

FREE SPEECH AND ILLOCUTION

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What one ought to mean by “speech,” in the context of discussions of free speech, is whatever it is that a correct justification of the right to free speech justifies one in protecting. What one ought to mean, it may be argued, includes *illocution*, in the sense of J.L. Austin.¹ Some feminist writers, accepting that free speech includes free illocution, have been led to take the notion of *silencing* seriously in discussions of free speech.²

We say that people are silenced when they are prevented from doing certain illocutionary things with words. People who utter words but fail to perform the illocution they intend may be silenced. The silenced person encounters illocutionary disablement: his or her speech misfires; what she does is unhappy.³ The silenced person is deprived of illocutionary potential; she does not have it in her power to do with language what she might want to.⁴ Our understanding of silencing has implications for a feminist claim about pornography. Catharine MacKinnon has claimed that the free speech of men silences the free speech of women.⁵ One way to understand this is as telling us that pornography has interfered with women’s freedom of speech. Given certain empirical assumptions about the effects of pornography’s production and consumption, pornography has prevented women from doing certain illocutionary things with words. On this way of thinking, there might be a free-speech argument against pornography.

This way of thinking has been criticized. The stumbling block has not been the empirical assumptions (although these need, of course, to be

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

2. Writers including MacKinnon, Langton, and Hornsby (*see infra* notes 3–5). The claim that “free speech includes free illocution” is our own summary of one of the ideas common to these three authors (though we do not say that MacKinnon would wish to formulate the claim in this way).

3. This way of putting the point is in R. Langton, *Speech Acts and Unspeakable Acts*, 22 *PHIL. & PUB. AFF.* 293 (1993). Parts are reprinted in *THE PROBLEM OF PORNOGRAPHY* (S. Dwyer ed., 1995).

4. This way of putting the point is in J. Hornsby, *Speech Acts and Pornography*, *WOMEN’S PHIL. REV.*, November 1993, at 38. Reprinted with a “Postscript” in S. Dwyer ed., *supra* note 3.

5. *See* C. MacKinnon, *Francis Biddle’s Sister*, in *FEMINISM UNMODIFIED* (1987) and C. MacKinnon, *ONLY WORDS* (1993).

evaluated), but the very idea that free speech includes illocution. It has been doubted that “speech” could mean anything more than locution (again in the sense of Austin). Daniel Jacobson has held that the free-speech argument against pornography fails, because free speech is “freedom of locutionary acts.” And Jacobson tells us that, even if free speech could include illocution, the argument against pornography would still fail: “the claim that pornography contributes to illocutionary disablement rests on a confusion,” he says.⁶ We shall reply to the particular charge of confusion in part 2.

The assumption which Jacobson set out explicitly to defend—that “speech” in “free speech” means *locution*—features in some writers as an implicit, hidden assumption. Ronald Dworkin made the assumption when he first criticized MacKinnon, and he continues to make it⁷; but, having no use for the distinction between locution and illocution, Dworkin does not see that his arguments use the assumption. Jacobson’s paper, then, helps to expose one real source of disagreement between writers on free speech; and it provides us with a useful target against which to direct our own, general argument, that *illocution* serves better than *locution* to give the sense of “speech” in “free speech.” (We shall not return to Dworkin until we have explained the assumption, and argued against it.)

It might be thought that notions like locution and illocution, from speech-act theory, could not cast light on the idea of speech, which enters into political debate. For there are some who say that free *expression* is what is protected under the head of “free speech,” and that expression embraces far more than what speech-act theory treats. Well, it is certainly true that an extended sense of “speech,” encompassing all expression, is nowadays usually taken for granted in discussions of free speech. But it seems clear that Mill defended free *speech* as an independent right⁸; and Mill is a writer upon whom contemporary liberals, including Jacobson and Dworkin, often draw. It is arguable that Mill got it right, and that free expression and free speech should receive separate defenses.⁹ But however that may be, it will be allowed on all hands that at least some speech in the sense of “speech act

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

7. R. Dworkin, *Liberty and Pornography*, N.Y. REVIEW OF BOOKS, August 15, 1991. (A nearly indistinguishable paper, on which this is “based,” is *Two Concepts of Liberty*, in ISAIAH BERLIN: A CELEBRATION (E. & A. Margalit eds., 1991).) The assumption was exposed in Hornsby, *supra* note 4. It is present in Dworkin’s later work, which we consider briefly in part 4 below.

8. Whereas the whole of J.S. Mill, ON LIBERTY (1859) can be read as a defense (*inter alia*) of free expression, Chapter 2, *Of the Liberty of Thought and Expression*, can only be read as a defence of free speech proper. See F. Schauer, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982).

9. Note that the shape of various debates is affected by whether or not speech is taken to encompass expression of all sorts. If pornographers’ “expressions” are on a par with the speech of women, which some feminists want to defend, then the feminists’ arguments will suggest that pornography provides an example of a clash of a certain right: the right of pornographers to free speech-and-expression is set against the right of women to free speech-and-expression. If, on the other hand, there is a defensible right to free speech as such, and pornographic material by and large is not speech, then the feminist who contemplates empowering women to put a halt to the publication or distribution of material whose dissemination interferes with

theory” is speech in the sense of “free speech.” So the question *Which speech acts does free speech subsume?* is a question for everyone. Jacobson has a view about Mill’s answer to this question: he suggests that Mill supports a minimal commitment—to freedom of locutionary acts. We shall argue that, on the contrary, Mill would endorse our own view that free speech includes free illocution. That argument is presented in part 3 of this article.

We do not attempt to define “speech” in the “free speech” sense here: a definition would need a settled opinion about the justification of a right to free speech, and one does not need such an opinion to enter into the debates that concern us now. Our overall aim is to show that a good defense of the right to free speech is plausibly a defense of the right to do (*inter alia*) illocutionary things. A more particular aim is to show the importance of that claim when it comes to the rights of women.

We should say at the outset that we do not take ourselves to be involved in the interpretation of the U.S. Constitution as such. Our claims here are claims about how free speech should be conceived if the value of protecting it is to be fully intelligible. In a final part of the article we indicate how our view of speech as illocution is situated in relation to understandings of the justification of free speech.

I. ILLOCUTION

Catharine MacKinnon’s claim about silence has its place in a more general view about speech—about how to think about it, and what the point of it is. MacKinnon says that speech is more than mere words: hence the (ironic) title of her work, *Only Words*. MacKinnon has something in common with those philosophers who believe that speech is best understood in the context of an account of speech acts. Speech is not a matter simply of the making of meaningful noises, but, as Austin put it, of doing things with words: hence the title of his *How to Do Things with Words*. Thinking about speech as a sort of action suggests a different perspective on the point of protecting it. And it also suggests a different perspective on the question of silence. If speech is action, then silence is not simply a matter of failure to make a sound: it is failure to do something one might want to do with words.

women’s freedom of speech will have to set one’s group right—*i.e.*, women’s right to free speech—against another group’s different right—*i.e.*, pornographers’ right to free expression. (We describe the feminist here as “contemplating empowering women . . .” in order to draw attention to the fact that those who question pornographers’ license do not necessarily advocate pornography’s censorship. If Catharine MacKinnon and Andrea Dworkin had eventually been successful in the courts, the legislation their campaigns would have introduced would have enabled individual citizens [of States governed by the ordinances to which they brought amendments] to sue in civil court to put a future ban on the publication of specified sexually explicit material and to collect damages for the harm that its publication had done. Their underlying idea was not that pornographers have no right to publish necessarily, but that women need to be empowered to defend themselves against being silenced.)

There are countless things people do with their words. But following Austin, one may distinguish three broad kinds of things, three sorts of speech act.¹⁰ (1) There is the saying of words that have a certain meaning, or content: that is the locutionary act. (Austin's example: one man says to another, "Shoot her," meaning by "shoot" to shoot with a gun, referring by "her" to a nearby woman.) (2) There is the saying of certain words such that, *in* saying those words, one performs an action: that is the illocutionary act. (In saying "Shoot her," one man ordered another to shoot.) (3) There is the saying of words, such that *by* saying those words, certain other things are done: that is the perlocutionary act. (By saying "Shoot her," one man persuaded another to shoot.) Now the distinction between (2) and (3), between the illocutionary and perlocutionary, has given trouble. Austin's marking of the distinction with a difference between "in" and "by" has seemed unhelpful. And Austin's idea that the perlocutionary act "brings in consequences" has not seemed to make the distinction out, because Austin characterizes the illocutionary by reference to the hearer's "uptake," and hearer's uptake can itself appear to be a sort of consequence. Still, one underlying idea of Austin's seems clear. The illocutionary/perlocutionary division can make a division between speech acts that are of proprietary concern to an account of language (the illocutionary) and speech acts that are not (the perlocutionary). Perlocutionary speech acts introduce the idea of *extra-linguistic* or *incidental* consequences of speaking—of, as it were, *further* things that are done for which the conventions attaching to forms of speech do not by themselves provide.

However the illocutionary/perlocutionary division is exactly to be made out, illocutionary speech acts are done when the saying of relevant words satisfies certain success conditions: felicity conditions, as Austin called them. For some illocutionary speech acts, the conditions are formal and conventional. These are the speech acts on which Austin concentrated early on in *How to Do Things with Words*: he confined his attention there to such acts as christening ships and getting married, where particular forms of words are tailored to the carrying out of some institutionalized procedure. The conditions for carrying out these acts relate to the procedure: for example, "I do" is only an act of marrying someone if the speaker intends to marry, the ceremony is complete, the celebrant is authorized, those present recognize the person to be marrying, and so on. But there are other illocutionary speech acts whose conditions are not bound up with particular

10. Notice that any actual piece of speech can typically be classified under all three heads: one can ask about a single piece of speech what locutionary kind it is of *and* what illocutionary kind it is of *and* what perlocutionary kind it is of. Whether a piece of speech is protected depends upon which acts it is used to perform. As our concern here is with only a limited range of speech acts (and there would be very much more to be said, if, for instance, we were to consider the use of nonindicative sentences), our overall claim that free speech includes free illocution might be put (allowing for our limited concerns) by saying that illocutionary acts may be such that pieces of speech merit protection in virtue of being performances of them.

procedures, and which require only the institution of language use itself.¹¹ Their conditions will include a hearer's recognition of the speaker's intention to perform the illocution in question. By involving the hearer as well as the speaker, illocutionary acts reveal language as communicative. And it is in virtue of this that illocutionary acts are of special concern in an account of how language works. (Perlocutionary acts are of concern when one's interest extends to the repercussions of communicating.)¹²

How is it that uttering words can be doing some illocutionary thing? Well, a background condition that makes this possible is what Hornsby calls "reciprocity."¹³ Reciprocity between speakers provides for someone's making of some noises being not merely her expression of a meaningful thought (which is a locutionary act) but also, for instance, her stating something (which is an illocutionary act). People who share a language have the capacity not simply to understand one another's words, but also to grasp what illocutionary acts others might be trying to make. Normally when a speaker tells someone something, for instance, the hearer takes herself to have been told something—she knows what the speaker was up to. This is "uptake" in Austin's sense. Uptake consists in the speaker being taken to be performing the very illocutionary act that, in being so taken, she (the speaker) is performing. Language use then relies on a mutual capacity for uptake, which involves a minimal receptiveness on the part of language users in the role of hearers. This minimal receptiveness does not mean that a hearer will agree, or is even capable of agreeing, with what a speaker is saying; but it does mean that a hearer has a capacity to grasp what communicative act a speaker might be intending to perform. When reciprocity is present, the speaker's utterance works as she means it to. Its working so appears to depend on nothing more than speaker and hearer being parties of a normal linguistic exchange, in which a speaker's attempt to communicate is successful. A speaker tries to do an illocutionary thing; a hearer recognizing that the speaker is trying to do that thing is then sufficient for the speaker to actually do it.

11. Much confusion has resulted from Austin starting from a particular notion of a performative—"Mark I performatives" as they are called by G.J. Warnock, *Some Types of Performative Utterances*, in *ESSAYS ON J.L. AUSTIN* (I. Berlin *et al.* eds., 1977). Mark I examples are all of formulae used in institutionalized procedures. This starting point led Austin to associate the idea of convention with the idea of illocution generally. See further J. Hornsby, *Things Done with Words*, in *LANGUAGE DUTY AND VALUE* (J. Moravcsik *et al.* eds., 1988).

12. We believe that in the order of definition the illocutionary should come first (and that the definition of *illocutionary* must not be focused exclusively on Mark I performatives, see note 11). Arguably, "repercussions of communicating" cannot be used on its own to define the perlocutionary, because the immediate upshot of the use of a Mark I performative is not a merely communicative one. But the upshots of Mark I performatives, although they may be thought to be further consequences of speaking, can nonetheless be distinguished from perlocutionary consequences: they are so distinguished when they are seen as consequences specifically for institutions within which there are performances *working through reciprocity*.

13. In J. Hornsby, *Illocution and Its Significance*, in *FOUNDATIONS OF SPEECH ACT THEORY* (S.L. Tsohatzidis ed., 1994). This provides a fuller account of the speech-act theoretical material relevant here.

It must be acknowledged 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. For example, we can imagine someone saying, "I warned him, but he didn't realize that I was serious." However, we can equally well imagine someone saying, "I tried to warn him, but to no avail." 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 speak in line with the latter case, where the hearer's failure of uptake is seen as showing that the speaker had not warned him. We need, that is, to focus upon what is necessary for doing such things as warning *fully successfully*, as one might put it. (The speaker who says that she warned him, but that he did not appreciate that she was serious, is someone who sees that she had failed "fully successfully" to warn him.) 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.¹⁴

If silence is failure to act, as MacKinnon has suggested, then perhaps it is a failure to perform an illocutionary act. Let us think about some examples. A man tries to marry, in saying "I do," and later discovers with horror that the "priest" was an actor in costume: so he failed to marry. Or some low type, in a fit of revolutionary passion, snatches and suitably smashes a champagne bottle, crying "I hereby name this ship the Generalissimo Stalin": but, low type that he is, he fails in saying those words to christen the ship. An actor in a play has a role in which he shouts (to the amusement of the audience) "Fire! I mean it! Look at the smoke!"; and a real fire breaks out, and in real desperation he shouts (to the amusement of the audience), "Fire! I mean it! Look at the smoke!"; but, actor that he is, he fails to warn. A woman living under Islamic law wishes to leave her husband, and says to him those magic words, "Divorced, divorced, divorced"; but, woman that she is, she fails to divorce him.¹⁵

In these cases the speech has misfired: it has gone wrong in a way that manifests illocutionary disablement. The acts are unspeakable for the speakers. There is a failure at the illocutionary level: a failure to marry, or to christen, or to warn, or to divorce. These speech acts go wrong because the speakers somehow fail to satisfy the conditions (the felicity conditions)

14. The idea that to "fully succeed" in certain acts, recognition on a hearer's part is necessary is in J.R. Searle, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 47 (1969). In the present paper, we use "to do the illocutionary act of X-ing" (and variants) to mean what Searle meant by "fully succeed in X-ing." Langton herself sometimes used just "to X" (*see infra*, note 18).

15. These examples are discussed in Langton, *supra* note 3, where the argument of this and the following part is given in more detail. The example of the "low type" revolutionary is from Austin, *supra* note 1, at 239–40. The example of the actor who shouts "Fire" is from D. Davidson, *Communication and Convention*, in *INQUIRIES INTO TRUTH AND INTERPRETATION* 269 (1984).

for the speech acts they want to perform. As a result, the speakers can say words, but they cannot (on these occasions) do what they intend with their words.

When MacKinnon says that pornography silences women, she means that pornography prevents women from doing certain things with their words: that pornography prevents women from performing certain speech acts. Her concern is not with those illocutionary acts whose conditions relate to specific institutions like marriage or christening, but to illocutionary acts generally. She may have in mind the different ways women's speech acts can go wrong in sexual contexts.

One way might be this. A woman says "No" to a man, when she is trying to refuse sex; she uses the right locution for an act of refusal, but somehow her speech act goes wrong. The woman says "No" and the man does not recognize what she is trying to do with her words. She says "No," intends to refuse, but there is no uptake in her hearer. She is therefore not fully successful in refusing: she fails to perform the illocutionary act of refusal. She is rather like the actor in the story, who says "Fire!", intending genuinely to warn, using the right locution for warning, but who fails to warn. Her speech has misfired.

On Austin's account, speech acts misfire when their felicity conditions go unsatisfied. The "low type" who tried to christen the ship did not have the authority. The woman who tried to use the *talak* illocution to divorce her spouse failed, because she was not a man. So in the above examples, we can suppose that the conditions for the illocutionary act of refusal fail to be satisfied. This should lead us to think about the source of conditions that constrain speech. MacKinnon says there can be "words that set conditions." Her idea (in part) is that some kinds of speech can set the conditions for other kinds of speech: they make some speech acts possible for some, and impossible for others. Speech acts of legal enactments, for example, can make speech acts of divorce possible for men, and not for women. And when MacKinnon says there can be "words that set conditions," it is pornographic words that she has in mind.¹⁶

One way to interpret this idea is to say that pornographic speech acts help create a communicative climate in which the felicity conditions for some of women's speech are not met. The illocutionary disablement of women in some circumstances is due (perhaps in part) to pornography: pornography is part of the explanation for why speech acts go wrong for some women, when, for example, they try to refuse. Pornography can make certain speech acts unspeakable for women.

What conditions might constrain women's speech, and might be affected by pornography? We have seen that conditions for performing an illocution typically include a hearer's recognition of a speaker's intention to perform an illocution, and that such recognition requires reciprocity to be at work.

16. See MacKinnon 1993, *supra* note 5, at 63–8.

When reciprocity is at work, a speaker tries to perform an illocution, a hearer recognizes that she is trying to perform that illocution, and that is sufficient for her performing it. In the case of refusal, a speaker says "No," intending to refuse, a hearer recognizes that the speaker is intending to refuse, and so the speaker does refuse. The refusal may or may not be respected, but at least it is recognized for what it is. When reciprocity fails the speaker, though, what she attempts to do, she is not recognized as attempting to do, thus cannot be understood as having done, and therefore, given how illocution works, simply cannot do. When reciprocity fails the speaker, she is silenced.

If pornography creates the climate for women's speech (or for a specific area of women's speech), then one way it might do so is by undermining reciprocity: by undermining the capacity of hearers to grasp the illocutions that women are trying to perform. Perhaps it does so by building an expectation that when a woman says "No" she does not intend to refuse. Hearers with this expectation will not recognize the intention when it is there, and then the hearer's part of the illocutionary deal—the uptake—is absent. In this way pornography might contribute to illocutionary disablement.

II. THE ALLEGATION OF CONFUSION

Jacobson believes that the claim that pornography contributes to illocutionary disablement "rests on a confusion" about speech-act theory.¹⁷ He concentrates on one example—the case of sexual refusal we have just described—and argues that pornography, even on the feminist hypothesis, does not silence in the sense that Langton intended. For the sake of argument, Jacobson allows that pornography might contribute to situations where a woman's "No" is not recognized as a refusal, and that rapes might occur as a result. But he denies that in such a situation a woman encounters illocutionary disablement. According to Jacobson, the woman in this example fails only to achieve a perlocutionary result she aims at: her speech does not have the intended further consequences of a refusal. To think otherwise, Jacobson says, would both misunderstand speech-act theory, and have an absurd result—namely, that the woman in the situation described is *not raped*.

We shall show that a woman is disabled at the illocutionary level in the case described; and that if pornography contributes to this disablement, then it can be said to silence women. We also show that this does not have the alleged absurd result. (There is no dispute that the alleged result would be absurd: it would be perverse to say that someone in the woman's situation, who meant *No*, was not raped after all.)

Langton's argument was made against the backdrop of Austin's classic

17. *Supra* note 6, at 78.

account of speech-act theory, as Jacobson is aware. Austin suggests—as Jacobson points out—that an illocutionary act must secure uptake. Austin says, “I cannot be said to have warned an audience unless it hears what I say and takes what I say in a certain sense.”¹⁸ Likewise, then, for a speaker to perform an illocutionary act of refusal, it is necessary that the hearer take the speaker to be refusing. So the woman whose “No” is not taken to be a refusal does not refuse (does not refuse, in Austin’s terms; does not perform the *illocutionary* act of refusal, in the terms we have adopted here). The argument about refusal, then, rests only on Austinian premises. 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 “heavy-weight of speech-act theory”¹⁹; Langton supposes that uptake is necessary, and is said to be confused.²⁰ What is fair for the gander, one might hope, is fair for the goose.

Jacobson himself, though, disagrees with the Austinian premise. To think that uptake is a necessary condition for the performing of a particular illocution is “to hold the performance of an illocutionary act hostage to the perversity of one’s audience.”²¹ But evidently when illocution is thought of in Austinian terms, this is no objection; Austinian illocutions, for which uptake is required, are indeed, in one relevant sense, “hostage to one’s audience”: linguistic communication presupposes reciprocity, but reciprocity may be missing because of the states of mind of one’s *audience*. Of course there are, as Jacobson says, “delicate” issues about speech-act theory here. There are writers who have ignored Austin’s emphasis on uptake, and there are writers who have thought that it is a mistake to include uptake in conditions for illocutionary-act performances: Strawson is an example. But Jacobson for his part tells us that he does not rely upon his sympathies with Strawson.²² He believes he has no need to rely upon these, because he believes he has an actual counterexample to the claim that uptake should be treated as necessary.²³

18. Austin, *supra* note 1, at 115. Jacobson, *supra* note 6, at 73. Jacobson thinks that Austin “overstates things.” Well, we noted *supra* (where note 14 is flagged) that verbs for illocutionary acts, like “warn,” may be thought to have application even where the hearer does not take the speaker to be warning. We advocated putting Austin’s point by saying that no *illocutionary* act of warning is performed unless there is uptake. Put that way, the danger of overstatement goes away. Interpreting her remarks in their context, 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).

19. Jacobson, *supra* note 6, at 72 and 73.

20. *Id.* at 76.

21. *Id.* at 74.

22. *Id.* In P.F. Strawson, *Intention and Convention in Speech Acts*, 73 *PHIL. REV.* 439 (1964), it is said that the aim, not the achievement, of securing uptake is essential to the illocutionary act. (We think that Strawson was registering appreciation of a point we acknowledged in the text *supra*—about what appear to be necessary conditions for the application of words like “warn” or “refuse.”) Jacobson says that he will use only a weaker claim than Strawson’s, that “*at most* the aim of securing uptake . . . is required” (*id.* at 74). Because the issue is whether there is any further requirement, it is not clear to us how Jacobson’s claim can be relevantly weaker than Strawson’s.

23. *Id.* at 76.

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.

Jacobson wants to say that uptake has not been secured in this case, and that Austin would therefore have to deem the attempted invitation a misfire. But it is not: Sally *does* invite Bill. So uptake is not a necessary condition of illocutions, contrary to Austin.

Jacobson's is a nice story, but it does not prove his point. There is a difference between inviting someone to your wedding and wanting him to attend, and there is a corresponding difference between someone's believing that he is invited to a wedding and his believing that his attendance there is wanted. Sally may well invite Uncle Harry, who will only get drunk and loudly reminisce about the war, because she feels she has to invite him. So she intends to invite him, she sends the invitation, he recognizes that she intends to invite him, uptake is achieved, and she does invite him—even if Uncle Harry also (rightly) believes she does not want him there. Her invitation does not misfire. Bill, likewise, can recognize that Sally intends to invite him even if he (wrongly) believes she does not want him there. Perhaps there is a sense in which she invites Uncle Harry "insincerely," but then that seems analogous to the person who promises "insincerely," not intending to keep the promise—an "abuse," in Austin's terms, rather than a misfire. And the story of Bill and Sally seems to be, in Austin's terms, the story of a believed abuse, rather than a misfire. The result is that one may agree with Jacobson's intuitions about this case (Sally does invite), while continuing to see the point in Austin's own view that uptake is a necessary condition for illocution. Jacobson's example is ineffective, then.²⁴

Jacobson thinks the example demonstrates a need for a novel account of illocutionary acts. We would have to go beyond our present task if we were to discuss the merits of the account which he proposes.²⁵ Our point should be clear already. The speech-act theory in which we have worked, unlike Jacobson's, has recognizably Austinian origins. On an Austinian account, it is at the illocutionary level that something goes wrong when a hearer fails

24. What Jacobson needs is a case where Bill does not recognize that Sally intends to invite him. There could be a story in which Bill believes that the invitation was sent to him by mistake, and Austin then might well say that the invitation misfired and she failed to invite him. (More cautiously: one might well say that she failed to perform the illocutionary act of inviting; see notes 14 and 18.)

25. Jacobson wants to preserve something of the Austinian view of uptake as required for illocution, but what he himself requires is counterfactual uptake by a "competent hearer": "[W]hat a competent auditor would take as an unambiguous warning is one" (*id.* at 78). The most obvious way to understand "competent hearer" here is as someone who would recognize the intended illocution. But so understood, Jacobson's apparent innovation appears to collapse into the Strawsonian view on which he claimed not to rely (*see supra* note 22).

to recognize which thing (like refusing) a speaker intends to do with her words. We have explained (part 1) how what goes wrong can be characterized as a kind of silence. If the publication, dissemination, and consumption of pornography brings it about that things do go relevantly wrong with a significant area of women's illocutionary acts, then pornography silences women.

What then of Jacobson's attempt at adducing an absurd conclusion? The charge against Langton is swiftly made:²⁶

The strange and troubling consequence of the argument from illocutionary disablement, however, is that *Langton cannot call this rape*.

Apparently Jacobson believes that, as long as there is no illocutionary act of refusal, a necessary condition for rape is not satisfied. But how could that be? Certainly on Langton's view, the state of mind of a hearer impinges upon the question of whether there was an illocutionary act of refusal (of whether, as Langton put it, the speaker refuses).²⁷ But that does not mean that the state of mind of a hearer impinges upon any question about the content of a speaker's intentions. The fact that the woman performed no illocutionary act of refusal could then have no tendency to show that she was someone who gave her consent.²⁸ Equally the fact, if it were one, that the man took the woman to perform an illocutionary act of consent could have no tendency to show that the woman consented. This seems obvious. If a speaker's illocutionary acts depend on the fulfillment of her intentions, and such fulfillment is uptake on the part of the hearer, then of course no view of the speaker's states of mind can be based solely upon what illocutionary acts she performed. Equally evident, no view of the speaker's states of mind can be based upon how the hearer takes her speech. Jacobson conflates a condition necessary for refusal with a condition sufficient for consent: seeing that Langton regards the man's taking the woman to refuse as necessary for the illocutionary act of refusal, he then supposes that Langton must regard the man's taking the woman to consent as sufficient for consent. It is Jacobson's conflation, and not any premise of Langton's, that gives the absurdity.²⁹

26. *Id.* at 77: the italics are Jacobson's.

27. See *supra* note 18.

28. Within the *mens rea* component of many legal definitions of rape, absence of consent on the woman's part is not sufficient for rape; there is a requirement also, *e.g.*, that the man not be reckless in his belief that the woman consented. This ensures that, in a legal context, the fact of a man's taking a woman not to refuse could be relevant to the question whether he is to be found guilty of raping her. But this legal point is independent of questions about the conditions for illocutionary acts. Even the most satisfactory legal definitions of rape may fail to accord with an intuitive understanding of it, because the legal definitions will always be constructed to register burden of proof.

29. It could be that Langton's discussion of a different example left her open to a misunderstanding like Jacobson's. In discussing Linda Marchiano, *ORDEAL*, Langton suggests that in a situation in which the book is bought and sold as pornography, and readers take it to be

III. FREEDOM OF ILLOCUTION

Austin introduced *illocution* because he wanted us to think of language use not merely as the production of meaningful sounds, but as the doing of various things with words. Taking illocutionary things to be things done with words, we see how someone might, through no fault of her own, be unable to do some of the things that can be done with words. If these things—illocutionary acts—count as “speech” in the free-speech sense, then such a person—a silenced person—is impeded in the actualization of the very capacity whose exercise a right to free speech is supposed to protect. Thus our account of silencing will have repercussions for debates about free speech.

But there is a different view. The capacity to speak may be conceived as something that a person can exercise on an occasion unless she is then physically obstructed: someone raised in the use of a language, who has the usual human cognitive resources and vocal apparatus, simply *can* speak. On this view, the freedom to speak is something which a speaker in isolation can be conceived as having in isolation: you do not need an audience to make meaningful sounds. 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. Jacobson thinks that the feminist argument connecting pornography with silencing cannot proceed from the value of freedom of speech, but must stem from a strange and unwarranted commitment to freedom of illocution.

Jacobson tells us that Mill is on his side:³⁰

Free speech, as glossed by Mill, is roughly the freedom of locutionary acts [F]reedom of expression is not the freedom of illocutionary acts.

pornography, it is pornography (Langton, *supra* note 3, at 322). This suggests that something’s being taken to be pornography is (in some contexts) sufficient for its being pornography, even if a speaker intends it not to be. Applying this, by analogy, to the example of sexual consent, one might come to suppose that something’s being taken to be consent is sufficient for its being consent, even if a speaker intends it not to be. That would give one the “absurd result” of which Jacobson complains, namely that the woman does consent and hence is not raped. Now Jacobson does not in fact argue by analogy, but appears to make the illegitimate conflation we have described. However, if he did argue this way, then Langton’s response would be that the illocutions of pornography (if pornography can be described in illocutionary terms) are very different from the illocutions of consent: the latter is a prime example of a communicative illocution, the former is not; and the speaker’s intention matters far more in the latter case than the former. This issue certainly deserves more attention than Langton gave it, and than we are able to give it now. Let a couple of sentences suffice. Whereas it is plausible to suppose that intending to consent is necessary for consenting, it is not plausible to suppose that intending to produce pornography is necessary for producing it. There need then be no inconsistency in allowing that a work’s being taken to be pornography might (in some contexts) be enough for it actually to be pornography, while denying that a person’s being taken to have consented is (ever) enough for her to have consented.

30. Jacobson, *supra* note 6, at 71.

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.

We shall have to say something about the suggestion that Langton is committed to advocating a right to any old illocution—to knight, to exonerate, or to canonize. In speaking to this, we can start to make clear the extent to which our own view is in fact in harmony with Mill's. That will put us in a good position to show that Jacobson's attribution of his own view to Mill is erroneous. Not only that: we shall see that proponents of free speech seldom stop where Mill is thought by Jacobson to have stopped—at a right to free locution.³¹

It is surprising to find the claim of a right to do any old illocutionary thing attributed to Langton. In the same article as she made her claims about pornography and silencing, Langton argued that pornographic speech acts may be illocutionary acts of subordination. If she were committed to freedom of illocutionary acts *tout court*, then her argument would have defended pornography, rather than questioned a license to publish it. 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.

Jacobson's list of sample illocutionary acts makes it clear that he focuses on the kinds of acts on which Austin concentrated in order to illustrate his idea of performativeness—acts where particular forms of words are tailored to the carrying out of some procedure.³² Evidently, arguments for the protection of such illocutionary acts will involve one in questions about the institutions of which the procedures are a part. Questions about the honors system and about sainthood, for example, would arise when acts of knight-ing and canonization were defended. But such questions evidently have little bearing on questions about free speech generally, so that someone who wants to defend a general view of free speech as free illocution will not have Jacobson's narrow focus. Someone interested in free speech will have a conception of illocutionary acts that extends beyond those acts whose conditions are bound up with specific institutions; it will extend to all of those acts which Austin came to say are illocutionary—acts which, as we put it, reveal language use as communicative. Certainly this includes the institu-

31. Jacobson's allusion to the First Amendment here suggests that he may have different objectives from our own in understanding the proponents of free speech (*see* the end of our introduction *supra*). If a Bill of Rights is introduced into the United Kingdom—as, with a new government, it is expected to be—then a U.K. citizen might appeal to a right to free speech even while it was granted that (given facts about U.S. legal history) she would stand no chance if she appealed to a First Amendment right.

32. *See supra* where note 11 is flagged.

tional acts upon which Jacobson focuses and about which special questions arise; but it includes a great deal more besides—refusing is just one example of what else it includes.

Now there is nothing here which Mill would disagree with. Mill defended a free market of ideas. He argued that a general license to speak is conducive toward the spread of truth. But the spread of truth is something that does not even come into the picture if we confine ourselves to the locutionary acts of speakers, to their makings of meaningful sounds. As Mill put it himself:³³

[T]ruth has no chance but in proportion as every side of it, every opinion which embodies even a fraction of the truth, not only finds advocates, but is so advocated as to be listened to.

Illocution in fact demands less of audiences than Mill indicates here. Illocution demands only minimal receptiveness on the part of audiences, whereas Mill is saying that realization of the good that free speech can bring requires attentive, “listening” audiences. If one were to demand even less than illocution demands—if one asked only that speakers should be able to come out with meaningful noises—then obviously one would not be in a position to claim for free speech the sort of value that Mill thinks attaches to it.

Still, Jacobson claims textual support for his idea that Mill believed free speech is free locution. He tells us that Mill allowed the prohibition of illocutionary acts, citing the following passage:³⁴

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 . . . may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer. . . .

Here Mill certainly excludes certain acts from free-speech protection. But these are not illocutionary acts. As Mill conceived his example they are perlocutionary acts. A riot is in an obvious sense an extralinguistic consequence of a piece of speech. Instigating a riot is not a matter of producing the kind of uptake distinctive of illocutionary acts: to intend to instigate a riot and to be taken so to intend is (fortunately) not sufficient for instigating one.

In drawing the line at instigating riots, Mill did not draw the line at locution. Mill never denies anyone a right (for instance) to say *and be taken as saying*, that the corn dealers are starvers of the poor: he never denies a right to illocution. If he had, then that would have fitted ill with his concern

33. In the version of ON LIBERTY printed in UTILITARIANISM (M. Warnock ed., 1962), at 180.

34. *Id.* at 184.

that people should be able to speak their opinions to one another, and to tell one another things—to do illocutionary things, that is. In circumstances in which a riot would ensue from expressing one's opinion to others, "immunity" to express it is "lost." And this is true not only in the judgment of Mill, but also, for that matter, in the decisions of U.S. courts.³⁵

IV. ILLOCUTION, EQUALITY, AND RIGHTS

There are egalitarians who will rejoice in Mill's having placed more demands on audiences than the minimal one that is placed through an illocutionary conception of speech. Some of MacKinnon's talk of silencing, for instance, may allude to cases where a woman is not "listened" to as Mill meant that, rather than only to the cases that have concerned us, where the minimal receptiveness required for illocutionary uptake is missing. Proponents of a specifically egalitarian approach may point out, as MacKinnon does, that a right to free speech may conflict with a right to equal treatment, and that the promotion of free speech as it is usually understood has the consequence of leaving the disempowered without a voice. But we have not considered such an egalitarian approach here.

We think that Jacobson evinces an unduly simple view of the dialectical situation when he sees the feminists as claiming that "the right to free speech conflicts with . . . equality." For, on the one hand, our own arguments, in support of the feminists, show that the claim that "speech" in "free speech" includes illocution need not be rested in any specifically egalitarian considerations. On the other hand, there is an anti-feminist position on free speech that purports to be an egalitarian one and yet has no truck with the idea that speech might include anything except illocution. This is Ronald Dworkin's position. And Dworkin, like Jacobson, thinks that Mill is on his side.

Dworkin wants to rest the right to free speech in the value of individual moral autonomy, and he considers his own defense of free speech, appealing as it does to "equal dignity," to be an egalitarian one.³⁶ But Dworkin

35. See *Brandenburg v. Ohio*, 1969: "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." As this quotation suggests, debate about what may be excluded from First Amendment protection is debate about which *perlocutionary* acts defeat a free-speech right. The debate always assumes (without making the distinction, it is true) that illocutionary, like locutionary, acts are protected. To say that some advocacy may sometimes be proscribed is to say that some pieces of speech intentionally have such consequences that they are then not protected. (Note that there could be no objection to treating "speech," in this formulation, as illocution.) But the immunity that is then lost, which is an immunity Mill generally advocates, is not immunity merely to do locutionary things.

36. The question whether Dworkin can carry on with his stated defense of pornographers' rights while allowing any genuinely egalitarian considerations to impinge as Dworkin thinks they ought to was answered negatively by R. Langton, *Whose Right? Ronald Dworkin, Women, and Pornographers*, 19 *PHIL. & PUB. AFF.* 311 (1990). (Parts are reprinted in S. Dwyer ed., *supra* note 3.)

attacks the claim that speech might be illocution. Relying on the idea that free speech must be defended as a negative liberty, he deems it “unacceptable” to suppose that “the right to free speech includes a right . . . that others grasp . . . what one means to say.”³⁷ (A right to do something is not *eo ipso* a right to conditions in which one *can* do the thing.)³⁸ Well, we have certainly not claimed that anyone has a *right* to another’s grasping what she means to say. But in thinking of illocutionary acts as candidates for free-speech protection, we have allowed that whether or not another will grasp what one means to say bears on one’s freedom as a speaker. And this prevents us from conceiving free speech as a negative liberty. The capacity to speak would be something that a speaker in isolation could be conceived as having if speaking were a negative liberty. So we must allow that our treatment of free speech conflicts with a defence of the right to speak as a negative liberty.³⁹ What the conflict shows, in our view, is the limitations of a libertarian, negative liberty defense of free speech, rather than the unavailability of a locutionary conception of speech.⁴⁰

A locutionary conception of speech is not what one needs unless one thinks that all of the value of free speech resides in people’s ability to make noises that are recognizable as speech. The value of free speech surely resides in fact in people’s ability to be recognized as doing what they mean to be doing in making noises—to be communicating. Caring about free speech is a matter of caring about people’s powers of doing things with words, including illocutionary, communicative things. And this seems to be true whatever detailed account is offered of why free speech is valuable. That is why a reason to protect locution—to stop people from interfering with one another’s actual production of words—is likely to be a reason also to be concerned with cumulative processes of silencing of women’s speech.

Other justifications than Mill’s of protecting free speech can be given. But many of these, like Mill’s, will see value as residing in free illocution. From the perspective opened up by thinking of speech as being communicative, one can take into account benefits of free speech as well as costs of unfree speech, and one can take account of benefits that only come into view when one’s sights are not set on the individual speaker. Dworkin sometimes confines his defense of free speech to the need to avoid harms to the individual dignity of would-be hearers, and would-be speakers. “We retain our dignity, as individuals,” Dworkin says, “only by insisting that no one—no official and no majority—has the right to withhold opinion from us on the ground that we are not fit to hear and consider it.” Taking the

37. *Women and Pornography*, N.Y. REVIEW OF BOOKS, October 21, 1993.

38. See pt. II of J. Hornsby, *Disempowered Speech*, PHIL. TOPICS (Fall 1995).

39. On “right” in “right to free speech,” see the section “Rights and ‘Rights,’” in J. Hornsby, *Free and Equal Speech*, IMPRINTS 59 (October 1996).

40. Knowing of the opposition (generally speaking) between libertarian and egalitarian versions of liberalism, one may not find it surprising that a conception of free speech like ours, whose *repercussions* may be egalitarian, cannot rely upon a thoroughgoing libertarian account of the right. (Dworkin seems to want to have it both ways: see Hornsby “Postscript,” *supra* note 4.)

point of view of the speakers, Dworkin appeals to the idea that “the government of a just political society will treat all adult members as moral agents, who have a responsibility to express . . . convictions of their own to others, out of respect and concern for them. . . .”⁴¹ Naturally, we do not deny that moral autonomy has some place in a defense of free speech. Indeed, we applaud Jacobson’s point that “[w]hat 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 the assault on her well-being.”⁴² But like Mill, we think that no defense of free speech can be based exclusively on individual autonomy.⁴³ A defense of free speech cannot then be rested only in the individualistic costs and benefits to which Dworkin appeals.

There is a distinctively human capacity that one has as a member of a speech community: one is able to do things with words (and take others to do them) when others are able to take one to do them (and to do them themselves). Possession of this capacity (which is to participate in illocution)—not just of the ability to produce intelligible sounds and marks (which is to participate in locution)—is necessary for any individual to flourish as a knowledgeable being, and for the spread of knowledge across populations and generations of individuals. It is a capacity that equips human beings with a nonviolent means for reaching decisions, whether on individual or collective action. And that no doubt explains why free speech should so often have been thought not merely to assist in the spread of truth but also to be partially constitutive of democratic arrangements.⁴⁴

41. See R. Dworkin, *The Coming Battles over Free Speech*, N.Y. REVIEW OF BOOKS, June 11, 1992. In the present context, of discussions of pornography, two things make Dworkin’s rhetoric here seem laughable. The first thing is the mismatch between the material with propositional content which Dworkin is actually defending (“opinions,” “convictions”) and the pornography producers’ products which he would wish to defend (*i.e.*, the mismatch between speech proper and “expression”: see *supra* note 9). The other thing is the motives imputed to pornography’s producers when Dworkin’s defense is applied to their case—“respect and concern for others.”

42. *Supra* note 6, at 76.

43. Of course, Mill defended moral autonomy in ON LIBERTY. But he did so elsewhere than in the chapter concerned with speech (see *supra* note 8.).

44. Here we can only gesture toward a wider free-speech literature. Democracy, of course, comes in with the famous argument of A. Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948), reprinted in POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965).