion*—by which he explicitly means the expression of that opinion—loses its general immunity. Nor is this liberty the freedom of illocutionary acts, since acts of instigation (or harassment, marriage, command, etc.), even when performed verbally, are beyond the pale of free speech protection.[49]

In my earlier paper I offered an avowedly rough-and-ready characterization of Mill's view of free speech as what I called the freedom of locutionary acts, glossed as the doctrine that "any opinion, however repugnant, may permissibly be expressed, though not in any possible con-

47. MILL, *supra* note 1, at 72.

48. *Id.* at 72. It is crucial to recognize that it cannot be the harmfulness of such speech, per se, which puts it beyond the pale of the general immunity given to opinions. This is evident when one considers that this opinion would be protected when circulated in the press, even with the intention (and the reasonable expectation) of bringing about political change which would be disastrous to the interests of corn dealers. On this issue, *see* Jacobson, *supra* note 2.

49. Hornsby and Langton raise another red-herring objection over whether instigation and incitement are illocutionary or perlocutionary acts. In ordinary language one can certainly instigate or incite without succeeding in precipitating an event (hence these seem to be illocutionary verbs). But one can still hold with Mill that, as a matter of law, "the instigation to [tyrannicide], in a specific case, may be a proper subject of punishment, but only if an overt act has followed, and at least a probable connexion can be established between the act and the instigation" (MILL, *supra* note 1, at 36, n. 1).

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text."[50] The idea is that no type of opinion can be prohibited, where opinions are type-identified by their content. I did not discuss the question of when restrictions on the expression of opinion that fall short of their prohibition can be justified. Had I done so, I would have added a corollary that falls out of the principle of content-neutrality: Opinions cannot even be materially impeded on grounds of their falsity, immorality, or even their harmfulness per se.[51] Advocacy of the opinion that property is theft, for instance, cannot be restricted either because it is fatuous or because it is harmful to the wealthy. Yet some tokens of this locutionary type can be prohibited without impinging on free speech, since, as Mill observes, in certain contexts their expression constitutes an instigation to mischief. This is certainly not all that needs to be said in order to characterize adequately the liberal conception, but I have not attempted to make progress on that issue here.

I have come to regret the phrase 'freedom of locutionary acts,' however, which was offered simply as a convenient term of contrast to the fulsome and untenable doctrines of freedom of verbal acts and freedom of illocutionary acts. I now regret that term for two reasons. First, it has evidently misled Hornsby and Langton as to my position; second, I am now convinced that the concepts of speech-act theory are not helpful for the task at hand. Hornsby and Langton attribute to me the view that so long as even one agent is allowed to perform any given locutionary act in some context or other, no one's speech rights have been violated. Thus they write: "On this view, pornographers could not interfere with the speech of women except by literally gagging them all. On this view, freedom of speech is freedom of locution only. And this is Jacobson's view."[52] Of course that is not my view, nor is it the view I attributed to Mill. It certainly does not follow from the denial that any right that can be exercised through speech acts, such as the right to vote or to marry, is thereby a speech right. Furthermore, the claim that on the liberal conception, all women (or all communists) would have to be prohibited from speaking—much less *literally* gagged—in order for any of their speech rights to be violated is irresponsible hyperbole. Mill was vividly aware of the danger of *de facto* prohibition via restriction.[53] For the state to prohibit the advocacy of communism except on May Day, in front of Sproul Hall, would be an illegitimate restriction of speech and a violation

50. Jacobson, *supra* note 5, at 71.

51. This is not to say that justifiable restrictions on expression must be blind to the content of the speech. The only way to know that the opinion given outside the corn dealer's house constitutes an instigation in this context is to understand its content. But such restrictions must be applied neutrally—for instance, against such instigations regardless of the moral value of the motivating cause. Thus it would make no difference, as far as speech rights are concerned, if the house belonged to a slave dealer rather than a corn dealer.

52. Hornsby and Langton, *supra* note 4, at 32.

53. Thus, although Mill favors the taxation of dangerous products, he writes that "to tax stimulants for the sole purpose of making them more difficult to be obtained, is a measure differing only in degree from their entire prohibition; and would be justifiable only if that were justifiable"—which, of course, it is not. *See* MILL, *supra* note 1, at 114.

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of the speech rights of communists. Similarly, to prevent just Gus Hall from speaking or merely from advocating his politics would be a violation of his freedom of speech. In short, the liberal conception of free speech grants a presumptive immunity to opinions, extending to both their thought and expression, which can, under certain narrowly circumscribed conditions, be lost. This parallels Mill's treatment of self-regarding action in general, of which he writes: "When, by conduct of this [ordinarily self-regarding] sort, a person is led to violate a distinct and assignable obligation to any other person or persons, the case is taken out of the self-regarding class" and becomes amenable to restriction.[54]

One of the frustrating aspects of Langton's argument in "Speech Acts and Unspeakable Acts" is that, although she clearly holds that the putative illocutionary disablement of women by pornography is a violation of their speech rights, her conception of free speech is never elucidated. Yet in order for the silencing argument to rest on liberal premises and thus to show that liberals should be amenable to the censorship of pornography on free speech grounds, the underlying conception of free speech must resemble the liberal conception. In "Freedom of Speech Acts?" I argued that the silencing argument actually presupposes a conception quite at odds with liberalism. But perhaps this criticism was insufficiently clear. I was not claiming that Langton's argument logically committed her to endorsing the absurd doctrine of freedom of illocutionary acts—although she can easily be read as doing so. As can Hornsby, in fact, when she compares the silencing supposedly perpetrated by pornography to that of hecklers who drown out the speech of others. She then writes: "Silencing is an act whose effect is to render difficult or impossible certain illocutionary acts. In that respect it is exactly like drowning out. And that means that it is like drowning out in exactly the respects in which advocates of free speech object to drowning out."[55] The implication is clearly that advocates of free speech—presumably liberals—must oppose such silencing on pain of inconsistency because they are committed to not making any illocutionary acts impossible (or even difficult) to perform. This is tantamount to explicitly committing liberalism to the freedom of illocutionary acts and implicitly praising them for this commitment. But it isn't much of an argument. Hornsby simply assumes, falsely, that what liberal advocates of free speech object to about drowning out is that it renders some *speech act* difficult or impossible. Rather, what is objectionable is the silencing of opinion (in Mill's sense), not all silencing (in Hornsby's sense).

54. *Id.* at 96. It is widely but mistakenly thought that speech is not a self-regarding action for Mill, because it can affect and even harm others. But this is true of all self-regarding action, as Mill acknowledges—the self-regarding is not the harmless: "I fully admit that the mischief which a person does to himself may seriously affect, both through their sympathies and their interests. . . ." (*id.* at 96). On speech as a paradigm of the self-regarding, *see* Jacobson, *supra* note 2.

55. Hornsby, *supra* note 4, at 229. While not all liberals assimilate drowning out with governmental restriction of speech, it is often held that such action infringes free speech.

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Silencing, so broadly understood, like illocutionary disablement, is not even a bad thing per se, much less a violation of rights. One might well conclude that this is a good reason not to understand silencing so capaciously. To take just one example, on any reasonable moral view, twelve-year-olds *should* be disabled from performing the illocutionary act of marrying. If this is silencing, then silencing isn't always wrong—and it certainly isn't always an infringement of free speech. Hornsby and Langton grant this point in their collaborative paper while disavowing the general doctrine of freedom of illocution:

> Langton's argument certainly did not assume that there is a free-speech right to any illocution anyone might want to perform. What it assumed was only that the capacity to perform the illocution of refusal is an important capacity. Faced with a conflict between freedoms to speak—faced, for example, with a conflict between subordinating with words and refusing with words—perhaps one should judge that refusal matters more.[56]

What the silencing argument requires, however, if it is to make good on its pretensions to rest on liberal premises, is not merely than that the capacity to perform the "illocution of refusal" is an important capacity. It requires, further, what they go on to assert: that this capacity is a speech right. But we are offered no argument for this conclusion. Moreover, this passage illustrates how Hornsby and Langton slide, at the crucial moment—when the importance of the capacity supposedly destroyed by pornography is at issue—between the concepts of refusing, refusing with words, and the so-called illocutionary act of refusal. As we have seen, however, their technical sense of that phrase is not equivalent to either ordinary notion.

For the silencing argument to show that liberals should be amenable to the restriction of pornography on free speech grounds, it must elucidate a conception of free speech that is compatible with the liberal conception; and it must claim that the relevant instances of putative illocutionary disablement count specifically as violations of women's right to free speech. The most obvious proposal is the freedom of illocutionary acts, which is patently absurd, and no other alternative was elucidated in either Langton's or Hornsby's earlier work. In their collaborative paper, however, they offer the (unexplicated) slogan that "free speech includes free illocution."[57] But how helpful is that slogan? It seems to me that it is both unhelpful and illiberal. This is evident when we ask: What makes one illocutionary act and not another a "freedom to speak"? Mill's liberal answer rests on the distinction between opinion and action, which Austin rejects. As far as I can see, the only suggestion Hornsby and Langton offer lies in their claim that Langton's argument assumes "only that the capacity to perform the illocu-

56. Hornsby and Langton, *supra* note 4, at 33.
57. *Id.* at 21.

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tionary act of refusal is an important capacity."[58] This suggestion is so terse that it is hard to evaluate, but it must be allowed that some kinds of refusal are considerably more important than others. Indeed, there are some things—such as obligations—that one cannot and should not be able to refuse: here illocutionary disablement is a good thing. But since all types of refusal (or promise, command, etc.), like all types of opinion, seem to have equal claim to be acts of speech, the very notion of *free* speech as an ideal must be undermined by this approach. Given that so many illocutionary acts are not within our rights to perform (on any reasonable moral view), and that many rights that can be exercised verbally are not speech rights, it will not suffice to insist that free speech involves free illocution. It is by no means clear even what this slogan means.

It should not be surprising that, having traduced the distinction between action and opinion, the silencing argument lacks the resources to advocate a coherent and plausible doctrine of free speech, much less one that resembles the liberal conception. That result is quite in keeping with the emphasis of speech-act theory on the performative aspects of language: on what we do with words. But it is deeply at odds with the fundamental priority that liberals give to opinion in the broad, Millian sense. Of course, advocates of the silencing argument need not accept liberal premises; and one suspects that, in fact, they do not. Perhaps it would be best for them to own up to this and to forswear the claim to be offering a free speech argument for censorship. Or perhaps not, since the silencing argument does not succeed even on illiberal terms.

58. *Id*. at 33.

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