

# *Not Excusing Rape: Silencing, Rationality, and Blame*

**Abstract:** Anti-pornography feminists have famously argued that pornography silences women: specifically, pornography causes women to be illocutionarily disabled in some real-life sexual contexts so that they are unable to refuse sex by saying ‘no’. Call this view *Silencing*. Some philosophers object to *Silencing* because it seems to entail that, in some cases, a rapist’s blameworthiness is significantly diminished. If the woman can’t refuse sex by saying ‘no,’ and this allows the man’s belief that she consents to be rational, then the man’s blameworthiness for rape is significantly diminished. The objection is that something must be wrong with a view like *Silencing* that allows rapists to get off the moral hook when, intuitively, they shouldn’t. In this paper, I defend *Silencing* from this objection by appealing to insights from the literature on moral encroachment in order to argue that it’s not rational for the rapist to believe (or accept) that the woman consents.

**Key terms:** silencing; pornography; blameworthiness; epistemic rationality; moral encroachment; acceptance

## 1. Introduction

Building off of Catharine MacKinnon’s claim that pornography silences women, Rae Langton and Jennifer Hornsby have famously argued that pornography makes it so that women are illocutionarily disabled in sexual contexts.<sup>1</sup> According to them, women are systemically unable to refuse sex by uttering ‘no’ and other refusal expressions. Call this view *Silencing*.

*Silencing* has many merits. Perhaps most significantly, it allows anti-pornography feminists to show that the free-speech reasons often given in favor of protecting pornography end up favoring its restriction – after all, by silencing them, pornography violates women’s right to free speech [West 2003]. Despite its merits, *Silencing* has a problem: it seems to entail that, in some cases, the rapist’s blameworthiness is significantly diminished. If a woman can’t refuse sex by saying ‘no’, then the man’s evidence that the woman consents to sex may not be defeated by her saying ‘no.’ And if his belief that the woman consents is rational, then this significantly diminishes his blame for rape. But *surely* this

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<sup>1</sup> See Hornsby (1993), Hornsby and Langton (1998), Langton (1993, 1998), Langton and West (1999), and MacKinnon (1987, 1992). For further developments of this view, see Bauer (2015), Maitra (2009), McGowan (2003), West (2003), and Dotson (2011). For criticisms, see Bird (2002), Jacobson (1995, 2001), and Wieland (2007).

can't be right. Surely there must be something wrong with a view that allows rapists to get off the moral hook when, intuitively, they seem fully morally responsible.

The goal of this paper is to defend Silencing from this objection. After detailing Silencing (section 2) and laying out the relevant objection (section 3), I consider a few defenses of Silencing advanced by Ishani Maitra and Mary Kate McGowan (section 4). I argue that these defenses are unsuccessful, and that a new defense is called for that avoids the worries that trouble Maitra and McGowan's. I then develop such a defense by appealing to insights from the literature on moral encroachment (section 5). According to this new defense, it is irrational for the man to believe – or to accept (section 6) – that the woman consents given the high moral stakes of so believing or accepting. I end by considering the debate about pornography and free speech in light of this new defense (section 7).

## 2. Silencing

Langton and Hornsby's development of Silencing begins with an appeal to J.L. Austin's account of speech acts in *How to do Things with Words*. According to Austin, there are three kinds of speech acts: locutions, perlocutions, and illocutions. A locution is the utterance itself and its semantic content, a perlocution is the extra-linguistic effect on the world that the utterance has, and an illocution is what's done in saying the utterance (warning, commanding, marrying, voting, endorsing).

There are three kinds of silencing that correspond with the three types of speech acts: simple silence, perlocutionary frustration, and illocutionary disablement. Simple silence happens when the speaker is inhibited from making any utterance at all – perhaps because she is physically restrained or because she fears the consequences of uttering. Perlocutionary frustration happens when the effects the speaker intends to bring about by making the utterance do not come about. Illocutionary disablement happens when the speaker's utterance fails to count as the action the speaker intends to perform in uttering it because of a failure of understanding on the hearer's end.

Although pornography may be thought to silence women in all three ways in sexual contexts, Langton and Hornsby focus on illocutionary disablement, and take pains to distinguish it from perlocutionary frustration in similar contexts. Suppose a woman utters a refusal expression in order to

block a sexual interaction, the man hears her and understands that she is refusing, and yet he knowingly has sex with her anyway. This is a case of perlocutionary frustration: the effect the woman intends to bring about by uttering ‘no’ – blocking unwanted sex – does not obtain. But, importantly, the woman’s ‘no’ *does* count as a refusal in such cases; in cases of illocutionary disablement, it *does not*.<sup>2</sup>

So how does pornography illocutionarily disable women? Langton and Hornsby both think that pornography creates communicative conditions in which women’s refusal utterances systemically<sup>3</sup> fail to have the illocutionary force of refusal in sexual contexts. Langton argues that pornography *constitutes* illocutionary disablement [Langton 1993], while Hornsby argues that pornography *causes* it [Hornsby 1993, 1995]. The differences between their views aren’t important for the purposes of this paper, so we’ll focus on Hornsby’s view since it’s simpler.

To understand the claim that pornography causes illocutionary disablement, we have to understand the importance of hearer uptake. If a particular utterance is to have the illocutionary force intended by the speaker, the hearer must understand it to be the sort of speech act intended by the speaker. What happens in cases of illocutionary disablement is that a woman says ‘no’ intending to refuse sex, the man hears her say ‘no’, but pornography causes the man to not recognize her ‘no’ as a refusal. Pornography does this by shaping its consumers’ beliefs and expectations about women in sexual contexts. For example, pornography may produce in its consumers the expectation that women play coy in sexual contexts and the corresponding belief that women do not intend to refuse when they say ‘no’ in such contexts. These beliefs and expectations then cause the relevant failure of hearer uptake. Because consumption of pornography is widespread, so, too, are the relevant beliefs and expectations, causing systemic illocutionary disablement of women in sexual contexts.

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<sup>2</sup> Some philosophers have criticized to the way the distinction between perlocutions and illocutions have been drawn in the literature on Silencing. For a helpful discussion, see Watson (2018).

<sup>3</sup> Illocutionary disablement is *systemic* if “it occurs in a wide range of contexts, and that it is hard to overcome (or escape) when it does occur” Maitra (2009), p. 315. Maitra notes that that notion of systematicity is not explicit in Langton or Hornsby, but nevertheless seems to be an essential component of their view.

### 3. The Objection

Silencing has a problem. It seems entail that, in some cases, a rapist's blameworthiness is significantly diminished. An early version of this problem for Silencing was introduced by Jacobson (1995), who suggested that Silencing entailed, absurdly, that women who attempt to refuse sex by saying 'no' but who are illocutionarily disabled are not actually raped. In response, Langton and Hornsby (1998) argue that lack of refusal does not imply consent – even in cases where a woman does not or cannot refuse, this does not mean she consents or has not been raped.

But Langton and Hornsby's response to Jacobson does not cover the refined version of the problem at hand: even assuming that the woman in question has not consented and has been raped, Silencing still seems to entail that the rapist's blameworthiness for the rape is significantly diminished – and this is an objectionable, if not absurd, conclusion. This problem comes out most clearly in cases of illocutionary disablement where the man and the woman mutually consent to a sexual interaction but then the woman wants to withdraw her consent, and attempts to do so by uttering a refusal expression. In these cases, the man's belief that the woman consents starts off as rational.

The objectionable conclusion is entailed by two plausible claims about the man in these cases. First, there's the epistemic claim that the man's belief that the woman consents is rational despite her refusal utterance. Second, there's the moral claim that the man's blameworthiness for the rape is significantly diminished in light of the rationality of this belief. It's worth considering each of these claims in turn. But, first, a few clarifications are in order.

Let's assume that to rape someone is, approximately, to have sex with that person without that person's consent.<sup>4</sup> The cases of rape relevant here are those in which a woman utters a refusal expression in order to refuse sex but, because she is illocutionarily disabled, her utterance does not

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<sup>4</sup> This approximate account of rape is based on Wieland's: "[the assumption is that] rape is coercive sex, and coercive sex is *something like* sex which has not been consented to..." Wieland (2007), p. 432. This account entails that lack of consent is sufficient for rape but does not entail that consent is sufficient for ethical sex. I assume, however, that sex with consent is significantly morally better than sex without consent. See Kukla (2018) for helpful discussions on the limits of consent in sexual ethics.

count as a refusal and the man has sex with her.<sup>5</sup> Call these *cases of illocutionary disablement*. Importantly, the focus here is on the moral – rather than the legal – status of the men in these cases: the relevant legal considerations are related to the moral ones, but legality and morality are not coextensive, and my aim here is to explore morality. Relatedly, when it comes to the man’s belief that the woman consents, I focus on the epistemological concept of epistemic rationality, rather than the legal standard of reasonableness.<sup>6</sup> Let’s assume that a belief is rational if and only if its propositional content is supported by the believer’s evidence (that is, the believer’s reasons for thinking that its content is true).

With these clarification in mind, consider the epistemic claim about the rationality of the man’s belief that the woman consents in the cases of illocutionary disablement in question. According to Silencing, many men have the pornography-induced belief that women do not intend to refuse when they utter ‘no’ in sexual contexts. Call this the *general norm-belief*. From his general norm-belief, the man in cases of illocutionary disablement infers that the particular woman in front of him does not intend to refuse when she utters ‘no’. Call this his *utterance-belief*. The man’s belief that the woman consents – his *consent-belief* – can continue to be rational based on previously attained evidence only if his utterance-belief is rational.<sup>7</sup> And the man’s utterance-belief is rational only if his general norm-belief is rational. So, in order to see whether the man’s consent-belief is rational, we have to look at whether his pornography-induced general norm-belief is rational. There’s a strong case to be made that it is.

Beliefs about some subject S on the basis of some source P are rational if it is rational for the believer to take P as reliable when it comes to S: believers have good reason to think that the things P indicates about S are true. Plausibly, it is (defeasibly) rational for believers to take P as reliable about S if it is widely accepted cultural practice to do so. Studies suggest that an increasingly large number of young people – especially boys and men – report turning to pornography for sex education [Davis et

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<sup>5</sup> I will be focusing on cases where a man is the rapist and a woman is the one raped since most cases of rape fit this description, and since these cases are the ones primarily discussed in the relevant literature on Silencing.

<sup>6</sup> I focus on rationality for a number of practical reasons, but my arguments work if talk of reasonableness is substituted for talk of rationality.

<sup>7</sup> After all, if it were rational, instead, for the man to believe that the woman *does* intend to refuse by uttering ‘no’ – which is typically the rational thing for a hearer to believe when a speaker utters a refusal expression – this would defeat any previously attained evidence that she consents.

al 2017; Rothman et al 2021]. So, it seems that it's defeasibly rational for consumers to take pornography as a reliable source of information about the norms of sex.<sup>8</sup> By extension, consumers have evidence for their pornography-induced beliefs about the norms of sex – like the general-norm-belief that women do not intend to refuse when they utter 'no' in sexual contexts – enabling these beliefs to be rational. This, in turn, allows the man's utterance-belief and consent-belief to be rational in cases of illocutionary disablement.

Now consider the moral claim: if the man's consent-belief is rational, his blameworthiness for the rape is significantly diminished. On most any account of moral responsibility, reasonable ignorance about matters of fact – including rational false beliefs<sup>9</sup> – can count as an excuse for wrongful action and, thus, significantly reduce blameworthiness for wrongful action [Rosen 2003; Harman 2011]. Similarly, if the man's false belief that the woman consents is *rational* in cases of illocutionary disablement, then the man is reasonably ignorant when it comes to the relevant facts about consent, which significantly reduces his blameworthiness for rape.

The conclusion that the man's blameworthiness for rape is significantly diminished is, intuitively, objectionable. Wieland (2007) traces this intuition back to the thought that rapists shouldn't get off the moral hook, even partially, because of some linguistic loophole. A rapist, she writes, is not “an unwitting victim of linguistic conventions” [Wieland 2007: 432].<sup>10</sup> The idea here is that it's problematic for rapists to evade full moral blame because of some technicality in the linguistic norms of sexual discourse, which is exactly what the conclusion as entailed by Silencing seems to suggest.

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<sup>8</sup> Not only is it a cultural norm to do so, but also the fact that many people do learn about sex from pornography *makes it true* that pornography is reliable source of information about sexual contexts. After all, the many people who learn about sex from pornography implement what they see in pornography in real-life sexual contexts, which makes it the case that what happens in pornography accurately portrays what happens in many real-life sexual contexts.

<sup>9</sup> Reasonable ignorance includes more than just rational false beliefs – for example, it also includes lack of belief. What matters for our purposes is that rational false belief is one type of morally exculpatory reasonable ignorance.

<sup>10</sup> She then goes on to write that, instead, rapists are “misogynistic, ill, or deranged (i.e., unable to distinguish between reality and fantasy), or unable to listen to the desires of real women in sexual encounters” [Wieland 2007: 432]. I do not endorse this farther characterization of rapists, since it seems to perpetuate the problematic narrative that rapes are committed by moral monsters or creeps. For discussion, see Yap (2017) and chapter 6 of Manne (2018).

Moreover, the intuition that the conclusion is objectionable tracks a familiar worry that arises whenever we turn attention toward systemic social forces that give rise to some morally problematic pattern of attitude or behavior. Views like Silencing that focus on systemic social forces, the worry goes, threaten to undermine our ability to hold individuals who instantiate those patterns fully morally responsible as they seemingly should be.<sup>11</sup> The worry is vindicated if, on such views, the relevant forces not only explain but also excuse severe individual wrongs. The conclusion baldly indicates that, when it comes to Silencing, this worry is vindicated, which is why it strikes us as objectionable.

We can formalize the problem for Silencing like this.

- (1) **Silencing:** Women are systemically illocutionarily disabled in sexual contexts and cannot refuse unwanted sex by uttering a refusal expression.
- (2) **The epistemic claim:** If a woman is illocutionarily disabled and cannot refuse sex by saying ‘no,’ then the man’s belief that she consents may be rational despite her refusal utterance.
- (3) **The moral claim:** If the man’s belief that the woman consents is rational, then the man’s blameworthiness for rape is significantly diminished.
- (4) **The objectionable conclusion:** The man’s blameworthiness for rape is significantly diminished in cases of illocutionary disablement.

One way to avoid the objectionable conclusion is to reject Silencing. But, of course, this is not an acceptable option for defenders of Silencing: in order to accept Silencing and reject the objectionable conclusion, we must reject either the epistemic claim or the moral claim.

#### 4. Unsuccessful Defenses of Silencing

Maitra and McGowan (2010) defend Silencing by rejecting the epistemic claim: they argue that it is not rational for the man to believe that the woman consents despite her saying ‘no’ in cases of illocutionary disablement. This means that he doesn’t have the excuse of *reasonable* ignorance to significantly diminish his blameworthiness for rape.<sup>12</sup> They give a couple of arguments for rejecting the epistemic claim, which I’ll call *the argument from analogy* and *the rational interpretation argument*. I will argue that neither argument successfully defends Silencing from the problem at hand.

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<sup>11</sup> This worry also arises for Charles Mills’ account of white ignorance, and other accounts of ignorance that focus on the systemic social forces that cause it. For helpful discussion, see Sullivan and Tuana (2007).

<sup>12</sup> McGowan, et al, (2011) offers similar defenses of Silencing.

Let's start with the argument from analogy. According to Silencing, in cases of illocutionary disablement, pornography causes the man who consumes it to fail to register the woman's 'no' as a refusal, which ultimately allows his consent-belief to be rational despite this utterance. But just because pornography causes the man to make a mistake that leads him to falsely believe that the woman consents doesn't entail that his consent-belief is rational. Maitra and McGowan argue for this claim by analogy to the following case [Maitra and McGowan 2010: 71].

**Distracted Driver** Mike habitually listens to audiobooks while driving, and doing so distracts him from properly attending to the road. One day, this causes him to fail to take into account the stop sign at an upcoming intersection – he sees it but doesn't properly register it. This, in turn, causes him to continue to believe that it is safe to proceed through the upcoming stretch of road without stopping. Acting on this belief leads to an accident.<sup>13</sup>

Just because listening to audiobook causes Mike to fail to properly register the stop sign and this causes him to falsely believe that it is safe for him to proceed driving without stopping doesn't mean that Mike's belief is rational. From here, Maitra and McGowan argue that something similar can be said about cases of illocutionary disablement. Just because pornography causes the man in cases of illocutionary disablement to fail to properly register the woman's refusal utterance and this ultimately causes him to falsely believe that the woman consents does not mean that his consent-belief is rational. This suggests that the epistemic claim is false.

The problem with this argument is that the Distracted Driver and cases of illocutionary disablement are relevantly dissimilar: the causal mechanisms in play in each case are relevantly different. In Distracted Driver, listening to audio books causes Mike to fail to properly register the stop sign by distracting him. In cases of illocutionary disablement, pornography causes the man to fail properly register the woman's 'no' by *inducing in him the rational belief* that women don't intend to refuse in sexual contexts. Yes, a belief that p is not automatically irrational just because something prevents the believer from properly registering an indicator that p is false, as Distracted Driver shows. But if that something prevents the believer from properly registering such an indicator by making it rational for him to believe

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<sup>13</sup> I have modified the case slightly so that it more closely parallels cases of illocutionary disablement.

that the indicator does not, in fact, suggest that  $p$  is false, then the belief that  $p$  may very well be rational.

This can be seen by considering a different version of the driver case.

**Misinformed Driver** Mike is visiting America for the first time and does not speak English well. He is an excellent driver but the road signs are totally different in his home country. His American translator – whom Mike has good reason to believe is reliable source of information about driving norms in America – tells Mike that the red octagonal signs found at intersections do not mean *stop*. One day, as he is driving, this causes Mike to fail to properly register a stop sign at an upcoming intersection, which leads him to continue to believe that it is safe to proceed through the upcoming stretch of road without stopping. This leads to an accident.

It seems that Misinformed Mike's belief that it is safe to proceed through the upcoming stretch of road is rational. That's because the thing that causes him to fail to properly register the stop sign – the translator's testimony – does so by way of making it rational for him to believe that the stop sign does not, in fact, suggest that it is unsafe to proceed without stopping. Cases of illocutionary disablement are relevantly similar to Misinformed Driver, not to Distracted Driver. So Maitra and McGowan's attempt to reject the epistemic claim by pointing to cases like Distracted Driver doesn't work.

Now let's turn to the rational interpretation argument against the epistemic claim.<sup>14</sup> The basic thought here is that just because the man's general norm-belief is rational doesn't mean that his utterance-belief and, thus, his consent-belief are also rational. That's because "the reasonableness of any interpretation of what a [particular] speaker says depends, as it always does, on many factors, including the speaker's tone of voice and her body language (i.e., whether she is struggling)" [Maitra and McGowan 2011: 170-171]

To flesh this point out: even in a context where it is rational for the hearer to believe, generally, that certain speakers do not intend to refuse by saying 'no', it is not also rational for the hearer to believe, inferentially, that the particular speaker in front of him does not intend to refuse when she utters 'no' if the utterance is accompanied by extra-linguistic signs that indicate refusal. If the speaker

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<sup>14</sup> Maitra and McGowan (2010) originally develop the rational interpretation argument against the epistemic claim given a different interpretation of Silencing than the one assumed in this paper. On this alternative interpretation, pornography makes it so that 'yes' means *no* in sexual contexts. I have modified the argument below so that it makes sense our interpretation of Silencing. The spirit of the argument remains the same.

shakes her head or closes her body off or has a distressed tone of voice to utter ‘no’, for example, it is not rational for the hearer to believe that the speaker is not intending to refuse by saying ‘no.’

This argument does show that there are some cases of illocutionary disablement where the man’s utterance-belief and, by extension, his consent-belief, are not rational even though his pornography-induced general norm-belief is rational – namely, cases in which the woman exhibits non-linguistic signs of refusal.

But, for all this argument entails, the man’s utterance- and consent- beliefs may still be rational in cases when these signs are absent. This indicates a couple of related problems for the rational interpretation argument. First, the argument doesn’t fully defend Silencing from the objection since the objectionable conclusion still holds in cases where the woman doesn’t exhibit non-linguistic signs of refusal. Second, the argument implies that, in addition to saying ‘no’, the woman must exhibit non-linguistic signs of refusal in order to render the man’s consent-belief irrational. This, I want to suggest, is an objectionable implication. Normally, the woman’s ‘no’ should be enough to make it irrational for the man to believe that she consents – that is, she shouldn’t have to do something extra to confirm that she is refusing.<sup>15</sup>

To sum up to far: Maitra and McGowan’s attempts to defend Silencing by rejecting the epistemic claim are unsuccessful. Their argument by analogy doesn’t work because the case they point to is not relevantly similar to cases of illocutionary disablement. A revised case that *is* relevantly similar suggests that the man’s belief that the woman consents is rational. Their rational interpretation argument fails, in part, because it entails that the objectionable conclusion still applies in a significant subset of cases of illocutionary disablement – namely, cases where the woman does not exhibit non-linguistic signs of refusal. It also implies that, in cases of illocutionary disablement, women must do more than utter a refusal expression to render the man’s belief that she consents irrational, and this is an objectionable implication.

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<sup>15</sup> As I will discuss in section 5, there seem to be some cases when it’s still rational for the man to believe that the woman consents despite her saying ‘no’ – namely, cases in which the man has evidence that the particular woman in question doesn’t intend to refuse when she says ‘no’. But these cases are the exception to the rule.

## 5. A New Defense

Now I want to develop a new defense of Silencing that avoids the worries that trouble Maitra and McGowan's attempts. Central to this new defense is moral encroachment.<sup>16</sup> Moral encroachment says that what counts as sufficient evidence for a belief to be rational is not static, but varies by context. More specifically, it says that moral considerations help determine the evidential threshold for rationality for a belief in a given context. When the moral stakes for having a belief are high in a certain context, morality pushes the evidential threshold upward for that belief in that context. When the moral stakes are low or absent, morality sets a lower evidential threshold.

Most defenders of moral encroachment agree that risk of harm plays an important role figuring out the relevant moral stakes: when a belief carries a significant risk of harm in a certain context, the moral stakes are high, and so more, or better, evidence is required than otherwise would be for that belief to be rational. A belief carries the relevant moral risk if acting on it or relying on it in practical reasoning would likely lead to harm if the belief turns out to be false. To get a firm grasp on moral encroachment, it's helpful to consider the following case modified from Ross and Schroeder (2012).

**Peanut Allergy** Sam's nephew Algernon is visiting for lunch, and asks Sam for a sandwich. Last night, Sam made three sandwiches and placed them in the refrigerator. He remembers placing the peanut butter sandwich on the left, the tuna sandwich in the middle, and the almond butter sandwich on the right. Sam knows that the peanut butter sandwich could be fatal to Algernon – who has a severe peanut allergy – but that the almond butter sandwich would be harmless. He also knows that Algernon has a slight preference for almond butter over tuna. When Sam goes to the fridge, he can tell by visual inspection which is the tuna sandwich, but not which is the peanut butter or the almond butter sandwich. Sam decides to give Algernon the tuna sandwich.

The belief that the sandwich on the on the right is made with almond butter is very morally risk: if false, acting on it would likely lead to severe harm to Algernon. Because of this, according to moral encroachment, there is a high evidential threshold for this belief. In other words, Sam must have a lot of (good) evidence in its favor in order for it to be rational. If Algernon had a mere preference for almond butter over peanut butter rather than a severe allergy, Sam's memory of where he put the

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<sup>16</sup> For defenses of moral encroachment, see Basu (2018), Fritz (2017), Moss (2018), Pace (2011), and Ross and Schroeder (2012). Bolinger (2019) argues for moral encroachment on rational acceptance. See Gardiner (2018) for a critical discussion.

sandwiches last night would be sufficient to rationalize the belief that the almond butter sandwich is on the right. But, given the high moral stakes, more (or better) evidence is needed to push it over the resulting high evidential threshold.

With a firm grasp on moral encroachment now in hand, I want to develop a defense of Silencing by appealing to moral encroachment to reject the epistemic claim. In sexual contexts, the moral stakes for believing that the woman consents are extremely high. As Curley (1976) puts it, “We are dealing here with people who are in a situation in which acting on a false belief involves immediate, serious, and irremediable harm to someone else” [Curley 1976: 346]. Given this, the evidential threshold for the man’s consent-belief is very high.

This alone does not show that the epistemic claim is false: it must also be that the man’s evidence is not sufficient to push his consent-belief over the high evidential threshold. So now I want to argue that his evidence is not sufficient. Even assuming that his pornography-induced general norm-belief is rational, his utterance-belief is not and so neither is his consent-belief.

First, it’s important to note that, on moral encroachment, the man’s utterance-belief must also surpass a high evidential threshold to be rational: since it’s directly linked to his consent-belief, relying on the utterance-belief in practical reasoning is very morally risky.<sup>17</sup> Given this high evidential threshold set by morality, the man needs *individual-specific* evidence to rationalize his utterance-belief. In other words, the man needs evidence that the woman in front of him, in particular, does not intend to refuse when she says ‘no’; evidence from pornography that makes it rational for him to believe that, generally, women do not intend to refuse in sexual contexts is not enough.

Here’s why. In addition to his evidence about the norms of sexual discourse he gets by consuming pornography, the man also has evidence that – despite these norms – there is a non-negligible possibility that this particular woman *does* intend to refuse when she says ‘no.’ And, given the high

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<sup>17</sup> It’s doubtful that the man’s general norm-belief is subject to a similarly high evidential threshold. First, it’s only indirectly linked to his consent-belief. Second, beliefs about particular individuals seem to carry a distinct moral risk that general or statistical beliefs about their social groups don’t. This thought is explored throughout the literature on moral encroachment. See footnote 18.

moral stakes, the man's utterance-belief to the contrary cannot be rational if his evidence suggests that such a possibility is non-negligible. The man needs individual-specific evidence that this particular woman does not intend to refuse when she says 'no' to defeat his evidence suggesting that the opposite is a non-negligible possibility. Thus, individual-specific evidence about the woman is needed to make it so that the man's total evidence is strong enough to rationalize his utterance-belief and, by extension, his consent-belief.<sup>18</sup>

I assume that the claims in the above argument are plausible given moral encroachment, and will not attempt to defend them further, with one exception: the claim that the man has evidence suggesting that there is a non-negligible possibility that the woman in front of him *does* intend to refuse when she says 'no' in the sexual context in question. Why think this is true?

For one, it's obvious that the norms in play in sexual contexts are atypical: in the vast majority of contexts, when people say 'no', they typically intend to refuse. cursory reflection on this would alert the man to the possibility that this particular woman may not be familiar with the atypical norms of sexual discourse that he rationally believes hold, or that she is abiding by the norms that are typically in place. This would give him evidence that the woman may be intending to refuse when she says 'no.' What's more, it's common knowledge that some women do not want sex in a variety of sexual contexts. In combination with knowing that using a refusal expression is a convenient and common way to refuse, this provides the man with even more evidence that some women – including, possibly, the particular woman in front of him – will want to refuse and will want to do so by uttering a refusal expression. Finally, there's widely available evidence that women have various views and desires about their sexuality, and this provides the man with evidence that this woman may not have the views and desires characteristic of women as portrayed in pornography.

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<sup>18</sup> This echoes a line of thought advanced by some defenders of moral encroachment. These defenders focus on cases of seemingly prejudiced belief about individuals from marginalized social groups that are based on statistical information about those social groups. It is argued that such statistical evidence is not good enough to rationalize these beliefs given the harm risked to the individuals who are their objects, and it often suggested individual-specific evidence is required.

Because this evidence is widely available and requires only simple reasoning to attain, it is safe to assume that practically all men in cases of illocutionary disablement have evidence suggesting that there is a non-negligible possibility that the woman *does* intend to refuse when she says ‘no’. And, so long as this evidence about the relevant possibility remains undefeated, the man’s total evidence is not strong enough to rationalize his utterance-belief or, by extension, his consent-belief. This means that, while it may be rational for the man to believe, generally, that women do not intend to refuse when they say ‘no’ in sexual contexts, it is irrational for him to believe, inferentially, that this particular woman does not intend to refuse by saying ‘no’. Thus, it is not rational for him to believe that she consents.

This new defense of Silencing based on moral encroachment shows that Silencing does not entail the objectionable conclusion. That’s because it is not rational for the man to believe that the woman consents in cases of illocutionary disablement, assuming he lacks the relevant individual-specific evidence. So, his blameworthiness for the rape is not significantly diminished.

This new defense isn’t troubled by worries that render Maitra and McGowan’s attempts unsuccessful. Their argument from analogy failed to take into account the rational means by which pornography causes the man to believe that the woman consents – it didn’t recognize that pornography makes it rational for the man to believe that, generally, women do not intend to refuse when they say ‘no’ in sexual contexts. The new defense does take this into account, but then goes on to contend that evidence from pornography that supports general beliefs about sexual norms isn’t sufficient to rationalize the relevant inferential belief about the individual woman given the high moral stakes.

Maitra and McGowan’s rational interpretation argument failed to cover cases of illocutionary disablement in which the woman does not display extra-linguistic signs of refusals – in these cases, the objectionable conclusion held true. Relatedly, this argument had the objectionable implication that women must do more than utter a refusal expression to render the man’s consent-belief irrational. The new defense is not troubled by either worry. Whether or not the woman struggles or sounds distressed, the man’s utterance-belief that she does not intend to refuse when she says ‘no’ is irrational – unless he has the relevant individual-specific evidence – and neither is his belief that she consents.

What's more, it is by virtue of the woman saying 'no' that the man's belief that she consents fails to be rational. On moral encroachment, in all cases of sexual interaction, each partner needs a lot of good evidence that the other consents given the moral riskiness of so believing. In the particular cases of sexual interaction in question, the woman utters 'no'. This utterance gives rise to – and leads the man to evidence that there is – a non-negligible possibility that the woman intends to refuse by so uttering. So, in these cases, given the high evidential threshold and because of her utterance, the man needs to have individual-specific evidence that the woman did not intend to refuse when she said 'no' if his utterance-belief and consent-belief are to be rational. Ultimately, then, it is just by saying 'no' in the relevant high-stakes context that the woman makes the man's consent-belief irrational, assuming he lacks the relevant individual-specific evidence – she doesn't need to do anything extra to make it irrational.

In addition to avoiding these worries, the new defense accommodates cases of sexual interaction in which the man's utterance-belief and consent-belief do seem rational. For example, suppose the man and woman are in long-term relationship and are intimately familiar with each other's sexual preferences and intentions so that the man has lots of individual-specific evidence that his partner does not intend to refuse when she utters 'no' during sexual interactions. Or, for another example, suppose that the man and woman are new sexual partners but, before their sexual interaction begins, they discuss their mutual desires and expectations and agree that the woman is playing coy when she says 'no'.<sup>19</sup> According to the new defense, the man's utterance-belief and consent-belief are both rational: the man has individual-specific evidence that defeats his other evidence that there is a non-negligible possibility that the woman does intend to refuse when she says 'no'.

It seems, then, that this new defense gives everything we want: it allows us to affirm Silencing and reject the objectionable conclusion while not only avoiding the worries that trouble Maitra and

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<sup>19</sup> Perhaps, for example, they establish a safe word so that, as long as neither partner utters the safe word, it is clear that each of them continues to consent to the sexual interaction even if some refusal expression is uttered. For a helpful discussion on safe words in sexual discourse, see Kukla (2018) section VI.

McGowan's unsuccessful defenses but also accommodating cases of sexual interaction where the relevant beliefs are rational.

## 6. A New Defense\*

The new defense developed, though promising, has a catch: it succeeds only if moral encroachment is correct. But moral encroachment is controversial – in fact, it goes against the traditional thought that epistemic rationality is determined only by evidential and other truth-related considerations [Conee and Feldman 2004]. For defenders of Silencing who are on board with moral encroachment, the new defense is a good bet. But what about evidentialists and others who reject moral encroachment? I want to argue here that the defense of Silencing featuring moral encroachment can be modified in a way that captures the relevant insights but does not rely on the truth of moral encroachment. Call this the new defense\*.

The new defense\* gets off the ground by distinguishing between belief and acceptance and switching the focus to acceptance [Cohen 1992]. To accept a proposition is to decide to treat it as something to act on and rely on in practical reasoning in the current context. A proposition is rational to accept if and only if it is sufficiently evidenced to act on and rely on in practical reasoning in the context at hand. Whether a proposition is sufficiently evidenced depends, in part, on the moral stakes of accepting that proposition. As Bolinger puts it, “[acceptance] is governed by epistemic norms and sensitive to practical [including moral] costs, aiming to be efficiently accurate: true enough, given what’s at stake and the costs of increased accuracy” [Bolinger 2018: 2418] Defenders of moral encroachment tend to assume that if a belief is rational, then it is rational to accept its propositional content. The new defense\* rejects this assumption,<sup>20</sup> and assumes that rational belief and rational acceptance can come apart: in some contexts, it may be rational to believe something even though it is not rational to accept it, or vice versa.

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<sup>20</sup> See Brown (2008, 2014) for reasons to reject this assumption. Although Brown’s arguments focus on knowledge, they can be modified to apply to epistemic rationality.

The new defense\* is based on moral encroachment on rational *acceptance* instead of rational belief: the moral stakes of a given context help determine how much evidence is needed in order for it to be rational to *accept* the relevant proposition in that context. In cases where the moral stakes are high, evidence sufficient to make some proposition rational to believe will not suffice to make it acceptable to rely on in action or practical reasoning. For example, in Peanut Allergy, it may be rational for Sam to believe, but not to accept, that the almond butter sandwich is on the right.

According to the new defense\*, rational acceptance – rather than rational belief – is the morally significant propositional attitude: it's the attitude that affects people's moral responsibility for actions that flow from it. I may be less blameworthy for a harmful action that flows from me rationally *accepting* some proposition, but I am not less blameworthy for a harmful action that flows from me rationally *believing* some proposition if it wasn't also rational to accept. For example, if Sam gave Algernon the sandwich on the right, his blameworthiness for his action is not diminished if it turns out his belief is false and Algernon has a severe allergic reaction – after all, the relevant proposition was not rational to accept even if it was rational to believe. In cases of illocutionary disablement, then, what would diminish the man's blameworthiness for rape is if it were rational for him to *accept* that the woman consents; whether it was rational for him to so believe is not morally significant.<sup>21</sup> The new defense\*, then, reframes the problem for Silencing like this.

- (1) **Silencing:** Women are systemically illocutionarily disabled in sexual contexts and cannot refuse by uttering a refusal expression.
- (2) **The epistemic claim\*:** If a woman is illocutionarily disabled and cannot refuse sex by saying no, then it may be rational for the man to *accept* that the woman consents despite her refusal utterance.
- (3) **The moral claim\*:** If it is rational for the man to *accept* that the woman consents, then his blameworthiness for rape is significantly diminished.
- (4) **Objectionable Conclusion:** The man's blameworthiness for rape is significantly diminished in cases of illocutionary disablement.

The argument for why the epistemic claim\* is false on the new defense\* runs parallel to the argument for why the epistemic claim is false on the new defense: given the high moral stakes, in order for it to

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<sup>21</sup> Importantly, I am not taking a stand here on whether it is rational for the man in cases illocutionary disablement to believe that the woman consents; I am just claiming that, on the new defense\*, the answer to this question does affect the man's blameworthiness.

be rational for the man to accept that the woman consents, he must have a lot of (good) evidence that she does so despite her refusal utterance. But the man does not have the individual-specific evidence needed to rationalize his acceptance, and so it is not rational for him to accept that the woman consents even if it is rational for him to believe so. Thus, his blameworthiness for rape is not significantly diminished.

The new defense\*, like the new defense, shows that Silencing does not lead to the objectionable conclusion. A little reflection also shows that the new defense\* avoids the worries that trouble Maitra and McGowan's attempted defenses when those worries are modified to concern rational acceptance instead of rational belief.<sup>22</sup> What's more, following the same line of reasoning given on the new defense, the new defense\* accommodates cases in which it is rational for the man to accept that the woman consents despite her refusal utterance. It seems, then, that, that Silencing can be successfully defended whether or not moral encroachment turns out to be correct.

## **7. Concluding Thoughts: Silencing and Free Speech**

Silencing has garnered so much interest largely because of its role in the debate about pornography and free speech. At first glance, it seems that considerations about free speech speak against restricting pornography. Pornography is speech, the thought goes, and so ought to be unrestricted. But, if Silencing is correct, then pornography systemically silences women in ways that undermine their freedom of speech, and, plausibly, considerations about free speech tip in favor of restricting pornography.

Given this, it's important to show that the defense of Silencing developed here is, well, a defense of *Silencing*, rather than some nearby view that lacks the significance in the free speech debate. One might worry that, in showing that rapists' blameworthiness is not significantly diminished, a defense of Silencing may inadvertently imply that women are unheard, ignored or otherwise disregarded in sexual contexts instead of illocutionarily disabled. To conclude, then, it's worth pausing to ensure that the

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<sup>22</sup> For the sake of brevity, those reflections won't be hashed out here.

new defense(\*) avoids this worry by ensuring that it's compatible with core claim of Silencing – namely, that women are illocutionarily disabled in sexual contexts, and, particularly, in the cases in question.

The new defense(\*) aims to show that the thing that allegedly diminishes the man's blameworthiness in the relevant cases fails to obtain. It is compatible with the claim that the woman in these cases is illocutionarily disabled because the thing that allegedly diminishes the man's blameworthiness is not the same as the thing that renders the woman illocutionarily disabled. By showing that the former thing fails to obtain, the new defense(\*) does not thereby show that the latter thing fails to obtain. Let's examine the new defense before turning to the new defense\*.

According to the new defense, what allegedly diminishes the man's blameworthiness is that his utterance- and consent- beliefs are *rational*. It's because the man is, allegedly, reasonably ignorant that his blameworthiness is diminished. But what makes the woman illocutionarily disabled is simply that the man has the relevant beliefs, rational or otherwise. It is by shaping the man's beliefs about sex that pornography causes the failure of hearer uptake central to illocutionary disablement, and this uptake failure may occur whether or not the beliefs are rational. The new defense shows that the relevant beliefs are not rational, but it does not, thereby, show that the man doesn't have the relevant beliefs. In fact, in showing that man's beliefs are not rational, the new defense assumes that he has them.

Similarly, on the new defense\*, what allegedly diminishes the man's blameworthiness is that it is rational for him to accept the utterance- and consent- propositions. But what makes the woman illocutionarily disabled is that he believes those propositions. The new defense\* shows that it is not rational for the men to accept those propositions, but it does not, thereby, show that the man does not believe them.

The new defense – and, for parallel reasons, the new defense\* – upholds the core of Silencing, allowing it to remain a significant tool in the anti-pornography feminist's toolbox.

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