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The Court's Wrong Reason: An Investigation of Langton's Illocutionary Account and the Limits of
R v Butler and the Obligation of the Law to Prevent Harm:

In *R v Butler*, the Supreme Court of Canada upheld s.163 of the Criminal Code, finding that the prohibition of obscene material was justified under s.1 of the Charter as it served the pressing objective of preventing harm to society. Specifically, the harm caused by attitudinal changes caused by exposure to degrading and violent pornography that predispose viewers toward violent and anti-social conduct. I will argue that the Court's conclusion was correct: such material warrants prohibition, however, that the reasoning the Court relied upon to reach this conclusion is philosophically unstable, and that Rae Langton's account of pornography as an illocutionary act of subordination provides the principled basis the Court failed to articulate. By grounding its justification exclusively in perlocutionary harm — the downstream attitudinal effects of obscene material — the Court produced a legal standard that is weaker, narrower, and less coherent than the one Langton's framework would supply.

The Court's justification proceeds in two steps. First, it rejects legal moralism by rejecting the imposition of a sexual morality "solely because it reflects the conventions of a given community", deeming it incompatible with Charter values. This stems from Charter precedent requiring a "pressing and substantial objective" under s.1, which restriction of expression solely to enforce majority moral preferences cannot constitute. It then turns to the threat of harm as justification in and of itself. The Court does not conclude that Parliament may never legislate with reference to morality, rather, legislation must be grounded in moral disapprobation rooted in Charter precedent as is consistent with step one. Equality and human dignity are legitimate bases for legislation provided the objective is to prevent harms that threaten values the Charter intends to protect. Thus, the valid and pressing objective is to avoid harm through attitudinal

change that vulgar and violent pornography may cause. Drawing on the Keegstra precedent, the Court reasons that speech predisposing viewers toward anti-social and violent behavior, regardless of conscious acceptance, can justify restricting expression. Obscene materials portraying women as objects for sexual exploitation reinforce degrading stereotypes and normalize violence in sexual relationships directly harming "the individual's sense of self-worth and acceptance," thus providing sufficient grounds to justify infringing upon Butler's expressive freedom.

This is a perlocutionary account of violent pornography's wrong defining the harm that lies in what pornographic speech causes in its observers as the attitudes and behaviors it produces downstream post consumption. The Court openly acknowledges that such harm "is not susceptible of exact proof", instead choosing to deliberate on inference of appreciable risk drawn from the material itself. The difficulty is that an inference of appreciable risk is doing very heavy lifting. The Court's framework follows that violence and violent media almost always constitutes undue exploitation, degradation may do so if the risk of harm is substantial, non-degrading explicit material generally does not. This is calibrated directly by the degree of inferred harm from the speech act of the violator. There is no account of why the speech acts in question are wrong independent of their effects leaving the framework perpetually hostage to contested empirical claims. Additionally, the framework does not address a dimension of pornography's inherent wrong that Langton argues is both more fundamental and more legally essential.

Langton builds on Austin's speech act theory to distinguish between the locutionary content of an utterance, its perlocutionary effects, and its illocutionary force. These can be defined as the literal semantic content of what is said, the action constituted in the saying itself, and the downstream effect of the utterance on the hearer whether that hearer be an individual, a community, or the world as a whole. Langton's claim is that pornography may function as an illocutionary act of subordination where depicting the subordination of women can cause active

ranking of women as inferior, legitimizing and perpetuating discriminatory behavior toward them and depriving them of basic personal and social powers. These are the same powers Langton identifies in the paradigm subordinating speech acts of apartheid akin to an apartheid legislator who enacts a systematic disablement like "these people are not permitted to vote" is not merely describe a policy or cause discriminatory attitudes; the utterance constitutes the discrimination by enacting it with the force of law. Langton's claim is that pornography may perform an analogous function within the domain of sex and gender relation provided it satisfies the felicity conditions required to do so. This felicitous authority is like a referee whose "off sides" changes the score while a fan's identical utterance has no real effect. In the same vein, pornographic speech subordinates only if it occupies or is legitimized by a position of authority allowing it to act as a verdict on what treatment of them is legitimate.

The practical significance of this framework is apparent through Langton's account of illocutionary disablement, especially in the case of Linda Marchiano, also known as Linda Lovelace, an adult actress who starred in a pornographic film called *Deep Throat*. During filming Marchiano had been beaten, hypnotized, and coerced into performing violent and degrading scenes against her will. She subsequently wrote *Ordeal*, a memoir depicting her enslavement in the pornographic industry intending it as an illocutionary act of protest. She uses the right words, means what she says, and intends to refuse and attack the industry. Yet *Ordeal* appears in a mail-order catalog for adult reading marketed to the same audience as *Deep Throat* for the same purpose. Her protest, while having the intended locutionary effect, ends up with the same locutionary effect it intended to dispute. The role she occupies as a famous pornography star using sexually explicit language to describe sexual violence, means that the uptake secured is that of pornography for the audience rather than protest. Her intended illocutionary act is disabled: she performs the locution but the utterance does not count as the intended action.

The Marchiano case is on in the broader phenomenon Langton calls illocutionary disablement where intended speech actions, while having the correct locutionary effect, fail in

their intended locutionary effects as they are superseded by a higher authority. This is what the Court in *Butler* entirely fails to consider. Langton's argument is that pornography sets the felicity conditions for the conventions that determine what counts as refusal, protest, consent, or general speech acts in sexual contexts. This is the same way that legislators set the felicity conditions for marriage, voting, free speech, and the general legality of actions. A woman who says "no" in a context shaped by pornographic conventions may fail to perform the illocutionary act of refusal, not because her hearer disobeys in an instance of perlocutionary frustration recognizable as rape, rather because the conventions of that context do not allow her utterance to count as refusal at all and may instead have an opposing effect of being perceived as sexual content itself. In this case, the speech act misfires at the illocutionary level causing refusal to become unspeakable for her. In this paradigm Marchiano's case is not an isolated event but a structural illustration of pornographic speech as authoritative determining the kinds of speech acts that can be performed in the domain it governs. The Court frames *Butler* as a conflict between one man's expressive freedom and women's right to equality where Langton's framework insists that the conflict is also between the liberty of men to speak and the liberty of women to speak and the way that the authority of pornography and the overarching industry creates a locutionary disconnect across individuals of different sexes.

It is clear that a court reasoning from Langton's framework would still uphold s.163, however, they would instead introduce essential precedent for future cases. This court would rule that degrading and violent pornography is itself an act of subordination that constitutes the ranking of women as inferior and the legitimization of violence against them making the ruling entirely independent of whatever downstream attitudinal effects it may produce. This illuminates a dimension of the decision the Court does not itself consider in that if pornography's subordinating illocutionary force depends on its functioning as authoritative speech within the domain of sex, then a ruling in *Butler*'s favor would not have simply been a failure to restrict harmful content, it would have satisfied an institutional felicity condition for pornography's

authority. By declining to prohibit such material, the Court, speaking on behalf of the state, would have been given the kind of recognition that sexually explicit speech requires to perform its illocutionary acts permitting pornographers to set the rules of sexual language. Without Langton's framework baked into the precedent, the Court opens the door to future rulings in favor of defendants who pose a lower threat of perlocutionary harm despite posing similarly dangerous illocutionary harm ultimately legitimizing the very authority by which pornography and other oppressive industries subordinates and silences groups and individuals. Thus, I believe the Court reached the right outcome, but failed to set the proper precedent needed for essential protection.

Bibliography:

Langton, Rae. "Speech Acts and Unspeakable Acts." Philosophy & Public Affairs, vol. 22, no. 4, Fall 1993, pp. 293–330

R v Butler, [1992] 1 SCR 452