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**Speaker: Rae Langton, University of Cambridge
Paper: Directive and Empowering Rules for Free Speech**



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Directive and Empowering Rules for Free Speech

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0. Preamble

Today I want to explore a different way of thinking about speech, and free speech, and the rules that govern free speech. In slogan form: free speech is about the *protection and enablement of speech acts that matter*. My interest is in how *rules* contribute to this protection and enablement.

Thus described, the proposal might sound simple enough, despite its curious focus on ‘speech acts’, things done with words. It might even be taken to fit *any* approach to free speech, as it stands. To take a salient example, the First Amendment of the U.S. Constitution is a rule that protects speech acts from government censorship and interference. It protects some and not others, because some matter more, perhaps because they express a political opinion; while others, like offering a bribe, do something else. If the slogan could, as it stands, fit pretty much any approach to free speech, how is this going to be ‘different’?

Well, I hope to flesh it out in a distinctive way. I want to draw on H.L.A Hart for some ideas about speech, and freedom, and rules. I want to build on his early contrast in *The Concept of Law* between *directive* and *empowering* rules. Hart said rules of the first type ‘impose duties’, while rules of the second type ‘confer powers, public or private’. Directive rules direct: they create duties, e.g. they prohibit and punish certain actions, such as theft. Empowering rules empower: they create powers, possibilities for action, e.g. they enable us to do things to ‘by contracts, wills, marriages, etc.’ (Hart 1961). Hart began with a distinction between these two kinds of

rules, and he emphasized the value of the empowering rules, calling the legal rules which create powers for private citizens ‘one of the great contributions of law to social life’. He was surely right, but his optimism about the law was tempered by an alertness to the law’s darker side, its equally potent contributions to injustice, e.g. in the British law of his time about homosexuality.

The distinction Hart saw in the law applies to social norms as well. Here too we can draw a comparable contrast between directive and empowering rules: the difference between social norms that tell us what to do, and social norms that create powers, possibilities for action. Here too, the social norms that empower us are among their ‘great contributions’ to ‘social life’, and here too they have a darker side.

With Hart’s contrast in mind, we can flesh out the slogan a little more. Free speech involves the protection, through *directive rules* (legal and social) that create permissions and obligations; and enablement, through *empowering rules* (legal and social) that create powers or capacities; of *speech acts*, ‘doing things with words’ (in J.L. Austin’s phrase); that *matter*, given their normative significance.

We are used to the idea that free speech involves the protection of speech through rules—directive rules, which permit speech, and prohibit restrictions and penalties on speech. But what if free speech requires *powers*, as well as an absence of ban or penalty? I mean ‘powers’ not in a handwaving feel-good sense of ‘empowerment’, but in the specific sense used by Hart. And what if empowering rules are needed not just for official or ceremonial speech acts, like the power to make a will, or to marry someone, but also for ordinary communicative speech acts, the traditional province of free speech? That is the prospect I would like to explore and defend, the idea that free speech is not only a hands-off absence of bans and penalties,

but also a hands-on enablement of certain speech-act powers, capacities without which we are, perhaps, not fully citizens at all.

My work here is exploratory, looking into the protection and enablement of speech through legal rules *and* social rules. Some of these rules involve the state, and others involve ordinary citizens, whose everyday conversations help build, or sustain, or erode the speech-related rules and norms that shape the social world and its possibilities for action. There is a lot of unfinished business, and several implications I barely touch upon. There is an implication for the idea of *silence*. Any picture of free speech will tend to generate a corresponding picture of silence, perhaps silence as censorship—or perhaps silence as failure to speak due to lack of a speech-act power, in Hart’s sense of ‘power’. There is an implication for the idea of *counter-speech*. Any picture of free speech will tend to generate a corresponding picture of speech that counters false or harmful speech, perhaps by contradicting it—or perhaps by undermining the speech-act power that makes it harmful, again in Hart’s sense of power. (Langton 2018a, cf. Langton 1993, 2018a, Hornsby 1995).

A key piece of my argument is still missing: namely, an account of the *social empowering rules* for ordinary *communicative speech acts*, the traditional province of free speech. There remain questions about which rules exactly are needed for free speech, who exactly is responsible for creating them, and how exactly my proposal relates to the vast wealth of work on this topic (especially a ‘capabilities approach’ to free speech, Gelber 2003, Brison and Gelber 2019). There is the challenge of navigating all this in the increasingly fractured free speech politics of our present time. The situation might seem so dire that my attention to ‘empowering rules’ might seem an indulgence, a subtle nicety—it might look like philosophical fiddling while

Rome burns in a conflagration of good old-fashioned state censorship, of the media, of street protests, and so much more.

There are wider interpretive questions about Hart, and how his two kinds of rules evolved into the ‘primary’ and ‘secondary’ rules for which he is more famous. I don’t use those labels, because they have become attached to a later version of his distinction with complexities of its own. ‘Secondary rule’ has become a label for a subset of the empowering rules he initially described, namely the rules that create *public powers for officials* to alter the directive ‘primary rules’ of the criminal law, for example. My interest is in the more basic distinction with which Hart began, between rules that direct, and rules that create powers. And among the secondary rules which ‘create powers’, my chief interest is in a different subset, namely the rules that create *private powers for citizens*—powers for ordinary individuals to perform speech acts that ‘mould their legal relations with others by contracts, wills, marriages, etc.’ Hart underlined significance of these at the outset, even though he later focused on the rules and powers that are required to make law into law. His earlier, more basic distinction has been neglected. It is enormously interesting and important, though, and sheds light on the directing and empowering rules that govern the speech acts of ordinary citizens in ordinary situations.

Many of these questions will get postponed, but let us make a start.

1. Hart’s cold feet and Austin’s ideas

Let me begin with a lovely story from a 1988 interview of Hart, where he confessed his initial terror about doing philosophy. He told David Sugarman that, back in 1945, he had tremendous ‘cold feet’ as a young ‘fledgling Philosophy don’ at Oxford, but his cold feet were cured by someone who introduced him to ‘some ideas’:

I had tremendous cold feet for two years. I had to deal with a very large number of returning servicemen. I suppose I was taking about 20 hours a week of tutorials. Some of the [students] were seasoned, aged 38 or something. I thought I should never catch up... That was my initial stage fright. (Sugarman 1988)

It seems odd to think of Hart with cold feet, or stage fright. Though it is not so odd if we have read Nicola Lacey's marvellous biography, which brings to life Hart's vulnerability as an 'outsider on the inside' of Oxford, given his training as a barrister in Philosophy and as a philosopher in Law, not to mention his ambiguous sexuality, and his Jewish background. Being an 'outsider on the inside' might or might not explain something (for more on this see Lacey 2004, Mendus 2008). But setting that aside, let's look at Hart's cure for cold feet, and his physician.

HART: The person who got me out of [the stage fright] was Professor J. L. Austin. He ran a seminar for what he called 'the hacks', the dons, on Saturday mornings when we discussed a great range of questions. He was a genius at this kind of thing and this steadied my nerves. I decided this was what I really wanted to do. [...]

SUGARMAN: How influential was [Austin] on you?

HART: Very.

...His understanding and subtle analysis of language was unrivalled, which absolutely excited me. And then he was naturally interested in law. He would have made a formidable QC. We ran a class together... And we read cases at each other and then it became clear to me that he had some ideas.

Austin certainly did have some ideas, and Hart explained them like this.

HART: [Austin] had the idea of what he called 'performance utterances'. And here the law came into its own. When I say, 'I hereby give you my gold pen', I'm not describing what I'm doing, I'm actually doing it with words. He wrote *How To Do Things With Words*. That tremendously impressed me. I developed that in certain ways. The other thing was his general interest in the diversity of rules and standards of conduct. (Sugarman 1988)

Hart was 'very' influenced by J.L. Austin, he said. He was inspired by two of Austin's ideas, first, the idea of speech as 'doing things with words', and second, the

idea of a ‘diversity of rules’. And he ‘developed’ them in ‘certain ways’—for example in precisely those parts of *A Concept of Law* we are considering here. The powers of individuals to do certain things with words, to perform certain speech acts, need to be created by legal rules whose job it is to create them. There is a ‘diversity of rules’, and the empowering rules are entirely different in kind from the directive rules of the criminal law.

We are building on Hart to explore the idea that free speech involves the protection, through directive rules, and enablement, through empowering rules, of speech acts—that *matter*. Now for that last word. There is no dodging the question of what matters, according to Hart, and this comes out vividly somewhere else, in his critique of John Rawls. Here he expresses sympathy for a liberal ideal, while raising an objection that emphasizes the costs of liberty, and the inadequacy of Rawls’ defence of it.

Any scheme for distributing liberty, he says, not only ‘confers on individuals the advantage of that liberty’, but also—

exposes them to whatever disadvantages the practices of that liberty by others may entail for them. These disadvantages include...interference with another individual’s basic liberties, [and] various forms of harm, pain, and suffering (Hart 1973, 550)

Liberties bring disadvantages as well as advantages, and there is no avoiding a decision about what matters more. Rules of order in debate restrict one liberty for the sake of another. They prohibit heckling, and restrict the liberty to ‘speak when we please’, and such rules do not protect a ‘*greater* or more extensive liberty’, contrary to Rawls, but rather ‘a liberty to do something more valuable’ (Hart 1973, 543).

Reasoned debate is more valuable than heckling.

The ideas from Austin which excited Hart were ideas about speech, and about rules. First was the idea about what speech is, ‘doing things with words’, such as

giving someone a gold pen, where the saying is a kind of doing—you're not 'describing' what you're doing, you're 'actually doing it with words', says Hart. Second was the idea of a 'diversity of rules', which Hart then 'developed in certain ways', for example in his contrast between directive and empowering rules.

Rules can indeed empower us, though not in the way a cure for cold feet might be said to empower us. Rules create powers to do things which set up 'structures of rights and duties', when you give someone a gold pen, or marry someone. Such rules do this by specifying 'procedures' and 'conditions' whose satisfaction creates new structures of rights and duties, and that is what enables us to 'mould our legal relations with each other by contracts, wills, marriages, etc.' (Hart 1961). Hart insists that such rules *do not direct us* to do things, or avoid doing things. But by setting up these systems of conditions—'felicity conditions', as Austin would have called them—they empower us to do things that normatively shape our lives and social relationships.

We shall be looking at parallels between the legal and the social, parallels which also inspired Austin and Hart, and cross-fertilized their thinking. Austin 'had the idea of what he called "performance utterances"', says Hart in that Sugarman interview, 'and *here the law came into its own*'. That is not at all surprising, because Austin's idea of the 'performative' was quite possibly inspired by the law in the first place. The 'nearest approach' to the 'performative', writes Austin, is 'the word "operative" as used by lawyers': they use the word for that part of a legal instrument which 'actually performs the legal act which it is the purpose of the instrument to perform' (for example, 'I give and bequeath my watch to my brother', 'Performative Utterances' 235-6).

Social rules, like legal rules, can likewise be either directive or empowering. For example, the speech act of *promising* can be understood to involve both kinds of social rule, a directive prohibition, and an empowerment. A directive social rule prohibits the breaking of a promise without good cause. But this presupposes the power to make a promise in the first place, a power which depends on a background empowering rule, i.e. a social practice (or ‘convention’) that enables us to bind ourselves with a promise, making our ‘word’ our ‘bond’, as Austin put it.

Parallels between the legal and the social are familiar, and have guided feminists writing, for example, on the topic of pornography. Catharine MacKinnon and Andrea Dworkin have gone so far as to claim that *pornography is like the law*, for women and for sex. On this way of thinking, the directive and empowering rules which Hart saw in the law are mirrored in the rules created by pornography—for example, directive rules which permit or encourage violent treatment of women; and on the other hand, empowering rules that silence the speech of women (Dworkin 2007, Langton 1993, 2017, MacKinnon 1987, 1993). I shall soon return to this feminist work, and to the significance of Hart’s two kinds of rules in this very different context. But my hunch is that social versions of Hart’s directive and empowering rules are at work everywhere, in the speech dynamics of socially penalized speech and disempowered speech, e.g. for racial groups targeted by hate speech, and for media journalists demonized by bully politicians.

A caveat to forestall misunderstanding, before we move on. If we find parallels between legal and social rules, this would not mean it is all ‘just social construction’. Hart said of legal rules that they ‘must in the end be submitted to a moral scrutiny’ (Hart 1961 p. 210). He is surely right, and the same goes for social rules. Legal and social rules are equally answerable to moral norms. The rules about

promise-making are in harmony with moral rules. Promise-breaking violates a moral rule as well as a social one; and it is a good thing morally that we have power to bind ourselves with a promise. On the other hand, pornography's directive and empowering rules are not in harmony with moral rules, if the feminist descriptions are apt. In this sense, they are like the 'evil' law Hart describes, i.e. a law which requires moral scrutiny, and rejection if need be. This topic deserves more attention than I can give it here; but I take for granted the answerability of social and legal rules to 'moral scrutiny', however this gets spelled out in the end.

2. Directive and empowering rules: a closer look

Hart introduces his two kinds of rules in the third chapter of *A Concept of Law*.

Rules of the first type impose duties; rules of the second type confer powers, public or private (Hart, 1961)

He finds special significance in rules of the second type that confer powers: such rules had been neglected by his predecessors, for whom the law was treated as a system of directives, 'orders backed by threats', as embodied in the criminal law. Power-conferring rules do something quite different, argued Hart. Let us look at his explanation more closely. These rules, he says,

provide individuals with *facilities* for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law. The power thus conferred on individuals to mould their legal relations with others by contracts, wills, marriages etc. is one of the great contributions of law to social life; and it is a feature of law obscured by representing all law as a matter of orders backed by threats. (Hart 1961, 27-8)

Hart admired Austin's insight about a 'diversity of rules', and there is a nice Austinian flavour to this part of *The Concept of Law*, with its contrast between rules as 'orders backed by threats', and rules that 'confer powers'. The latter provide

individuals with capacities to create, ‘by certain specified procedures and subject to certain conditions’, structures of rights and duties. They provide ‘facilities’ for individuals to ‘mould’ our ‘legal relations with others’. They enable certain forms of *saying* to count as certain forms of *doing*, through speech acts of e.g. contract, will-making, and marriage.

Some laws direct and apply sanctions, ‘don’t steal, or else!’, while others empower, providing capacities to do things we otherwise couldn’t, such as marry, or make a will. We can add that sometimes both kinds of law go hand in hand. Australian voting law, for example, *empowers* citizens to vote, and *directs* citizens to vote, imposing penalties on those who don’t.

In support of his argument about the distinctiveness of power-conferring rules, Hart observed that non-compliance results in something quite different for each kind of rule. When you fail to comply with a directive rule, that is a punishable violation of a duty. When you fail to comply with an empowering rule, that is instead a ‘nullity’.

If we do not comply [with the conditions on a will] it will be a ‘nullity’ without legal ‘force’ or ‘effect’... not a ‘breach’ or ‘violation’ of any obligation or duty. (Hart 1961, 28)

Failure to comply with a rule about the ‘conditions’ on a will results in a ‘nullity’ without legal ‘force’ or ‘effect’. It is what Austin called a ‘misfire’.

Hart’s observation about non-compliance has consequences that beyond the need to distinguish empowering from directive rules. It brings out the point that an empowering rule which creates conditions for a valid will is also one which creates conditions for a *failed* will—a ‘nullity’, a ‘misfire’. A rule which sets conditions for success is, at the same time, a rule which sets conditions for failure. Hart has put his finger on a fact with implications for silence as well as for speech. It means an empowering rule will always have two faces: in creating certain possibilities, it denies

others; it empowers the speech acts that meet the conditions, and disempowers those that do not.

3. *Hart on an ideal and its cost*

Among the giants of recent liberal philosophy, Hart did more than most to make the liberal ideals a reality. He argued for progressive law reform in his famous debate with Patrick Devlin about the criminal law on homosexuality, seeking a change in the law's directive rules which at the time prohibited and punished sodomy (Hart 1959). His work became 'the nearest thing' to a 'manifesto' for a campaign that ultimately succeeded, beginning with the decriminalization of homosexual acts in 1967 (Lacey 2004: 201, 2022: 5, Hart 1959 being the 'manifesto').

With that change in the law's directive rules came a change in social norms, in this case social *directive* rules. These gradually evolved to become more permissive, or so Les Green has suggested, offering evidence to show that the law, in this instance, helped to *improve* social morality. Being gay became more visible and normal, so that in Britain by 2008 few people believed homosexuality to be 'wrong' (of those, most were over 55; and of those, fewer than half). Green underlines the dynamic relationship between legal and social rules: 'It is widely conceded that criminalization can stigmatize an activity; why doubt that decriminalization can do the opposite? (Green 2013, 485-6).

In turn, that shift in social directive rules eventually had consequences for the law, first of all for other directive rules in the law, such as anti-discrimination law in the eighties protecting gay people. There were consequences still later for the law's empowering rules, such as those making gay marriage possible, in 2013-2014. Until then, the empowering rules of the law enabled some couples, but not others, to 'mould

their legal relations' through marriage. The empowering rule making space for heterosexual marriage at the same time prevented gay marriage—any attempt to perform a gay marriage would have failed, it would have been, in Hart's term, a legal 'nullity'.

While Hart did so much to make liberal ideals a reality, in comparison to others in the liberal pantheon he was unusually alert to the costs of liberty, and the perils of a certain kind of ideal theorizing. Perhaps that's because he did see things differently, as an 'outsider on the inside', or so, at any rate Susan Mendus has argued, drawing on Lacey's account of Hart's life (Mendus 2008, Lacey 2004).

Let us recall Hart's critique of Rawls. Any scheme 'providing for the general distribution in society of liberty of action' not only gives individuals the advantages of that liberty, but also 'exposes them to whatever disadvantages the practices of that liberty by others may entail for them'. Such harm may include 'not only interference with another individual's basic liberties, but also the various forms of harm, pain, and suffering against which legal systems usually provide by restrictive rules'; and it 'may also include the destruction of forms of social life or amenities which otherwise would have been available to the individual' (Hart 1973, p.550)

Hart is describing conflicts between liberty and other values, and conflicts within liberty itself, and insisting on 'consideration of [their] relative value'. We must ask what matters most. Hart finds Rawls' insistence on the priority of liberty 'baffling' and 'dogmatic' (pp. 534, 554), and diagnoses its roots in an unacknowledged assumption, 'a latent ideal' of Rawls' own (p.554), about liberty and political participation: an assumption that an agent in Rawls' 'original position' would want what the liberal wants, and would not e.g. willingly trade political participation for material security. Hart is not criticizing the assumption itself, which he describes

as one of ‘the chief ideals of liberalism’, but he criticizes its role in Rawls theory, as ‘tacit’ and unargued. In developing this objection, Hart can be seen as anticipating later critiques of ideal theory, and feminist critiques of liberalism—a now-familiar concern that the liberal theorist is too ready to project onto a supposedly blank and neutral individual the values and blind spots he or she brings to the enterprise. Little wonder that such values, smuggled in, then emerge in the conclusion (cf. Mills 2005, Okin 1989).

Hart draws attention to routine ‘considerations of relative value’ when it comes to certain rules about speech, for example regarding libel and civil debate. Libel presents a conflict between liberty and something else. Civil debate presents a conflict within liberty itself. Libel rules restrict a speech liberty for the sake of a different value that matters more, they shield citizens from the ‘harm, pain and suffering’ inflicted by libelous speech. Rules of order in debate restrict a speech liberty too, the liberty to ‘speak when we please’, restricting one speech liberty for the sake of another. We saw Hart’s complaint against Rawls:

What such rules of debate help to secure is not a *greater* or more extensive liberty’ [contrary to Rawls, but rather] a liberty to do something which is more valuable [...] than the activities forbidden by the rules’ (Hart 1973 p.543).

Libel and heckling are both speech, but there are directive rules, backed by penalties, which restrict both, with the aim of protecting, in each case, something ‘more valuable’, according to Hart.

Hart’s attention to the costs of liberty is salient, given some free speech pathologies of recent times. We need little reminder that ‘various forms of harm, pain, and suffering’ can be brought about by speech, and also ‘the destruction of forms of social life or amenities’, including damage to the democratic process itself, often

done, for profit, by agents who do not speak as individual citizens or human beings, but as corporations, state and political parties, and machines, robot algorithms.

Such destruction can be brought about by lies and conspiracies, and also by *bullshit*, in the sense that Harry Frankfurt has made familiar:

[T]he bullshitter... is neither on the side of the true nor on the side of the false... He does not care whether the things he says describe reality correctly. He just picks them out, or makes them up, to suit his purpose. (Frankfurt 2005, pp. 55-6)

Concern over recent years about ‘post-truth’, ‘fake news’, ‘alternative facts’, can plausibly be interpreted as a concern about bullshit, just as much as lies: it is about a speaker’s not caring whether the things they say ‘describe reality correctly’, instead simply ‘making them up’ to suit their purpose.

In recent times we have been ruled by political leaders who have been rightly decried as liars. But they are also rightly described as bullshitters—and interestingly enough, they are even *self-described* bullshitters. By ‘self-described’ I mean their self-descriptions match Frankfurt’s description of the bullshitter. There are plenty of up-to-the minute illustrations to hand, but let me go back to a couple of older stories. Donald Trump once responded to Justin Trudeau’s claim that Canada had ‘no trade deficit’ with the USA as follows: ‘Wrong, Justin, you do!’ And he later bragged ‘I didn’t even know....I had no idea. I just said, ‘You’re wrong.’” (Keith, 2018). Boris Johnson once described to the BBC his writing methods, back when he was a journalist based in Brussels:

Some of my most joyous hours have been spent in a state of semi-incoherence, composing foam-flecked hymns of hate to the latest Euro-infamy.

Johnson was referring to his propagation of ‘Euromyths’ over the decades leading up to Brexit. (British readers may recall euro-mythical tabloid headlines about Bonkers

Bureaucrats Banning Bendy Bananas, and such-like.) Johnson's self-description of his journalistic activity:

[I] was sort of chucking these rocks over the garden wall and I listened to this amazing crash from the greenhouse next door over in England [...] it really gave me this, I suppose, rather weird sense of power.
(Lawley 2005)

Bullshitting contributes to a social practice of bullshitting, just as lying contributes to a social practice of lying. And these practices eventually undermine other practices—including the very practices that make communicative speech acts possible. Social practices of lies and bullshitting lead, in Hart's phrase, to the 'destruction of forms of social life or amenities which otherwise would have been available'. They lead to the destruction of the very forms of life and amenities that give point to speech, and hence to free speech. They destroy social norms of truth and truthfulness, undermining the rules and practices that empower communication (cf. Kenyon and Saul 2022). [Unfinished business drawing on Shiffrin, Lewis; social practices as including directive and empowering rules; reliance of communicative speech acts on empowering rules.]

The costs of liberty, including the costs of speech liberty, takes us back to the founding fathers of liberalism—e.g. in J.S. Mill's harm-based restrictions on a rabble-rouser before a crowd, whose 'opinion' that 'the corn-dealers are the starvers of the poor' is expressed in a speech act of incitement (Mill 1859). Many theorists who are alert to the costs of speech have focused on particular kinds of 'speech', such as pornography, hate speech, incitement, or conspiracy theories. The costs of such speech can include damage to the democratic process, social inequality and hatred, even violence and death. These present conflicts between liberty and other things that matter. They may also present a conflict within liberty, if they involve costs to speech itself: if they involve, for example, a silencing of certain people through the workings

of hate speech or pornography. MacKinnon has said, with pornography in mind, that the free speech of men silences the free speech of women (MacKinnon 1987, 1993).

According to Hart, if a liberty has costs (whether for another liberty, or for something else) there is no avoiding the question of ‘relative value’: no avoiding the question of ‘what matters more’.

4. Speech as doing things with words

We are building on those two ideas that struck Hart in the work of Austin. The first is about speech as ‘doing things with words’, giving a gold pen, yes, and a vast range of other speech acts, promising, marrying, consenting, refusing, voting, testifying, and telling things to each other in ordinary communication. If speech is doing things with words, free speech involves a power to do things with words, and silence involves constraint on that power. At a time when speech is often shrunk down to ‘expression’, or ‘information’, or ‘data’, we have here a salutary reminder that ‘saying is doing’.

To forestall misunderstanding again, the speech powers of marrying and voting are not, I acknowledge, paradigm cases of the kind of speech that is supposed to be ‘free’, and that is not what I mean at all. ‘Freedom of speech acts’ does not require powers to perform just any old speech acts, such as knighting someone, or naming a ship (cf. Hornsby and Langton 1998). But I see a continuity, all the same, between the speech act powers that are the business of free speech, and other powers to perform speech acts—a theoretical continuity which allows us to see their relationship to empowering rules, our theme here; and perhaps a political continuity, if some speech act powers turn out to be constitutive of political agency.

The two ideas Hart admired in Austin are closely connected. The idea about speech as ‘doing things with words’ is closely linked to the idea about a ‘diversity of

rules', since it is precisely the business of some rules to create powers to perform speech acts, things done with words. Empowering rules, unlike directive rules, create powers for ordinary citizens to 'mould their relations with each other' through speech acts that create systems of rights and duties (Hart 1961, 28). The error of Hart's predecessors was to see the law as a system of orders and sanctions only, leaving out the law's different role in creating powers, especially powers to perform some distinctive speech acts.

To be a speaker is to have powers to do things with words. Some of these powers need the law, not just for their protection, but for their very being. It is this creative role which Hart describes as one of the 'one of the great contributions of law to social life' (Hart 1961, 28): the law's role in building a space of powers for individuals to shape our relationships, with new structures, and permissions, and obligations. The law sets up certain 'specified procedures', subject to 'certain conditions', and citizens get the power to perform speech acts that maintain, alter and control our social and normative relationships. These speech acts would not be possible without the empowering rules of the law.

Many of our speech act powers do not need the law for their very being. One just mentioned is the power to promise, which arguably needs social empowering rules rather than legal ones. There are admittedly some very special, legally binding promises, such as those of contract and marriage, which do require the empowering rules of the law to set them up. But ordinary, everyday promising requires social empowering rules, rather than legal ones. Promising is a familiar example, and there are many other speech act powers that do not need the law for their being: the powers to tell each other things, to argue, to testify, the powers to protest or criticize. These powers are the stuff of ordinary communicative speech, which depend on social

empowering rules, which have no need of the law to do their work: unlike the power to marry or make a will, communicative speech acts do not need the law for their very existence, though they may need the law for their protection.

What, then, do these other speech powers need for their very being? Extending Hart's picture, they must need rules, or norms, or practices that are comparable in their function to the law's empowering rules. Social rules and norms resemble the law in their own 'diversity of rules', which just like the law, can be directive or empowering. Some social rules are directive, comparable to orders backed by threats; while other social rules create powers, possibilities for action.

I am interested in the social versions of Hart's legal empowering rules that create powers to 'mould our relations with each other', through speech acts binding us in ties of obligation and intimacy. Social versions of Hart's legal empowering rules are required to build our powers to promise, powers to protest or criticize, powers to refuse or consent to sex, even powers to tell each other things. Speech acts quite generally need rules of the empowering kind, rules which can be either social or legal. We sometimes call those norms 'conventions' (as Austin did) or 'constitutive rules' (Searle), and we sometimes call the powers they create 'deontic powers'. If speech is 'doing things with words', and this involves certain speech act powers, let us follow Austin and Hart in concluding they need empowering rules for their being, whether legal or social.

We are postponing the question of which speech powers need legal rules, directive rules, for their *protection*. That is a more familiar 'free speech' question, and its answer will depend on *which speech powers matter*, when it comes to our judgement of 'relative value', in Hart's phrase. Perhaps the speech powers needed for

formal debate need protection, through directive bans on heckling. But question of which speech powers matter, and need protection, will remain unfinished business.

5. Silence as failing to do things with words

If speech is about ‘doing things with words’, then silence is about failing to do things with words, and this can happen in two ways, which correspond to Hart’s two kinds of rules. One way is that your speech is banned and censored. You are punished if you speak. You are silenced by a rule of Hart’s first kind, a directive rule, which is like an order backed by threats and sanctions. That is what first comes to mind, when we think of how speech can fail to be free. Another way is that you lack the power to speak, in Hart’s sense of a power; or perhaps something has got in the way of your exercising your power. Your attempt to speak will be a ‘misfire’, a ‘nullity’. It may be that you have been silenced by an empowering rule, which at the same time disempowers, just as that old empowering rule for marriage would have disempowered attempts at same-sex marriage. This means that corresponding to Hart’s two kinds of rule are two kinds of silence.

The kind of special interest here involves ‘misfire’, or ‘nullity’. A misfire occurs, for Austin, when the felicity conditions for a speech act are not fulfilled. A ‘nullity’ for Hart ‘ensues when some essential conditions for the exercise of the power is not fulfilled’ (Hart 1961, 33):

Failure to conform to the conditions of the enabling rules make what is said ineffective and so a nullity (Hart 1961, 30-31).

When you fail to do something, in this way, that is not like being coerced by a directive. It is not like obeying an order to be quiet, backed by a threat, or a penalty. You might not, in fact, be quiet at all. And your ‘nullity’, your failure to do what you

were planning to do, is *not itself* a sanction or penalty. Hart insisted on this point, rightly in my view.

The possibility of misfire, or nullity, goes hand in hand with the idea of an empowering rule—and *can be viewed as part of the rule itself*, said Hart:

The provision for nullity is part of this type of rule itself... If failure to get the ball between the posts did not mean the ‘nullity’ of not scoring, the scoring rules could not be said to exist. (Hart 1961, 35, italics added)

Hart’s point here comes straight from Austin. A rule that makes a speech act possible at the same time a rule that makes ‘nullity’ or ‘misfire’ possible. The empowering rule is at once the source of success, and of failure: it is the source of nullity or misfire, when the conditions specified by the rule do not obtain. The rules creating a power to score a goal also create the possibility of failing to score a goal. Extending Hart’s point about games to speech acts: the possibility of empowered speech brings with it the possibility of disempowered speech.

When misfire occurs, you might say the right words, but they are not the right speech act. In Austin’s terms, you use the right locution, but your utterance lacks the right illocutionary force. Here are some favourite examples that Austin used, which as ever border on the surreal. Suppose an authorized official stands ready to name a ship the ‘Queen Elizabeth’, but a ‘low type’ rushes up, grabs the bottle, smashes it against the prow, crying ‘I hereby name this ship the Generalissimo Stalin’. We can agree it was an ‘infernally shame’, says Austin, and that it did not count as a naming. Suppose someone tries to marry, says ‘I do’, but it does not count—the prospective spouse is a monkey. Suppose a short-sighted saint sprinkles water on the inhabitants of a remote island, ‘I baptise you in the name of the Father, the Son, and the Holy Ghost’, but it does not count as a baptism—they are penguins. [Side note: Austin’s interpretation of the story by Anatole France is philosophically acute, but ornithologically mistaken.

The baptisees are *penguins* in French, which is to say *great auks*, not penguins, as Richard Holton has helpfully pointed out.] Or suppose, going back now to Hart's example in the interview, someone tries to give someone something, 'I hereby give X my gold pen', but it doesn't count as his last will and testament—advanced dementia has disqualified him.

In such cases there is a 'misfire' or 'nullity' because the felicity conditions for the relevant speech act are not fulfilled: the want of authority, for the naming; the want of suitable spouse, for the marriage; the want of a soul, for the baptism; the want of adequate 'capacity or minimum personal qualification', for the will (cf. Hart 1961, 28). Or we might equally say: for want of rules specifying procedures and conditions that would empower a 'low type' to name a ship, a monkey to be married, a penguin to be baptised, or an incapacitated person to make a will. The empowering rule specifies the felicity conditions, and thereby creates the conditions not only for success, but also for failure, i.e. misfire or nullity.

Hart was right to draw attention to the distinctive role of laws that create powers. He was also right to emphasize, as 'one of the great contributions of law to social life', the law's empowerment of individuals 'to mould their legal relations with others' in the ways we have been describing (Hart 1961, 28). But a dark cloud lingers behind this silver lining. (Or a dark lining behind the silver cloud, depending on your viewpoint.) We saw one dark side of the law in the homophobic directive rules against which Hart himself campaigned in his debate with Devlin. We saw a different dark side of the law in those homophobic empowering rules which made gay marriage impossible until much later.

And while the empowering role of the law may well be one of 'the great contributions to social life', it is also one of its most grotesque and oppressive

contributions to social life. We regularly ‘mould our legal relations with others’ for ill and not for good, when it comes to e.g. property, employment, contract, and marriage, yielding familiar patterns of exploitation and inequity. The social world we build through the exercise of our legal powers includes just and unjust relationships of obligation and intimacy. At the most fundamental level, as we have just seen, the rules that empower can also, by that very token, disempower. In creating new possibilities for success, they create new possibilities for failure.

Austin’s examples of misfire are often entertainingly surreal. Let us add to his list some more politically salient cases of misfire, which take us beyond the marrying monkey and the baptised penguin. Someone tries to marry, says ‘I do’, but it does not count—the prospective spouse is a man, and so is the speaker. Someone tries to vote, but it doesn’t count—the speaker is black, in apartheid South Africa. Someone tries to refuse sex, saying ‘No!’, but it doesn’t count—she is a wife, and he is her husband, and ‘the wife hath [in marriage] given up herself in this kind unto her husband, which she cannot retract’. [Note: that was Sir Matthew Hale writing in 1736. The principle was reaffirmed as recently 1984, and overturned only in 1991. Comparable laws appear to hold in around one third of UN member states.]

In each case, the speech act faces a problem, not because what is said is banned or penalized, but because its felicity conditions have not been fulfilled: the speaker does not have the power, or cannot exercise that power, because something has got in the way. The speaker can say her words, but her words lack the force she intends—the ‘illocutionary’ force, as Austin put it. The speaker is silenced in her speech act. This is the silence of what I have elsewhere called ‘illocutionary disablement’ (Langton 1993). Hart calls it ‘nullity’. It is worth emphasizing again, with Hart, that this ‘nullity’ is not the same as a directive, which resembles an order,

backed by a threat. Being unable to vote is different to being ordered not to vote.

Being unable to marry is different from being ordered not to marry.

Nevertheless, disempowerment may in practice work a bit like an order, backed by a threat, and the outcome might sometimes look the same. You might not bother to say the words, if you lack the power to make them the right speech act. If you're a 'low type', perhaps you won't try to name the ship, if that wouldn't count as a naming. If you're a gay couple, you won't try to marry, if that wouldn't count as a marriage. If you're black in apartheid South Africa, you won't try to vote, if that wouldn't count as a vote. And under the old rape law, if you are a wife, you might not try to refuse sex, if that wouldn't count as a refusal. Powerlessness, in this very particular sense of powerlessness, might prevent you even attempting the speech act in question.

To step back a little: the law is itself speech that, in these examples, silences the speech of some citizens, by disabling or disempowering it, rather than by banning it. A disempowering law that makes it impossible for some citizens to vote, or marry, or refuse sex, is a law that silences its citizens, not through a directive rule that censors them, but through an empowering rule which disempowers them, so that if they attempted those speech acts their words would be a 'nullity'. The law itself can be a tool for silencing in its empowering role, as well as its directive role.

6. Social directive and empowering rules: the case of pornography

Some feminists have argued that 'pornography is like the law', for women (MacKinnon 1987, Dworkin 2007), and they may mean this in precisely the two ways that Hart distinguished. First of all, they might mean that pornography is a source of social directive rules, backed up by sanctions, about how to have sex, or how to treat

women. Second, they might mean that pornography is a source of empowering rules about what counts as a speech act of sexual consent or refusal—rules which, by the same token, disempower those who fail to meet the conditions.

The idea of a *directive* rule appears in the following lines from Andrea Dworkin:

[P]ornography is the bible of sexual abuse; it is chapter and verse; pornography is the law on what you do to a woman when you want to have mean fun on her body and she's no one at all. (Andrea Dworkin, *Heartbreak*, 2007)

Pornography is comparable to the Bible, she says, it is 'the law' on what you do to a woman, it issues directives about how to have sex, and how to treat women.

In a 2013 UK government report, teenagers described their uses of pornography. 'You learn how to have sex, you're learning new moves. You get to see the way it's done, and the way people do it.... 'Young people expect sex to be like porn. There's that standard where if it's not like that, then sex isn't good', 'a bit aggressive, a bit forceful', 'sexist', 'degrading' (Coy *et al*, 2013). The language used by the teenagers is the directive language of a social norm, which slides seamlessly between 'is' and 'ought'. What you learn from pornography is the way *it's done*, the way *people do it*, the *standard*, the moves that are *expected*.

Jeremy Waldron picks up on this theme in his discussion of pornography's 'pedagogical function':

The visibly pornographic aspect of our society has a pedagogical function [...] Not only does pornography present itself as undermining society's assurance to women of equal respect and equal citizenship, but it does so effectively by intimating that this is how men are taught, around here, on the streets and on the screen, if not in school, about *how women are to be treated*. (Waldron 2012, italics added)

Pornography teaches 'how women are to be treated', says Waldron, his version of Dworkin's claim that pornography is 'the law on what you do to a woman'.

The idea of an empowering rule, on the other hand, seems implicit in the following lines from Catharine MacKinnon, spelling out her analogy with the law.

Together with all its material supports, authoritatively saying someone is inferior is largely how structures of status and differential treatment are demarcated and actualized. Words and images are how people are placed in hierarchies, how social stratification is made to seem inevitable and right, how feelings of inferiority and superiority are engendered, and how indifference to violence against those on the bottom is rationalized and normalized. (MacKinnon 1993, 31)

The free speech of men silences the free speech of women: it is the same social goal, just other people (MacKinnon, 1987)

MacKinnon describes a kind of authoritative speech which is not, or not only, directive, but also enactive: and what it enacts is a social hierarchy, bringing with it certain structures and possibilities for action. When pornography puts people into hierarchies, it gives some people powers, and takes powers away from others, including their speech act powers. The ‘free speech of women’ ends up getting silenced, not by being banned, but by being disempowered.

In that 2013 study of teenage perspectives on sex, it seems that consent and refusal were not visible as consent and refusal to many of the teenagers. According to British law, someone sexually ‘consents’ only ‘if he or she agrees by choice and has the freedom and capacity to make that choice’ [Section 74 of 2003 Sexual Offences Act]. In the 2013 study, a series of fictional vignettes were presented where consent, thus described, was absent. The adolescent viewers nevertheless tended to see consent as present, and as shown e.g. in the clothes a girl was wearing. In one fictitious scenario, a 14-year-old girl was gang-raped by three boys. In teenagers’ responses to that scenario, they explained why, although she said *no*, her clothes were saying *yes*. It was ‘her fault for wearing that top’. ‘It started off with that top saying...’ ‘It’s like a door saying Fire Exit, you’re going to go through that if there’s a fire. ‘Yes, big

flashing sign saying come to me. It's like a sign on your head saying shag me.' (Coy *et al*, 2013)

Les Green has argued, interestingly, that the law should *improve social morality*—not that the law should *legislate* social morality, as Devlin argued, but rather it should make social morality better (Green 2013). He develops an optimistic case study about the decriminalization of homosexuality, which in his eyes achieved precisely that, i.e. it improved social morality on homosexuality. But Green matches this with a pessimistic case study about sexual consent. There is, he argues, a worrying mismatch between the law about sexual consent, and the social norms about sexual consent. This is illustrated in the work of feminists he cites, such as MacKinnon. It is illustrated also, I would add, in that 2013 study on sexual attitudes of teenagers. He poses the question: if better laws about homosexuality can improve social norms about homosexuality, why isn't better law on sexual consent improving social norms about sexual consent?

This is a complex issue. But let me begin by observing that Green thinks of these legal and social norms about consent as directive rules about what is permissible. What is missing in his analysis is the role of *empowering* rules. Social norms for sexual consent, in that teen subculture, might well involve empowering rules, as well as directive rules. Just as, for Hart, the empowering rules of law make something 'count as' a will, if certain conditions are met, so too the empowering rules of the teen subculture make something 'count as' consent, if certain conditions are met. And what 'counts' as 'consent' in that context?

The language of the teenagers is chock-full of speech acts attributed to a girl who supposedly says what her clothes are saying. It started off with *that top saying*, Like a door *saying 'Fire Exit'*, like a big flashing sign *saying 'come to me'*, like a

‘sign on your head *saying shag me*’. It is as if what the girl actually says is irrelevant to her hearers (‘she’s no-one at all’, in Andrea Dworkin’s phrase). There is a mismatch between the empowering rules for consent in the teen subculture, and the legal rule saying someone consents only if ‘she agrees by choice’ and ‘has the freedom and capacity to make that choice’.

Whether or not the law should ‘improve’ social morality, let me now add something to Green’s argument. My hunch is that *the law itself needs an improved social morality*. The law needs us to have speech powers: and these powers need to have been enabled, in the appropriate way, by social rules. The law on sexual consent is premised on the possibility of socially empowered consent, a speech power that reflects the point of the law, if it a good law. This is what is missing in the mismatch Green describes, and the mismatch in the attitudes of those teens.

My hunch about what the law needs may turn out to be a wider one. The law may presuppose our social capacity to perform many other kinds of speech acts: to make ordinary promises, and to give ordinary testimony; as well to perform special legal versions of those ordinary speech acts, in contracts or on the witness stand. My hunch is that the law presupposes an array of ordinary speech act powers, all of which need background social empowering rules.

Let us pause to take stock. Corresponding to Hart’s two kinds of rules, we have considered two kinds of silence: you fail to speak because your speech has been banned; or you fail to speak, because your speech has misfired, become a nullity. Hart’s insight about two kinds of rules can be extended to two kinds of social norms, one issuing directives and imposing penalties; the other creating powers for action, that empower some, and disempower others. A feminist claim that pornography is ‘like the law’ can be unpacked in just these terms: pornography as a system of

directives, and as a system of empowering rules that also disempower. Pornography can say, do sex this way, treat women this way, or else. Or it can say, this is what counts as consent. The former corresponds to Hart's first sort of rule, a directive rule. The latter corresponds to his second kind of rule, an empowering rule.

7. Concluding remarks

We have been exploring the idea that free speech is about the protection and enablement of speech acts that matter: the protection, through directive rules; and enablement, through empowering rules, of speech acts, doing things with words, that matter, given their normative significance. We have at the same time been taking seriously the idea that the conditions for free speech are more than simply the 'hands off' absence of state censorship, or the absence of other directive bans. Free speech needs more.

The thought that 'free speech needs more' is familiar to us from other territories in legal and political philosophy. It is familiar in work on 'positive' liberty, and in approaches to free speech that emphasize resources and 'capabilities'. Indeed there may be important connections with a 'capabilities approach' to free speech (cf. Gelber 2003). Hart's empowering rules, applied to free speech, might well bring out an unnoticed dimension to the idea that free speech needs hands-on resources, as well as hands-off absence of interference. But the resources we have identified do not concern e.g. literacy, or money, or broadcast air-time. The resources we have identified are structural: they involve rules that are created by the law, as well as rules that are created by all of us, in our everyday lives as speakers and listeners.

Drawing on Hart, I have focused on empowering rules, legal and social: rules which confer speech powers, including communicative speech powers. We have not

yet done justice, though, to the question about which speech acts ‘matter’: which of them have special ‘normative significance’, and require special protection and enablement.

It may be that certain speech powers are constitutive of our civil standing, and these matter more, though not all of these (voting, marriage etc.) belong in the traditional domain of ‘free speech’. For the traditional communicative domain, we need not, in any case, expect a simple or unified answer to the question about normative significance (Simpson 2014).

An earlier father of liberalism, J.S. Mill, said that speech matters, and hence free speech matters, because it is a route to knowledge (Mill 1859). That would be one kind of answer, and it would prioritize communicative speech acts, acts of telling each other things, arguing, debating in a shared pursuit of knowledge. Lies and bullshit might not, then pass the bar (cf. also Shiffrin 2014, Langton 2021). Lies and bullshit may undermine the empowering social rules that constitute a precious social good or amenity, the very speech powers we need to communicate in the first place.

Drawing on Mill, we might wish to go further: we might wish to explore a still richer set of conditions for free speech, which would enable speech to better achieve what gives free speech its point. These richer conditions might include equality, if social hierarchy is itself a barrier to communicative speech powers (as Mill argues in *On the Subjection of Women*, 1869). These richer conditions might include active hearers and bystanders as listeners, since according to Mill—

[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. (Mill 1854)

These richer conditions might include active counter-speakers, who respond to harmful speech by defusing its harm. As Mill said (though he was not the only one),

what it takes for evil to succeed is for others to ‘look on and do nothing’ (Mill 1867, 37, cf. Langton 2018b).

One more thing, finally we might be tempted to take from Mill: a more open-minded attitude to free speech itself, or rather our different visions of it. This takes us beyond our topic, but I sometimes wonder whether different approaches to free speech could be viewed as different collective ‘experiments of living’. We might then turn down the volume on righteous grand-standing, and cultivate a little more humility. Mill wrote:

As it is useful that while mankind are imperfect there should be different opinions, so is it that there should be different experiments of living; that [...] the worth of different modes of life should be proved practically, when any one thinks fit to try them. (Mill 1854, 114)

Mill wanted to make space for proving ‘different modes of life’ for individual citizens, but his point could be extended to groups and nations as well. If different approaches to free speech could be different ‘experiments of living’, more than one set-up might be worth a try. Within limits, different systems of free speech rules might be defensible. The First Amendment picture of free speech might be one such ‘experiment in living’, being run in a nation with a particular culture and history. A different picture of free speech might be run in e.g. Germany, a nation with a different history of hate speech and its dangers. I wonder what it would mean to think this way, to run the experiments, see what happens, revise if they don’t work. [Compare e.g. diverse national responses to the United Nations requirement on member states to combat hate speech (ICERD 1969).] But to my mind, there would be something refreshing about this kind of Millian meta-tolerance about different opinions of free speech itself, resisting dogmatism, promoting open-mindedness, not insisting on the compulsory export of one’s own ‘experiment’ onto other nations.

‘The worth of different modes of life should be proved practically’, says Mill. Perhaps this applies to our free speech modes of life, as to everything else.

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