Review Essay

The Eclectic Model of Censorship

CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION.
Edited by Robert C. Post†
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INTRODUCTION

> Censorship used to be a very dull subject. Aligned along predictable and venerable divisions separating liberals from conservatives, oriented toward ancient and well-rehearsed chestnuts such as obscenity and national security, the topic promised little of analytic interest.
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> In recent years, however, the landscape of censorship has altered dramatically. Now feminists in Indianapolis join with fundamentalist Christians to seek the regulation of pornography. Critical race theorists join with Jesse Helms to regulate hate speech. Advocates of abortion rights seek to restrict political demonstrations while conservative pro-life groups defend the freedom to picket (p. 1).

So begins Robert Post's introduction to *Censorship and Silencing: Practices of Cultural Regulation*, a collection of essays by scholars "from divergent disciplinary perspectives, ranging from political science to philosophy, from law to cultural theory, from literary criticism to anthropology" (p. 5).[1] With characteristic acuity, Post has isolated two

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1. In addition to the introduction, the essays discussed in this review include the following: Rae Langton, *Subordination, Silence, and Pornography's Authority*; Frederick Schauer, *The Ontology of Censorship*; Sanford Levinson, *The Tutelary State: "Censorship," "Silencing," and the "Practices of Cultural Regulation"*; Leslie Green, *Pornographizing, Subordinating, and Silencing*; Lawrence

interesting aspects of the contemporary debate about censorship and silencing. The first is the fracturing of old political coalitions and the creation of strange new alliances, such as the one between feminists and fundamentalist Christians. Jack Balkin has explained this development through his theory of "ideological drift," which posits that because "alliances between particular conceptions of rights and a particular political agenda are always contextual," we should not be surprised when historically liberal principles "drift" to serve conservative interests (or vice versa).[2] The second and more puzzling development is the proliferation of different conceptions of censorship, such as the extension of the concept of censorship beyond obscenity to hate speech. For if adherents of "free speech" can support the regulation of pornography or hate speech, it is in large part because they construe pornography and hate speech themselves to be inhibitors of "free speech."[3] This, of course, is a very different conception of censorship from the classical one, under which the regulation of pornography and hate speech, but not pornography and hate speech themselves, would qualify as censorship.[4] What is the explanation for this proliferation?

In his brief essay, Post begins to answer this riddle before gesturing toward the other essays in the collection, which provide further clues to the riddle's resolution. Post explains our changing views of censorship by looking to our changing conceptions of the censoring subject. He suggests that the old order had a monolithic view of the state as the only censoring subject (p. 1). This view led to the "very dull" alignment of censorship along predictable lines: state against individual, conservative against liberal (p. 1).

According to Post, this conventional wisdom came under attack due in significant part to insights gained from Michel Foucault's work on power (p. 1).[5] Put crudely, Foucault's view is that power never resides unproblematically in a subject, but is rather diffused across relationships in a

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Douglas, *Policing the Past: Holocaust Denial and the Law*; Ruth Gavison, *Incitement and the Limits of Law*; Judith Butler, *Ruled Out: Vocabularies of the Censor*; Richard Burt, *(Un)Censoring in Detail: The Fetish of Censorship in the Early Modern Past and the Postmodern Present*.

2. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383.

3. *See, e.g.*, OWEN M. FISS, THE IRONY OF FREE SPEECH 16 (1996) (describing silencing effects of pornography and hate speech).

4. *See id.* at 2 (noting that classical conception of censorship viewed state as sole threat to free speech).

5. As Post explicitly recognizes, insights gleaned from Foucault are clearly not the only impetus behind the proliferation of censorship models. Indeed, I believe that even his references to Foucault can be read as placeholders for a broader skepticism (in both constitutional advocacy and postmodern theory) about the primacy of state power.

minute and shifting array.[6] When censorship is seen through this lens, it may no longer be viewed as the special prerogative of the state (pp. 1-2). This corroborates our intuition that many non-state entities censor. Yet as Post points out, this diffuse conception of censorship—under which censorship does not emanate from any individual subject but rather from pervasive social norms—is also problematic (p. 4). It makes the commonsensical conception of censorship as a transaction between subjects ("*X* censors *Y*") unintelligible (pp. 2, 4). Indeed, it rescues us from the idea that the state is the sole censoring subject only by positing that *no* entity is a censoring snbject. Post registers the need for a view of the censoring subject that is neither as sentimental as the old statist conception nor as skeptical as the Foucaultian conception (p. 4). He explains the current polyphony of views about censorship as arising out of the indeterminacy of this middle ground (p. 5).

Post's account of changing conceptions of the censoring subject is powerful. I wish to supplement it, however, with an analogous account of changing conceptions of censoring speech. For just as there are sentimental and skeptical conceptions of the censoring subject, so too are there sentimental and skeptical conceptions of censoring speech. Under the sentimental conception of censoring speech, only certain kinds of words have the power to silence others. Rae Langton's essay in this collection describes these explicit commandments of censorship, such as "I forbid you to speak," or "I threaten you with sanctions if you speak" (p. 261). The skeptical conception of speech, which could also be characterized as Foucaultian, criticizes the claim that only explicit orders or threats can foreclose speech. As Frederick Schauer's essay explains, it maintains that the most potent forms of censorship are not even experienced as speech, but as a set of background conditions of intelligibility, such as the rules of grammar or syntax (p. 147). Foucaultian acid can thus dissolve speech into norms just as easily as it can dissolve the subject into norms. Yet in so doing, it will again be experienced by some as going too far. Thus there is a need for a conception of censoring speech that is neither as sentimental as the old explicit conception, nor as skeptical as the Foucaultian conception. Only under such an account can we intelligibly recuperate the conception that speech can censor even if it does not do so explicitly. Langton's essay notes that pornography, for example, is said to silence women by barring their speech from being heard and understood, despite the fact that it does not explicitly forbid them to speak (pp. 274-75). It is, moreover, understood as discrete speech rather than as a diffuse set of conventions that govern speech (pp. 261-62).

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6. *See, e.g.*, MICHEL FOUCAULT, *Two Lectures*, *in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, 78, 92-108 (Colin Gordon ed. & Colin Gordon et al. trans., The Harvester Press 1980).

As I will repeatedly use the words "sentimental" and "skeptical" to describe homologous views about both subjects and speech, I explicitly define these terms here.[7] By "sentimental," I mean the tendency to attribute more power to an object than that object actually possesses. Here those objects are either subjects or speeches. In contrast, by "skeptical," I mean the tendency to treat any statement about an object's power as naive. The danger of the sentimental view is the error of synecdoche. Synecdoche is a literary device through which parts are substituted for wholes, or wholes for parts—as when one says "seven sails" to denote seven ships.[8] The sentimental view engages in synecdoche because it ascribes the power to censor to a subset of the entities that actually possess that power, making the part stand in for the whole. Thus, it takes the subset of all censoring subjects that is the state, or the subset of all censoring speeches that is the explicit prohibition, and imbues it (and only it) with the power to censor. Conversely, the danger of the skeptical view is the error of dissipation. The skeptical view leads to dissipation in its suspicion that power is always elsewhere, always more minute and fine-grained than the agent proposed as the candidate for power. Under this conception, power is spread so thinly across society that no discrete agent can ever be held accountable for censorship.

In Part I of this review, I elaborate on the parallel stories that can be told about changing conceptions of subjects and speech: stories of error (the classical model's sentimental conception), overcorrection (the Foucaultian model's skeptical conception), and equilibration (the contemporary model's comprehensive conception). I argue that despite postmodern encouragement to view all censorship as arising from norms, the contemporary model has retained a partially sentimental conception (which could also be called a partially skeptical conception) of both subjects and speech as discrete agents of censorship. I call the contemporary model the "eclectic" model of censorship, drawing on the historical use of that word to denominate the class of philosophers who adopted whatever philosophical doctrines pleased them without much attention to the distinctions between the schools from which the doctrines emanated.[9] The contemporary model is eclectic in its embrace of the classical model, the Foucaultian model, and other models of censorship without regard to the tensions between them. I wish to argue that while the eclectic model therefore risks incoherence, it also powerfully captures the way many of us think about censorship today. I demonstrate this in Part II by diagramming the eclectic model more formally as a censorship matrix that

7. I appropriate these terms from Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149, 1151 (1997), where they are used in a related, but not identical, sense.

8. *See* 17 OXFORD ENGLISH DICTIONARY 478 (2d ed. 1989) [hereinafter OED].

9. *See* 5 *id.*, at 56.

contains nine different models of censorship. I briefly discuss each of these models, drawing where possible on the collection for my examples. By so doing, I hope to show that the practice we call "censorship" actually denominates a family of very different sub-practices which it is useful—however incoherently—to disaggregate.

I
OF SUBJECTS AND SPEECH

Conventional wisdom would probably cast the censoring subject as the main agent of censorship and censoring speech as a mere instrument in the hands of that agent. This intuition justifies Post's focus on the censoring subject. However, I wish to suggest that censoring speech, far from being a simple tool of the censoring subject, may be viewed as a co-equal agent in the practice of censorship. In making this contention, I begin with the more circumstantial claim that the censoring subject and censoring speech have had parallel conceptual histories. I then make the more analytic claim that our understanding of censorship would be incomplete without taking both subjects and speech into account.

A. *Sentimental and Skeptical Conceptions of Subjects*

Post argues that censorship theory has traveled through three conceptions of the censoring subject (pp. 1-5), which might be described as a trajectory through error (the sentimental conception), overcorrection (the skeptical conception), and equilibration (the eclectic conception). In the first phase, censorship is assumed to proceed only from the state (p. 1). This sentimental conception is our current juridical one, as our First Amendment jurisprudence protects individuals only against state censorship. Under this conception, Post views censorship as "very dull" because the binary of censorship/speech tracks the familiar binaries of state/individual and right/left.

Tedium is not the only fault of the sentimental conception. It is also problematic, according to Langton, because it presumes that if the state does not censor, the individual is free to speak (pp. 261-62). Yet individuals can clearly be impeded from speaking, even without the intervention of the state, in at least two ways. First, private actors can censor. As Schauer notes, "If during the first session of a class I point out the silliness of some student's comments, I can be confident I will not hear again from that student for the remainder of the course" (p. 152). Call this private censorship. Second, social norms that cannot be traced to any single actor (whether public or private) can censor. As Schauer also observes, "censorship may come from discourse itself, as when forms of discourse discourage people from speaking, or when the rules of discourse make certain utterances impossible" (p. 147). The existence of such censorship

means that "[t]o be for or against censorship as such is to assume a freedom no one has. Censorship is" (p. 2).[10] Call this pervasive censorship. To the extent that it seeks to protect the autonomy of individuals to speak, the classical model's failure to take private and pervasive censorship into consideration is troubling.

These two objections to the sentimental conception of the subject are clearly very different: private censorship is much less radical an extension of the sentimental model than pervasive censorship. This is because private censorship, like public censorship, assumes a discrete censoring subject. All that is required to include private censorship in the old model is a more expansive notion of censoring subjects. In contrast, pervasive censorship does not seek to expand the set of censoring subjects, but rather to expose the very idea of the censoring subject as naive. Put differently, both public and private censorship are forms of what might be called "discrete" censorship and, as such, they stand in contrast to pervasive censorship.

It is pervasive censorship's radical objection to discrete censorship that inaugurated the second phase of censorship theory. Post assigns much of the responsibility for this shift to the work of Michel Foucault (p. 1). Foucault observed that the state has no monopoly on power, exhorting us to "eschew the model of Leviathan in the study of power."[11] Indeed, Foucault averred that while the state's more spectacular exercises of power draw our eye, real power lies elsewhere.[12] Such micropower—the power of discourse or norms—is not concentrated in any given subject, but rather diffused through a "capillary" action across every quotidian social activity:[13] "Power is not something that is acquired, seized, or shared, something that one holds on to or allows to slip away; power is exercised from innumerable points . . . ."[14] Such power is likely to remain invisible because it is so shifting and minute that it is unlikely to be experienced as an exercise of power. Yet it is more, rather than less, powerful for that.

Thus, in general, no state commandment requires that men observe the grooming code that tacitly forbids them to wear dresses. In truth, it would be difficult for one to point to any actor as the source of that commandment. Nor do men, from one day to the next, experience their adherence to the code as an exercise of power. Yet neither of these facts means that power has not been wielded. Indeed, both might suggest the opposite. The fact that one cannot trace the command back to a source means that one cannot appeal to that source to alter it. As Michael Walzer notes,

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10. Post is quoting Michael Holquist, *Corrupt Originals: The Paradox of Censorship*, 109 PMLA 14, 17 (1994).

11. FOUCAULT, *supra* note 6, at 102.

12. *See id.* at 94-97.

13. *See id.* at 96.

14. MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY 94 (Robert Hurley trans., Pantheon Books 1978).

"[t]here can't be a seizure of power if there is nothing at the centre to seize."[15] And the fact that men do not experience the decision not to wear a dress as a decision means that they will not have occasion to reflect and choose otherwise.

Has the state then no power? One wishes to ask if a Foucaultian would say the state had no real power if it were sentencing him to death. Yet the Foucaultian has an answer to this. He would argue that to the extent that the state has real power, it is micropower. In other words, the power of the state is not immanent within the state, but rather arises from a set of norms that give the state, and not some other entity, this force. Thus, when the judge sentences the convict, her power relies on the micropower that keeps her authority intact. Norms make the bailiff take the prisoner away; norms make the warden turn the key; norms prevent the public from rioting in the streets and freeing the prisoner. The fact that the state has this force, then, should not be taken as evidence that there are some forms of power that are not based in micropower. Instead, what keeps that spectacular exercise of power in place is precisely a web of hidden and minute exercises of micropower. The "state still exists, more or less, but it merely conceals the actual procedures of power, the mechanisms of disciplinary coercion, which operate beyond the effective reach of the law."[16]

To this point, I have been summarizing the Foucaultian position at the level of abstraction at which Foucault framed it—that is, as a general theory about power and subjects. The application of this general theory to the specific case of censorship, however, should be intuitive. The spectacular form of power in this instance is the act of state censorship. The Foucaultian critique is that the real exercise of the censoring power occurs at a much more diffuse level. To extend my earlier example, men will find their speech as well as their grooming affected by gender norms. This is perhaps most evident in languages that require gender-differentiated speech, such that to speak a language not appropriate to one's gender is tantamount to speaking that language ungrammatically.[17] To one negotiating in such a language, the source of the commandment to speak in gender-appropriate ways is always obscure. Moreover, the act of compliance is not seen, except in rare moments, as an accession to power.

The allure of the Foucaultian model of censorship is that it punctures the illusion that the state has a monopoly on censorship. When grammar is recognized as a form of censorship, it becomes clear that some forms of censorship are beyond the will of the most efficient mortal sovereign. "I

15. Michael Walzer, *The Politics of Michel Foucault*, *in* FOUCAULT: A CRITICAL READER 51, 55 (David Couzens Hoy ed., 1986).

16. *Id.* at 54 (internal quotation marks omitted).

17. *See, e.g.*, PETER MÜHLHAÜSLER & RON HARRÉ, PRONOUNS AND PEOPLE: THE LINGUISTIC CONSTRUCTION OF SOCIAL AND PERSONAL IDENTITY 70 (1990) (describing such languages).

am afraid we are not rid of God," Nietzsche once said, "because we still have faith in grammar."[18] With that insight comes the concomitant notion that individuals do not have full agency to speak simply because they are protected from state censorship. Indeed, it leads inexorably to the belief that individuals can never have such complete agency, as they are never free from censorship.

The problem with the second phase of censorship theory, however, is that it overcorrects for the error of the first. Rigorous adherence to Foucault's conception of micropower captures the conception of pervasive censorship, but only by rejecting conceptions of discrete censorship. Foucault's work insists that we be skeptical of labeling anything as the agent of power, suggesting that the moment of saying "*X* censors *Y*" is a naive moment. Power is always elsewhere: "It is never localized here or there, never in anybody's hands, never appropriated as a commodity or piece of wealth."[19] The acid of Foucaultian skepticism dissolves the concept of the state as a sole censoring subject only by dissolving the concept of *anything* as a censoring subject.

Post points out that the Foucaultian move seems to scant "something of importance featured in more traditional accounts"—namely, public censorship (p. 4). He suggests, for example, that this conception denigrates the state-imposed martyrdom of dissident writers and poets: "The new scholarly orientation toward censorship seems blind . . . to the 'high drama of repression and suppression' retold by Zamir Niazi in his effort to 'preserve . . . for posterity' the courage of Pakistani writers resisting the oppression of a tyrannical regime" (p. 4).[20] Post could also have pointed out that the Foucaultian conception ignores forms of private censorship that do not figure even in the traditional account. Catharine MacKinnon's activism against pornography, for example, finds no basis in a conventional statist model, as pornography is produced by private actors.[21] Nor does it find a basis in a Foucaultian model, as it attempts to hold individual producers of pornography accountable.[22]

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18. FRIEDRICH NIETZSCHE, *Twilight of the Idols*, *in* THE PORTABLE NIETZSCHE 483 (Walter Kaufmann ed. & trans., Viking Press 1968).

19. FOUCAULT, *supra* note 6, at 98.

20. Post is quoting ZAMIR NIAZI, THE WEB OF CENSORSHIP xv, xviii (1994).

21. *See, e.g.*, American Booksellers Assoc. v. Hudnut, 771 F.2d 323, 327-28 (7th Cir. 1985) (striking down anti-pornography ordinance drafted by MacKinnon and others as enshrining state orthodoxy about women, thereby implying that pornography itself is not such a state orthodoxy). This is not to say, of course, that the statist model could not be enlarged to encompass pornography. *See* CATHARINE A. MACKINNON, ONLY WORDS 10 (1993) (suggesting that conception of censorship be enlarged to include powerful private individuals silencing powerless individuals and "hiding behind state power to do it").

22. The ordinance at issue in *Hudnut* provided a civil cause of action against the makers and sellers of pornography. *See Hudnut*, 771 F.2d at 325.

We are thus driven onward to a third phase of censorship theory: equilibration between the first two models. In this phase, we reject the sentimental conception of the sovereign subject as monolithic censor that animated the traditional model. Yet we also reject the skeptical conception of all subjects that leads to their erasure in the Foucaultian model. This partially sentimental model acknowledges the force of norms, but still retains the view that it is meaningful to speak of discrete subjects of censorship. It is a middle ground that covers all ground: censorship is seen to emanate from public actors, private actors, and from norms. For this reason, I call this an eclectic conception of the subject.

The danger of this conception is a potential for incoherence. To cling to the conception of discrete subjects of power after acknowledging the power of pervasive norms seems to risk contradiction. Can we recuperate a meaningful censoring subject that can withstand Foucault's acid sophistication? Some have sought to answer this question normatively, by suggesting that Foucaultian sophistication is not incompatible with the agency of discrete actors.[23] I wish to approach the question somewhat differently, relying not on theoretical grounds but on pragmatic ones. I suggest that one test of a theory's merit is how well it is perceived to fit empirical facts. Foucaultian skepticism does not do well under this test. The marked persistence of sentimental conceptions of the subject even in the wake of the Foucaultian revolution implies that the theory fails to resonate with lived experience.[24] Even Foucault himself was unable to eschew such sentimental conceptions of the subject in his interviews on politics.[25] While we live in an age of skepticism about the subject, nothing is more notable than our inability to carry that skepticism to its limits, that is, our inability entirely to relinquish a sentimental conception of the subject. Unless it is our equally sentimental attitude toward speech.

B. *Sentimental and Skeptical Conceptions of Speech*

A parallel account of error, overcorrection, and equilibration can be told about the conceptions of censoring speech. Just as the sentimental conception of the subject holds that only a special kind of actor—the state—can be a censoring subject, so too does the sentimental conception

23. *See, e.g.*, JUDITH BUTLER, THE PSYCHIC LIFE OF POWER: THEORIES IN SUBJECTION (1997).

24. Of course, a Foucaultian might respond that the persistence of the sentimental view is merely the persistence of false consciousness. The longevity of the sentimental view, he might say, arises not from a failure in the theory, but from a failure in the mind that cannot internalize that theory. This response is impossible to overcome on its own terms, as any counterargument will be seen as further evidence of the criticized false consciousness. To concede that the Foucaultian response is unfalsifiable, however, is not to concede that it is true.

25. *See* Walzer, *supra* note 15, at 60 (suggesting that Foucault, in his interviews on politics, often engaged in advocacy of large-scale reforms that conflicted with his views on micropower).

of speech hold that only a special kind of speech—the explicit prohibition—can constitute censoring speech.

To see this, note that under the classical (and juridical) model, not all speeches that are made, *even by the state*, are considered censorious. Only explicit state pronouncements that forbid the speech of private individuals—such as sedition acts, hate speech codes, and anti-pornography ordinances—are so viewed. Sanford Levinson's essay concerns other instances of state suppression, as when the state drowns out the speech of other actors through its own affirmative speech, which are not so classified (pp. 195-96).

J.L. Austin's theory of speech acts, which makes numerous appearances in *Censorship and Silencing*,[26] is useful in making the distinction between different forms of censorious utterances. In his canonical work, *How To Do Things with Words*,[27] Austin concerns himself with a category of speech he calls "performative"—speech that creates, rather than merely describing, the thing it names.[28] Austin further refines this category of speech into "illocutionary" and "perlocutionary" utterances to distinguish between two different senses in which words can "do" things.[29] Illocutionary speech is speech that does something in the very act of utterance.[30] Famous examples include "I thee wed," "I christen thee," "I give you," or "I bet you," in which the marriage, the christening, the gift, or the bet are not being described, but rather called into being, by the utterance.[31] Perlocutionary speech, in contrast, is speech that does something as a consequence of the utterance.[32] "Ready, aim, fire," would be a particularly clear example, but such instances should not obscure the fact that most speech has perlocutionary effects. Indeed, speech commonly denominated as illocutionary will also have perlocutionary effects. Thus, when I say "I promise," the utterance has the illocutionary effect of promising, but may also have the perlocutionary effect of reassuring its hearer.[33] Under the sentimental model, only the illocutionary utterances of censorship—for example, "I order you to be silent," or "I threaten you with sanctions if you speak"—are deemed censorious. The perlocutionary utterances of censorship are not so denominated.

Like the sentimental conception of the subject, this sentimental conception of speech suffers from two problems. The first is that

26. For example, see the references in the Green, Langton, Levinson, and Schauer essays.

27. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975).

28. *Id.* at 6-7.

29. *Id.* at 94-107.

30. *See id.* at 99-100.

31. *See id.* at 5-6 (adducing these examples as instances of "performative" speech).

32. *See id.* at 99-100.

33. *See id.* at 109-10.

perlocutionary utterances can have the effect of suppressing speech, as when one actor's speech "drowns out" the speech of another. This can occur whether the speaker is the state or a private actor. The derogation of a particular viewpoint in a public school curriculum would be an example of perlocutionary silencing by the state. And Schauer's example of a professor silencing a student by humiliating him (p.152) would be an example of perlocutionary silencing by a private individual.

More subtly, speech may have the perlocutionary effect not of precluding others from speaking, but of preventing their speech from being understood. Rae Langton's essay in this collection suggests that even assuming that pornography does not prevent a woman from saying "No" to the sexual advances of men, it may prevent her "No" from being heard as a refusal (pp. 274-75).[34] Langton gives the following example, drawn from Donald Davidson's work, of how speech may be disabled in this way: "An actor has a role in which he shouts, 'Fire! I mean it! Look at the smoke!'; but then a real fire breaks out in the theater, and he shouts, 'Fire! I mean it! Look at the smoke!'" (p. 274).[35] In this instance, the actor is not prohibited from shouting "Fire!" but his utterance is misunderstood as a line in a play as opposed to a warning in real life. His "Fire!" in Austin's terms, "misfires" as a communicative gesture.[36] Langton then builds the analogy to pornography, suggesting that pornography puts women in a play where their "No" is taken to be a fictive rather than an actual refusal. When a woman is placed in a position where she wishes to refuse a sexual advance, she is "like the actor who says 'Fire,' intending to warn, and using the right words, but failing to warn" (p. 275). In technical terms, then, pornography has the perlocutionary effect of what Langton terms "illocutionary disablement" (p. 274). Even if not itself an illocutionary utterance, pornography may have the consequence (the perlocutionary effect) of silencing other forms of speech. Specifically, it may have the ability to prevent the illocutionary speech of *others* (such as "I refuse your sexual advance," or, more plainly, "No") from being efficacious. Illocutionary disablement is this forced misfire of speech.

The second problem with the sentimental conception of speech is that many kinds of censorship do not take the form of discrete speech at all. The rules of intelligibility, such as grammar or vocabulary, might again be such an example. As noted earlier, such diffuse rules of discourse may be seen as a censoring force that contrasts with discrete subjects.[37] Here we see that such discourse can also be seen as a force that contrasts with

34. In her essay, Langton summarizes an argument she makes more fully in Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 293, 293-330 (1993).

35. The hypothetical of the scripted fire appears in DONALD DAVIDSON, INQUIRIES INTO TRUTH AND INTERPRETATION 269 (1990).

36. *See* AUSTIN, *supra* note 27, at 16.

37. *See supra* notes 10-25 and accompanying text.

discrete speech. Discourse, then, has the impressive quality of being the opposite of both discrete subjects and discrete speech; it is a site where subjects and speech dissolve and merge.

Again, it is the second, more radical objection that embodies the Foucaultian critique. The objection notes that we ascribe power to discrete speech, the spectacular agent of power, when really the power is held by the norms that underlie speech. In other words, while we might sentimentally believe that the illocutionary utterance "I thee wed," enacts the wedding rather than describing it, this is not entirely true. If it were, I should be able to get married whenever I said "I thee wed," in the same way that God produces light whenever he says "Let there be light!"[38] But I clearly do not have this power, for mere utterance of the words will not result in marriage if addressed to someone already married, or to someone of my own sex, or before someone not ordained to perform the ceremony. This suggests that the real power of illocutionary words must inhere in a set of underlying norms. Just as micropower is the real source of power for the spectacular subject of the state, so too does micropower guarantee the spectacular speech of illocution.

This point can be assimilated into an Austinian framework. Austin noted that no performative utterance could be efficacious unless a set of underlying "felicity conditions" were satisfied.[39] The first of Austin's six felicity conditions posits that: "There must exist an accepted conventional procedure having a certain conventional effect, that procedure to include the uttering of certain words by certain persons in certain circumstances."[40] In the case of the marriage, the conventional procedure is the marriage ceremony, which produces the marriage by requiring the uttering of certain words (for example, "I thee wed") by certain persons (for example, two unmarried persons of opposite sexes who are over-age), in certain circumstances (for example, before someone ordained to perform the ceremony).

To adapt this Foucaultian critique to the case of censorship is a simple matter. Leslie Green's essay responds to Langton's contentions about illocutionary disablement by deploying such a critique. After quoting Austin's first felicity condition (p. 299), Green criticizes "[t]he idea of silencing through illocutionary disablement" for resting "on the very general and convention-independent thesis that one is silenced whenever one's words fail to be taken with the force one intends" (p. 302). Green thus suggests that Langton is proposing that a woman's "No!" should be like God's "Let there be light!" calling the refusal into being independently of background conventions. He then asserts that because no speech has

38. *See* JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 13 (1993).

39. AUSTIN, *supra* note 27, at 14.

40. *Id.*

meaning outside of a set of background conventions, no one can assume the right to have her speech be efficacious in this way.[41] Green observes that it is ludicrous to state that silencing has occurred simply because the felicity condition that would enable the speech does not exist in the speaker's culture, giving the example of someone who claims that he is silenced because he cannot engage in *talaq* divorce in the United States merely by thrice uttering the phrase "I divorce you" (p. 300).

The response to the Foucaultian critique is again that it goes too far: dissolving all speech into norms does not adequately describe instances in which discrete speech seems to censor. In responding to Green's comments, Langton criticizes his characterization of pornography as a kind of silencing that proceeds through diffuse norms. She notes that Green sees only two alternatives. One is narrow silencing (which is similar to my conception of sentimental censorship) in which "(a) you fail to speak at all; (b) you fail because someone else stops you" (p. 276). Both Langton and Green agree that such silencing can be troubling. The other is broad silencing (which tracks my conception of skeptical censorship) in which "(a) you speak, but fail to be heard as you intend; (b) you fail because there is no universal guarantee that you will be heard as you intend" (p. 276). Both Langton and Green agree that broad silencing is generally unproblematic. But Langton admonishes Green for not seeing another alternative: "(a) you speak, but fail to be heard as you intend; (b) you fail because some[one] else stops you" (p. 276). In other words, she argues that assuming that anything that is not an explicit prohibition is reducible to prohibition by a norm elides the circumstance in which specific perlocutions can disable speech.

It thus appears that we find ourselves in the context of speech, as in the context of the subject, in a strange middle ground that covers all ground. In this middle ground we adopt an eclectic conception of speech that acknowledges the power of illocutionary censorship, perlocutionary censorship, and pervasive censorship.

II
THE CENSORSHIP MATRIX

My homologous accounts of censoring subjects and speech might imply that I believe these are parallel concepts that never meet. Because this is far from my view, I hasten to synthesize the two variables. By deploying the distinctions made above, I first create a formal taxonomy of the various forms of censorship. I then use the essays in the collection to elucidate some of the categories in the taxonomy. I note, however, that some forms

41. Langton responds that it was never her position that human beings should have the power to secure uptake of any illocution, but rather that there are particular illocutions that are so important that they must be protected against interference (pp. 275-76).

of censorship suggested by my taxonomy are not addressed even in this urbane collection. I therefore generate my own examples of such forms of censorship.

I have now distinguished between sentimental and skeptical conceptions of subjects and speech, and the intermediate ground between them. I have identified three potential subjects of censorship: public subjects, private subjects, and norms. I call the first two discrete, and the third pervasive. Similarly, I have identified three potential kinds of censoring speech: illocutionary censoring speech, perlocutionary censoring speech, and norms. I call the first two kinds of speech discrete, and the third pervasive.

When these distinctions are used together, they suggest a taxonomy of censorship. The taxonomy might be arrayed as follows, with subjects on the horizontal axis, and speech on the vertical one:

	Public Censoring Subject (Discrete)	Private Censoring Subject (Discrete)	Norm (Pervasive)
Illocutionary Censoring Speech (Discrete)	Anti-Pornography Ordinance, Anti-Hate Speech Ordinance Douglas, Gavison (I)	Editorial Decision by Newspaper, Curatorial Decision by Museum Schauer (III)	Prohibitions of Four-letter Words (VI)
Perlocutionary Censoring Speech (Discrete)	State Education, Monuments Levinson (IV)	Pornography, Hate Speech, Langton (V)	Elision of Third-Gender Pronoun (VII)
Norm (Pervasive)	Pronouncements of the Académie Française (VIII)	Elision of Words by Dictionaries (IX)	Rules of Grammar, Vocabulary Butler (II)

The matrix thus shows that there is not only one model of censorship (as the classical juridical model might suggest), or two models of censorship (as the Foucaultian critique of the classical model might suggest), but at least nine models of censorship. I have numbered these models to track the story of error, overcorrection, and equilibration described above. Under that account, the classical model represented in Cell (I) is attacked by the Foucaultian model represented in Cell (II). These two poles imply an intermediate ground, represented by Cells (III), (IV), and (V). Perhaps because these models of censorship simply extend the classical model to other discrete subjects (private actors) and other discrete speech (perlocutionary speeches), they are fairly intuitive, and therefore well represented in this collection. But the matrix also suggests other permutations: Cells (VI), (VII), (VIII), and (IX). These permutations are perhaps less intuitive because they involve the interaction of discrete agents and norms, which are often considered to be antithetical categories. These models of censorship are less well represented in this collection, and I seek to speculate about their nature here. The remainder of this discussion will travel through the cells in the enumerated order, considering how the collection represents, or does not represent, each particular cell.

Cell (I) is illocutionary censorship by a public actor. This cell is the only one containing practices that the classical model of censorship consistently deems constitutionally impermissible. Under this model, anti-hate speech ordinances and anti-pornography ordinances will be struck down as state action inhibiting "free speech."[42] The silencing effects of pornography and hate speech themselves will not fall under this model, both because they are private and perlocutionary in nature. The criticisms of this model are by now well-rehearsed, and the collection as a whole embraces a more plural conception of censorship.

To say that the collection recognizes many other forms of censorship, however, is not to say that all of the essays argue unequivocally against the classical model. In their contributions, Lawrence Douglas and Ruth Gavison express concerns about departures other legal systems have made from the classical model. Douglas considers laws prohibiting Holocaust denial that have been promulgated in a variety of Western democracies. He argues against the legal regulation of Holocaust denial because the purpose of such regulation is the preservation of history, which he believes the law is not institutionally competent to perform (pp. 83-84). Gavison examines Israeli debates about legal curbs on private speech that followed the assassination of Itzhak Rabin, a murder thought to have been

42. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding that St. Paul ordinance regulating hate speech violated First Amendment); American Booksellers Assoc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (holding that Indianapolis ordinance regulating pornography violated First Amendment).

incited by speech. While she believes that Israeli incitement laws should remain on the books for the present, she also believes that such restrictions on speech are often "ineffective and counterproductive" (pp. 60-61). Critical commentary thus not only departs from the classical model, but consistently returns to it.

Diametrically opposed to the classical model, both spatially and conceptually, is Cell (II), or the Foucaultian model of censorship. This model involves neither discrete actors nor discrete speech. Such censorship includes the rules of grammar or vocabulary, in which the conditions of intelligibility are set forth without attribution to any specific actor. In asking us to consider the formidable force of this kind of censorship, Judith Butler's essay argues that classical censorship may be in some ways easier to overcome than pervasive censorship (pp. 247-59). Butler points out that explicit state interdictions are prone to self-contradiction insofar as they generate speech about *X* by saying "don't say *X*." She gives the military's "don't ask, don't tell" policy as an example of such a self-defeating interdiction, arguing that the restrictions on speaking about homosexuality within the military actually "proliferated such references not only in its own supporting documentation but also in the public debates fostered on the issue" (p. 250). The paradox that one must sometimes speak the unspeakable to keep it unspeakable ensures that, to a certain extent, explicit censorship will be self-defeating.

Unlike such explicit interdictions, pervasive censorship need not name what it seeks to restrain. This is because such censorship functions "on a level that is prior to speech—namely, as the constituting norm by which the speakable is differentiated from the unspeakable" (p. 255). While the classical model takes speech as (if only imaginatively) preexisting the act of censorship, Butler's model suggests that speech can only be produced through an act of censorship that precedes the speech itself. Such censorship does not risk self-contradiction because it need not articulate the prohibited speech to foreclose it. Indeed, Butler argues that such censorship is undefeatable, as it is the pre-condition for meaningful speech.

The poles described by Cells (I) and (II) imply a middle ground. The extremes of public actors and norms suggest the intermediate term of private actors, just as the extremes of illocutionary speech and norms suggest the intermediate term of perlocutionary speech. Adding these intermediate terms to our matrix limns three other permutations of censorship involving both discrete actors and discrete speech.

Cell (III) is illocutionary silencing by a private actor. This form of censorship is identical to the classical model in being illocutionary in nature. It differs from classical censorship only in that the censoring subject is private rather than public. Schauer gives the examples of "the decision

of a newspaper editor (or television network) to 'spike' what a reporter has written, or the decision of the organizers of a political debate to exclude a so-called fringe candidate, or the decision of a curator to exclude a work of art from a museum . . . ." (p. 151). In all these instances, the censoring actor is saying "Thou shalt not speak," but the interdiction is constitutionally permissible because it emanates from a private actor. Schauer suggests, however, that the social reality of these practices may sometimes be the same as state-sponsored acts of censorship (p. 151). Is there such a difference between a legislature that bans Mapplethorpe and a gallery that does so? (pp. 151-52). If so, does that difference neatly track the public/private distinction, or is some other distinction, such as institutional competence/incompetence in play? (p. 162). Schauer is led by such questions to the conclusion that the term "censorship" has no ontology, that there is no definition of censorship (such as state-sponsored, illocutionary silencing) that remains constant over context (p. 164).

Cell (IV), or perlocutionary silencing by a public actor, is the obverse of Cell (III). This form of censorship is identical to the classical model in emanating from a public actor. It differs from the classical model in being framed in perlocutionary rather than in illocutionary terms. Levinson adduces the instances of the state inculcating lessons through public education (p. 198), or honoring certain people but not others through street names (p. 199) or stamps (p. 212-13). Such state speech clearly makes it harder or impossible for others to express counter-visions of reality or esteem (p. 196). But because the state is foreclosing those other visions not by burning the offending book with its illocutionary speech but by drowning it out with its perlocutionary speech, this form of silencing is constitutionally permissible. Levinson critiques this illocutionary/perlocutionary distinction in the way that Schauer problematizes the public/private distinction. Levinson suggests that

> [t]he danger of 'silencing' those who disagree with the state's views comes, most often, not from any plausible fear of classic censorship—the overt punishment for offering views repugnant to state authorities—but, rather, from being 'drowned out' in the marketplace by the superior resources often available to the state (p.196).[43]

Taking the example of public monuments, Levinson demonstrates that the harms of such state perlocutions can be analogous to state illocutions, as when the state's maintenance of a monument to white supremacy is experienced as "drowning out" anti-racist speech by placing the state's imprimatur on racism (pp. 204-11).

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43. Levinson does not specify whether he believes state perlocutions are more threatening than state illocutions per se, or whether state perlocutions are more threatening than state illocutions because the law provides fewer protections from the former than it does from the latter.

Cell (V) is perlocutionary censorship by a private actor, exemplified by pornography or hate speech. Pornography is not promulgated by public actors, but by private ones. Moreover, the silencing effects of pornography are not illocutionary, but perlocutionary. Most opponents of pornography are not arguing that one opens a pornographic magazine to find the words—"women are forbidden to speak." Rather, they aver that the pornography need not make this interdiction of speech explicit in order to effectuate it. Unlike Cells (III) or (IV), this model is thus twice removed from the classical model of censorship. Langton implicitly acknowledges this by replicating the moves made by Schauer *and* Levinson. Like Schauer, she seeks to problematize the public/private distinction, considering the ways in which private actors, like public actors, can have "jurisdiction" over other private actors (p. 264). Langton notes that just as the "private" Catholic church may have state-like power over its adherents (and non-adherents), so too might pornographers have such a power over pornography's consumers (and non-consumers) (pp. 264-73). Similarly, like Levinson, she questions the illocution/perlocution distinction. Langton opines that even assuming that pornography is itself not an illocution, it has the perlocutionary effect of disabling the speech of women (pp. 273-77).

The collection, then, fills out our matrix nicely, suggesting that there are not one, or two, models of censorship, but rather five. Yet even this more robust account of censorship leaves some cells at the margins of the matrix undertheorized. Cells (VI)-(IX) can be grouped together as the most speculative forms of censorship, which seem to go largely unanalyzed even in this sophisticated anthology.

Cell (VI) is illocutionary censorship through a norm. By this, I mean an explicit prohibition on certain kinds of speech that cannot be said to originate in a state or private actor. An example of such censorship might be prohibitions on four-letter words. Obviously, there are instances in which we can trace this prohibition to state actors, as in anti-swearing ordinances,[44] or to private actors, as in more quotidian injunctions laid down by parents, teachers, or peers. But to speak of any of these actors as *originating* the prohibition seems wrong, as the taboo seems much more diffuse. Thus, while the injunction is discrete in form ("Thou shalt not say *x*"), it is pervasive in origin—it is a censoring illocution produced by a norm.

Cell (VII) is perlocutionary censorship through a norm. Here the prohibition is not framed as a direct prohibition, but rather as an affirmation that indirectly forecloses other forms of speech. Yet this locution is also not traceable to any particular public or private actor. The convention of using "he" and "she" as mutually exclusive and cumulatively exhaustive

44. *See* ASHLEY MONTAGU, THE ANATOMY OF SWEARING 158 (1967).

singular pronouns for human beings might be such a form of censorship. Unlike the taboo against four-letter words, the interdiction is not a direct one in the form of "Thou shalt not say *x*," where *x* would represent some alternative other than "he" or "she." In the case of four-letter words, the *x* in this formulation is intelligible—everyone knows the word that is being suppressed. In the case of a third-gender pronoun, no widely known word is being forbidden. Rather, the seeming sufficiency of "he" and "she" has the perlocutionary effect of rendering such an alternative largely unimaginable.

With Cell (VIII), we shift to the confluence of discrete actors and pervasive speech. This cell represents public actors who alter the norms surrounding speech. While public education might be the most obvious example of such regulation, the Académie Française might provide a more vivid one. The Académie, which Cardinal Richelieu made an official French institution in 1635,[45] seeks "to labor with due care and diligence to provide certain rules to [the French] language, and to render it pure, eloquent, and capable of treating the arts and sciences."[46] As such, it is a public institution seeking to engage directly with the norms of discourse itself. The Académie's longstanding war against "franglais," for example, is less well understood as an objection to particular words like "Euroland" than as a defense of the "linguistic purity" of French discourse.[47]

Finally, Cell (IX) represents the attempt by private actors to change the norms of language. An easy example would be the English-language dictionaries that serve the same function as the Académie Française in determining the metes and bounds of standard English. Our expectation that such dictionaries will serve this function can be seen in the response to a decision made by the compilers of *Webster's Third New International Dictionary*. In 1961, the compilers stated that the project of the dictionary would shift from the prescriptive one of distinguishing correct from incorrect usage to the descriptive one of simply reporting developments in the language.[48] This decision caused a furore among many intellectuals, who believed "that the turn to 'descriptive linguistics' represented a fundamental betrayal of the normative duty of lexicographers."[49] This response implies that while these dictionaries are created by private entities, they nonetheless exercise influence on the conditions of discursive intelligibility.

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45. *See* JEAN-POL CAPUT, L'ACADÉMIE FRANÇAISE 7 (1986).

46. Maurice Druon, *Preface* to DICTIONNAIRE DE L'ACADÉMIE FRANÇAISE I (9th ed. 1992) (quoting Statutes and Rules of Académie Française, 1635) (my translation).

47. John-Thor Dahlburg, *Euro Currency Earns a Wealth of Linguistic Controversy*, L.A. TIMES, Jan. 9, 1999, at A2.

48. *See* J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1773 (1994).

49. *Id.*

Travelling through the matrix demonstrates that there are at least nine different practices that could be called censorship. Even this array is not meant to be exhaustive, as there are forms of censorship that do not fit comfortably within any single cell. Richard Burt's contribution, for example, contends that censorship in the early modern English theater was a collaborative enterprise between public subjects (the court censor) and private ones (the playhouse bookkeeper, scribe, or dramatist) (pp. 17-41). Nonetheless, the matrix amply demonstrates that the practice of "censorship" is not one but many practices, among which cogent distinctions can be made. While, as Schauer says, censorship has no ontology (p. 164), it may be that it has ontologies.

CONCLUSION

I started with Post's conundrum—how are we to explain the proliferation of categories of censorship? Developing on Post's answer, I suggested that this proliferation could be explained by a parallel shift in conceptions of subjects and speech. We began with the sentimental classical model, which only recognized state illocutions as censorship. We then moved to the skeptical Foucaultian model, which refused to recognize anything but norms as the agents of censorship. Finally, we equilibrated back to an eclectic conception of both subjects and speech. That phase of equilibration led us to recognize many more forms of speech as censorship.

But to answer Post's question is to pose others. Is this phase of equilibration internally coherent? More specifically, can we drink from the Foucaultian well and still validly maintain the eclectic conception? After all, the Foucaultian account provides a complete story about censorship, which casts adherence to any other account of censorship as a form of false consciousness. We might thus ask if the eclectic model is sufficiently rigorous.

The answer to the last question depends on what is meant by rigor. If by rigor we mean philosophical coherence, the answer is probably a negative one. By definition, eclecticism draws on many disparate, and even contradictory, philosophical traditions. On the other hand, if by rigor we mean a sedulous descriptive accuracy, the answer is more likely to be affirmative. The eclectic model more accurately captures a lived and legal experience in which discrete actors and speeches are felt to have the power to censor. It also more accurately describes a lived and legal experience in which censorship can be driven by norms so pervasive as not to be perceived as censorship.

It may well be that these two forms of rigor are not simultaneously attainable. We may need to trade off some philosophical coherence to describe a complex social phenomenon like censorship with precision.

Necessary or not, this is the bargain that the eclectic model of censorship has struck.