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Toxic Misogyny and the Limits of Counterspeech

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TOXIC MISOGYNY AND THE LIMITS OF COUNTERSPEECH

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INTRODUCTION: SPEECH AS HARM

Gender equality, across all the ways that we humans are engendered, is an unrealized ideal of many contemporary Americans. It is not enshrined in the U.S. Constitution, unless one interprets "men" to include women, which the Framers did not.[1] Although passed by Congress in 1972, the Equal Rights Amendment (ERA) failed to gain the necessary thirty-eight state ratifications, and it has never become law.[2] Thirty-five states initially ratified it between 1972 and 1977,[3] then two more in 2017 and 2018.[4] It remains one state short. These ratifications indicate significant social progress for women, but the progress is uneven, even within states that have supported the ERA. Offering a glimmer of hope, the Senate of Virginia voted to ratify the ERA in February 2019, but the measure was killed in committee by the Republican-controlled House of Delegates.[5] Women remain constitutionally unequal.

Achieving equal rights requires closing constitutional gaps and eliminating the widespread and varied social practices that reinforce sexism and misogyny. Rampant misogyny is not just found in the words and images of

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1. *See* Allison L. Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113, 113–14 (1997).

2. *See* Sarah A. Soule & Susan Olzak, *When Do Movements Matter? The Politics of Contingency and the Equal Rights Amendment*, 69 AM. SOC. REV. 473, 475 (2004). The ERA would guarantee legal gender equality for women and men. *Id.*

3. *Id.*

4. *Ratification Info State by State*, ERA, https://www.equalrightsamendment.org/era-ratification-map [http://perma.cc/9XY4-DXQT] (last visited Apr. 10, 2019).

5. Jenna Portnoy, *ERA Bill Dies for Good in GOP-Controlled Virginia House of Delegates*, WASH. POST (Feb. 21, 2019), https://www.washingtonpost.com/local/virginia-politics/virginia-house-kills-era-ratification-bill/2019/02/21/82920204-3560-11e9-854a-7a14d7fec96a_story.html [http://perma.cc/5CT9-72TF].

internet trolls. It is the heart of advertising, literature, journalistic practice, and more. Misogynist discourse, in speech and images, inflicts tremendous harm on women every day, reinforcing lower social status, and rationalizing discrimination and mistreatment—including unequal pay, sexual abuse and violence, and more. The U.S. Constitution's First Amendment gives priority to freedom of speech because of the power of speech. It is often easy to identify bad speech that causes harm, but there are forms of speech that harm in stealthier ways. Some courts, following Justice Louis Brandeis, hold that the cure for bad speech, which is harmful and undermining on a daily basis, is more speech.[6] U.S. Supreme Court doctrine favors such counterspeech over censorship, except in cases of incitement.[7] Unfortunately, gender egalitarians cannot have both fully free expression, which is rife with misogyny, *and* gender justice.

Free speech is a crucial component of a free society, and although it is not absolute, protecting freedom of expression matters, especially to the most vulnerable among us.[8] Freedom of expression is an engine of autonomy. As philosophers María C. Lugones and Elizabeth V. Spelman have argued, "[T]he articulation of our experience is part of our experience."[9] Therefore, "it matters to us what is said about us, who says it, and to whom it is said: having the opportunity to talk about one's life, to give an account of it, to interpret it, is integral to leading that life rather than being led through it."[10] The United Nations Universal Declaration of Human Rights demands a universal right to freedom of expression, including "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[11] Thus, freedom of expression ought to be respected across a range of significant contexts.

This freedom comes at a price, particularly to those most vulnerable, who are often targeted by nasty speech that has harmful effects on their freedom to work, learn, and develop in myriad ways. It is not easy to discern the best methods for responding to nasty speech such as hate speech, racist rhetoric, and sexist comments that impose dignitary harms. Such harms can chill expression in a workplace or a classroom—an effect that undermines individual and social growth and development. Legal responses have been

6. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969). For a thoughtful defense of counterspeech, see generally Maxime Lepoutre, *Hate Speech in Public Discourse: A Pessimistic Defense of Counterspeech*, 43 SOC. THEORY & PRAC. 851 (2017).

7. *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 726–27 (2012).

8. *See* JEREMY WALDRON, THE HARM IN HATE SPEECH 1–17 (2012); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2350 (1989).

9. María C. Lugones & Elizabeth V. Spelman, *Have We Got a Theory for You! Feminist Theory, Cultural Imperialism and the Demand for 'the Woman's Voice*,*'* 6 WOMEN'S STUD. INT'L F. 573, 574 (1983).

10. *Id.* at 573.

11. G.A. Res. 217 (III) A, art. 19, Universal Declaration of Human Rights (Dec. 10, 1948).

stymied by the principle of viewpoint neutrality,[12] but advocates for fighting dignitary harms cannot see speech promoting the damage and destruction of half the human race as simply a viewpoint. Justice Kagan has argued that harm-based arguments are not really independent of the viewpoint arguments and that they stand or fall together.[13] This creates legal minefields. Perhaps the deepest problem is that misogyny is so thoroughly woven into the norms and practices of society that it can neither be treated as a mere viewpoint nor as special discriminatory harm. It is a harm of which we are made, a deeply constitutive harm, so it will not be easily gainsaid.

Along these lines, in 1993 Justice Kagan wrote, "I take it as a given that we live in a society marred by racial and gender inequality, that certain forms of speech perpetuate and promote this inequality, and that the uncoerced disappearance of such speech would be cause for great elation."[14] The key here is lack of coercion, presumably by government and law, but misogyny is often ruled by the coerciveness of the court of public opinion. John Stuart Mill, for example, worried about both government coercion and what he called "the tyranny of the majority,"[15] and this led him to develop strong arguments for protecting freedom of speech and thought.[16] Mill was also concerned that custom and habit, sometimes aided by reason, would overpower new ideas before they could get a fair hearing.[17] He was attuned to imbalances of power, particularly between the lone novice with a potentially great new idea and the entrenched majority that does not want to hear it.[18] To take this idea more seriously, one must understand how speech can be constitutive of society's members and can douse the spark of new ideas. It is essential to see harms as not only aftereffects but as woven through the whole social fabric.

Counterspeech has limited power and reach, and often the most vulnerable targets of nasty speech are not in a position to reply with "more speech." This raises the issue of which social positions are graced with the power of "more speech" and which are denied such power; it also raises the question of how to change these imbalances. State-sponsored and enacted censorship is a blunt tool, which might be sought as protection for the vulnerable, and yet it

12. Viewpoint neutrality is a well-established principle in First Amendment law that prohibits the government, when taking action that implicate free speech rights, from discriminating against specific viewpoints. Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 702 (2011).

13. *See* Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. CHI. L. REV. 873, 880 (1993).

14. *Id.* at 873.

15. JOHN STUART MILL, *On Liberty*, *reprinted in* ON LIBERTY AND OTHER ESSAYS 5, 8 (John Gray ed., 1991).

16. *Id.* at 21 ("But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.").

17. *Id.* at 7–8; *see also* JOHN STUART MILL, THE SUBJECTION OF WOMEN 6 (Transaction Publishers 2001) (1869).

18. MILL, *supra* note 15, at 7–8.

can also be wielded against those who are vulnerable and whose views are deemed inconvenient.[19] Misogyny is a dominant hegemonic force.[20] Some critical legal and critical race theorists, focusing on racist hate speech, have argued that the vulnerable pay the highest price for the free speech of others even though they rarely have such freedom themselves.[21] Accordingly, they have posited that we should protect the vulnerable against certain forms of derogation by providing tort remedies or even censoring the harmful speech outright.[22] The fight between free speech advocates and those who seek stronger enforcement of equal protection tends to be liberal infighting,[23] with each side seeing the importance of the general principles but being unable to settle questions of priority.

In *Only Words*, Catharine MacKinnon makes the argument that hate speech and pornography are better understood as discrimination than defamation.[24] MacKinnon's arguments also apply to the toxic misogyny of sexist advertising, cultural images, and speech practices that put women qua women in a secondary place—not just as citizens and political participants but as human beings. MacKinnon uses *Roberts v. United States Jaycees*[25] to argue that equality is a compelling state interest.[26] In *Jaycees*, the Supreme Court sided with Roberts and the Minnesota Department of Human Rights and held that the Jaycees were required to allow women to enjoy full membership in light of the size and scope of the membership and the purpose of the organization.[27] From *Jaycees*, MacKinnon concludes that "expressive means of practicing inequality can be prohibited."[28]

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19. For example, Indiana and Minnesota's anti-pornography laws and the Canadian Supreme Court decision *R. v. Butler*, [1992] 1 S.C.R. 452 (Can.), set out to protect women, but they were all disproportionately used against gay and lesbian pornography. *See, e.g.*, Susan R. Taylor, *Gay and Lesbian Pornography and the Obscenity Laws in Canada*, 8 DALHOUSIE J. LEGAL STUD. 94, 95 (1999).

20. *See* KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY 20 (2018). For a brief glossary of key terms, see Annie McGrew & Kate Bahn, *What Is Misogyny and Why Should You Care?*, MEDIUM (Sept. 28, 2017), https://medium.com/@amprog/what-is-misogyny-and-why-should-you-care-90ef7d4174aa [http://perma.cc/7HJ9-ARQ6].

21. *See, e.g.*, Noah Berlatsky, *Is the First Amendment Too Broad? The Case for Regulating Hate Speech in America*, NBC NEWS (Dec. 23, 2017), https://www.nbcnews.com/think/opinion/first-amendment-too-broad-case-regulating-hate-speech-america-ncna832246 [http://perma.cc/8LF5-C8FM] (explaining that "free speech rights have rarely protected black people in this country" yet free speech advocates suggest "victims should toughen up and ignore hateful words, or accept them as the price of freedom").

22. *See generally* MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993) (discussing various perspectives and analyses on the need to regulate hate speech); Brian Owsley, Note, *Racist Speech and Reasonable People: A Proposal for a Tort Remedy*, 24 COLUM. HUM. RTS. L. REV. 323 (1993) (proposing a new tort remedy for victims of racist speech).

23. *See* Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353, 360–61 (2009).

24. *See generally* CATHARINE A. MACKINNON, ONLY WORDS 3–43 (1993) (discussing defamation and discrimination).

25. 468 U.S. 609 (1984).

26. *See* MACKINNON, *supra* note 24, at 146 n.64.

27. *Jaycees*, 468 U.S. at 623.

28. MACKINNON, *supra* note 24, at 107.

Current Supreme Court doctrine on restrictions of speech harkens back at least to *Schenck v. United States*,[29] in which Justice Oliver Wendell Holmes Jr. first articulated the "clear and present danger" test under which the government has a right to regulate speech that will bring about "substantive evils."[30] *Schenck* also focused on differences between regulation in times of war and times of peace.[31] More definitively, *Brandenburg v. Ohio*[32] established a two-part test for regulating speech: (1) whether the speech is "directed to inciting or producing imminent lawless action," and (2) whether the speech is "likely to incite or produce such action."[33] A speaker would have to intend to bring about "imminent lawless action" and harm, and the probability of that harm would have to be significant.[34] As Richard Wilson has pointed out, *Brandenburg* and prior decisions were about protecting the state itself, but it was only in the late twentieth century that the law began to address the issue of protecting citizens from the harmful speech of one another.[35] This is a welcome development. There are problems with determining both of *Brandenburg*'s factors, but we can set them aside as being of little help with cases in which the imminent harms are part of the very fabric of an unjust society. Incitement to criminal action is itself a crime—independent of any dignitary harms it imposes.

The daily onslaught of misogynist speech and images[36] endangers women and causes significant social, psychological, and economic harms[37] to both our sense of well-being and our actual safety and development. Ubiquitous in patriarchal societies, misogyny is inherent in the structural norms that shape gender identities, relationships, economics, and politics—it is woven into the very fabric of society.[38] Despite its clarity, presence, and

29. 249 U.S. 47 (1919).
30. *Id.* at 52.
31. *Id.*
32. 395 U.S. 444 (1969).
33. *Id.* at 447.
34. *Id.*
35. *See* Richard Ashby Wilson & Jordan Kiper, *Brandenburg* in an Era of Populism: Risk Analysis in the First Amendment 34 (Feb. 6, 2019) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3330195 [http://perma.cc/ZU45-4PWC].
36. For a compendium of sexist and misogynist comments from the forty-fifth president of the United States, see Claire Cohen, *Donald Trump Sexism Tracker: Every Offensive Comment in One Place*, TELEGRAPH (July 14, 2017, 9:03 AM), https://www.telegraph.co.uk/women/politics/donald-trump-sexism-tracker-every-offensive-comment-in-one-place/ [https://perma.cc/5VNW-9PU3]; and see also Berit Brogaard, *12 Ways to Spot a Misogynist*, PSYCHOL. TODAY (Feb. 18, 2015), https://www.psychologytoday.com/us/blog/the-mysteries-love/201502/12-ways-spot-misogynist [https://perma.cc/4FSF-N4BZ].
37. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22–23 (1993). *See generally* Julia Gillard, Speech to Australian Parliament (Oct. 10, 2012) (transcript available at https://www.smh.com.au/politics/federal/transcript-of-julia-gillards-speech-20121010-27c36.html [https://perma.cc/DMN6-R3TF]) (denouncing misogyny in public life).
38. *See* Sopen B. Shah, *Open Season: Street Harassment as True Threats*, 18 U. PA. J.L. & SOC. CHANGE 377, 390–96 (2016); *see also* Maeve Olney, *Toward a Socially Responsible Application of the Criminal Law to the Problem of Street Harassment*, 22 WM. & MARY J. WOMEN & L. 129, 133–38 (2015). For an example of street harassment, see Rob Bliss Creative, *10 Hours of Walking in NYC as a Woman*, YOUTUBE (Oct. 28, 2014), https://www.youtube.com/watch?v=b1XGPvbWn0A [https://perma.cc/C9WT-D267].

dangerousness, most misogyny will fail the "clear and present danger" test time and again. Unfortunately, imminence tests like *Brandenburg* will not help dismantle systemic oppressions.

For anyone concerned with justice, the question is not *whether* something should be done about the misogynist onslaught girls and women encounter; the question is: *What* should be done, and *who* should do it? Supreme Court doctrine may favor counterspeech to tort remedies or criminalization, but to justify this we need a robust conception of what sorts of speech might have the power to counter oppressive speech, who can achieve it, and under what circumstances.[39] In setting policy, we cannot assume a speech encounter between equally powerful adults, each fully free to speak their minds and each with the backing of deep and broad social norms. Where inequality reigns, the odds are not in favor of someone who tries to combat the bad speech of the powerful with the more speech of the vulnerable.[40] This paper explores the mechanisms of counterspeech and the limits of the remedies counterspeech can provide. By understanding the very concept of misogyny and considering some mechanics of the ways language works, we can gain a better picture of the prospect of creating normative change through counterspeech.

I. TOXIC MISOGYNY

"Misogyny" is the ubiquitous common coin of the patriarchal realm. Perhaps no one has done more to focus attention on the power of words and images to harm women than MacKinnon. She pioneered sexual harassment law,[41] crafted and fought for anti-pornography legislation,[42] helped get rape recognized as a war crime through her testimony at the International Criminal Tribunal for Rwanda in *Prosecutor v. Akayesu*,[43] and so much more. In a

39. *See generally* Mary Kate McGowan, *Responding to Harmful Speech: The More Speech Response, Counter Speech, and the Complexity of Language Use*, *in* VOICING DISSENT: THE ETHICS AND EPISTEMOLOGY OF MAKING DISAGREEMENT PUBLIC 182, 182–99 (Casey Rebecca Johnson ed., 2018).

40. One might think policy should also address the bad speech of the vulnerable against the powerful, but the powerful (qua powerful) have a platform; their speech tends to carry the day.

41. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32–47 (1979) (introducing quid pro quo harassment versus harassment due to the conditions of work).

42. *See, e.g.*, Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 13 (1985); Winifred Ann Sandler, *The Minneapolis Anti-Pornography Ordinance: A Valid Assertion of Civil Rights?*, 13 FORDHAM URB. L.J. 909, 909–10 (1985).

43. Case No. ICTR-96-4-A, Judgment (June 1, 2001). *See generally* Catharine A. MacKinnon, *Defining Rape Internationally: A Comment on* Akayesu, 44 COLUM. J. TRANSNAT'L L. 940 (2006); Valerie Oosterveld, *Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court*, 12 NEW ENG. J. INT'L & COMP. L. 119 (2005); Helen Trouille, *How Far Has the International Criminal Tribunal for Rwanda Really Come Since* Akayesu *in the Prosecution and Investigation of Sexual Offences Committed Against Women? An Analysis of* Ndindiliyimana et al., 13 INT'L CRIM. L. REV. 747 (2013).

recent paper discussing the significance of MacKinnon's work, Susan Brison offered this focus on the power of language, saying:

> We're told they're 'only words,' but we live and die by them. We're born into them and made out of them. They welcome us to the world—whether harshly or warmly—and, if we're lucky, at the end of our days, they may help to ease our way as we leave it. In between, they undo and remake us, destroy and sustain us. They are never simply the construction we choose to put on things. They are our inheritance and our legacy, our ancestors and our descendants, our past, our future, and who we are now.[44]

On this constitutive view of the self, speech and images matter because the self is socially constituted by the words, images, and other social constructions that not only mediate our experiences but actually constitute experiences. Some speech and images enhance freedom and shape autonomy, which enables people to build the world of tomorrow. This is why freedom of expression matters. And yet, misogynist speech and images curtail women's freedoms, damage our autonomy, and limit our capacity to contribute to society now and in the future.[45] In *Only Words*, MacKinnon makes the argument that hate speech and pornography are better understood as discrimination than as defamation.[46] When most words and images that surround, shape, and even constitute us are misogynist, these should be seen as *simultaneously* defamatory and discriminatory. When these words and images are, so to speak, part of the very air we breathe, it becomes hard to see misogyny for what it is and a terrible challenge to figure out how to mitigate its harms. It sounds exaggerated and redundant to say "toxic misogyny," so we must first understand what misogyny is.

Merriam-Webster defines "misogyny" simply as "a hatred of women," which suggests an individual psychological state.[47] In an egalitarian society, a lone outlier who vilifies and disparages women might be a nuisance, an annoyance, or even a danger to others, but cannot alone constitute a toxic social situation. In such a case, our overall egalitarian norms would counter the outlier. The lone "incel"[48] who blames women for his loneliness and strikes out is distressing, but, so long as he remains an isolated and random phenomenon, he is not our subject. His ideology is misogynist, and his

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44. Susan Brison, *'We Must Find Words or Burn': Speaking Out Against Disciplinary Silencing*, 3 FEMINIST PHIL. Q., no. 2, 2017, at 1, 9–10.

45. *See* SANDRA LEE BARTKY, FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION 22–32 (1990).

46. *See generally* MACKINNON, *supra* note 24, at 3–43.

47. *Misogyny*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/misogyny [https://perma.cc/AK9Y-SKFV] (last visited Apr. 10, 2019). The *Oxford English Dictionary* offers "[d]islike of, contempt for, or ingrained prejudice against women." *Misogyny*, OXFORD ENGLISH DICTIONARY, http://en.oxforddictionaries.com/definition/misogyny [https://perma.cc/W4NY-ZTZF] (last visited Apr. 10, 2019).

48. The term "incel" refers to "the online community of 'involuntarily celibate' men radicalized by their shared mistrust of women." Rebecca Jennings, *Incels Categorize Women by Personal Style and Attractiveness*, VOX (Apr. 28, 2018, 9:00 AM), https://www.vox.com/2018/4/28/17290256/incel-chad-stacy-becky [https://perma.cc/752L-STJK].

actions might lead to punishable crimes, but the crimes are what would be punished, not the ideology.

When there is a movement of incels spreading an extremist ideology of oppressing women and declaring that violence is justified, then we are in the realm of overt and toxic misogyny.[49] This extreme example should not be our central case. These extremists are motivated by a variety of psychological needs that are exaggerations of ordinary heterosexist society. That is, they take assumptions about male entitlement and female availability to an extreme, and they act on them in ways that not only violate social norms, but break laws.[50] Just the same, misogyny is everywhere around us, so no misogynist stands alone, and the extremism is rooted in everyday assumptions and power dynamics.

Toxic misogyny is a feature of patriarchy's very structure. Accordingly, Andrea Dworkin's groundbreaking 1974 book *Woman Hating* never really addresses individual hate as a psychological state because her target is to develop "an analysis of sexism (that system of male dominance), what it is, how it operates on us and in us."[51] So, even as early as 1974, misogyny was being treated as *systemic*; it did not require a psychological state or a guilty mind, but it was instead rooted in patterns of dominance.[52] It is not an attitude of an outlier, but an intrinsic dimension of society.

In an influential 1983 essay, philosopher Marilyn Frye argued that the locus of sexism is in the system or framework, not in the individual act; she takes individual acts to be sexist insofar as they serve to support that system.[53] The system is an elaborate set of practices of "sex-marking" and "sex-announcing" that "divide the species, along lines of sex, into dominators and subordinates."[54] Discrimination is a precondition for this system of dominance to work. So we find ways to speak and act toward others that *mark* their sex, and we are each and all required to *announce* our own sex through patterns of speech, attire, comportment, attention, and more. No one needs to be *trying* to support the system; all it takes is behavior that coheres. Frye did not address the situations of nonbinary and genderqueer people, but her analysis shows why they are subjected to so much violence—because they are failing to support the discriminatory categories that uphold heteronormative patriarchy.[55]

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49. For a policy brief on the security issues raised by the rise of incel ideology, see generally Shannon Zimmerman et al., *Recognizing the Violent Extremist Ideology of 'Incels*,*'* WOMEN INT'L SECURITY, Sept. 2018, at 1. For further discussion, see also Amia Srinivasan, *Does Anyone Have the Right to Sex?*, 40 LONDON REV. BOOKS, Mar. 22, 2018, at 5; and Jia Tolentino, *The Rage of the Incels*, NEW YORKER (May 15, 2018), http://www.newyorker.com/culture/cultural-comment/the-rage-of-the-incels [https://perma.cc/94JE-ZTX9].

50. *See, e.g.*, MANNE, *supra* note 20, at 34–41 (analyzing Elliot Rodger, who uploaded a video explaining that he wanted to punish women before going on a killing spree).

51. ANDREA DWORKIN, WOMEN HATING 17 (1974).

52. *See id.*

53. MARILYN FRYE, *Sexism*, *in* THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 17, 38 (1983).

54. *Id.* at 29, 38.

55. *See id.*

Most recently, philosopher Kate Manne's trenchant theory of misogyny is akin to Frye's but with changed, ameliorative terminology.[56] Manne defines sexism as a form of ideology that distinguishes between men and women; it is about ideology and beliefs that discriminate.[57] So far, Manne and Frye agree, but for Frye, sexism is all in the practices, and beliefs are not the issue.[58] The patterns of sex-marking and sex-announcing that "divide the species, along lines of sex, into dominators and subordinates" might be seen as a form of ideology in practice.[59] Given that both are concerned with practices that damage women, we are still in friendly territory. Manne's originality is in seeing misogyny as about distinguishing good women from bad women, and punishing the bad.[60] Manne wants to dissuade us from thinking of misogyny as hate; she instead encourages us to see it as power. It is about punishing women who violate the norms of patriarchy. Girls and women are thus subjected to great "surveillance, scrutiny, and suspicion."[61] Manne says, "at the most general level of description, misogyny should be understood as the 'law enforcement' branch of a patriarchal order, which has the overall function of *policing* and *enforcing* its governing ideology."[62] Misogyny is thus coercive.[63] Since misogyny is systemic enforcement of patriarchal power and is not about individual hate, mens rea—a crucial criterion in most criminal law—will not generally apply. Individuals may be purposefully enforcing male dominance, but often they are just following social scripts and requiring others to do the same. Thus, there is often no intent to harm.

When we ask how misogyny harms women's speech and participation in shared social life, feminists, following MacKinnon,[64] have cited women's subordination and our silencing.[65] Many people find the subordination claim plausible and balk at silencing claims. Silencing claims address women's systematic exclusion from conversations, decision-making, and what Simone

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56. MANNE, *supra* note 20, at 78–84.
57. *Id.* at 79–80.
58. FRYE, *supra* note 53, at 38.
59. *Id.*
60. MANNE, *supra* note 20, at 263–67.
61. *Id.* at 64.
62. *Id.* at 63.
63. Louise Richardson-Self, *Woman-Hating: On Misogyny, Sexism, and Hate Speech*, 33 HYPATIA 256, 261 (2017).
64. *See generally* Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L.L. REV. 1 (1985) (discussing pornography's impact on the social status and treatment of women and advocating to define pornography as a civil rights violation).
65. *See* NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 83–106 (1995); Alisa L. Carse, *Pornography: An Uncivil Liberty?*, 10 HYPATIA 155, 163–67 (1995); Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 293, 300–28 (1993). *See generally* Ishani Maitra, *Subordinating Speech*, *in* SPEECH AND HARM: CONTROVERSIES OVER FREE SPEECH 94 (Ishani Maitra & Mary Kate McGowan eds., 2012) (arguing that racist hate speech can be authoritative and can subordinate people of color); Lynne Tirrell, *Pornographic Subordination: How Pornography Silences Women*, *in* ON FEMINIST ETHICS AND POLITICS 226 (Claudia F. Card ed., 1999) (examining a case in which pornographic images were used to sexually harass an individual and highlighting the lasting impact of that harassment).

de Beauvoir calls building "the world of tomorrow,"[66] by making our discursive moves impossible.[67] So, for example, Rae Langton introduced the concept of "*illocutionary disablement*" to explain how it is that when we do get to speak, our speech is often unable to achieve what we are aiming to achieve.[68] The concept of "illocution" comes from philosopher J. L. Austin, who distinguished the mere "locution," saying "I do," from illocution, in some contexts, making a marital vow.[69] Langton's illocutionary disablement is illustrated well by contexts of sexual negotiation, in which a woman thinks her locution of "no" issues a sexual refusal (the illocution) but her speech act is defined by the hearer as something else entirely, a veiled "come on."[70] Generally, the hearer's meaning wins. These mechanisms of illocutionary disablement silence our capacity to consent or refuse.[71] Notably, across contexts, dominant meanings prevail, and those dominant meanings undermine women's power to commit certain sorts of speech acts. There's a rich and growing philosophical literature on this.[72]

Along a different vein, sometimes women are operating with what philosophers, following Miranda Fricker, call "credibility deficit[s]."[73] We can utter the words, and our testimony may be item for item the same as that of a male counterpart, but gender norms undermine our credibility. Austin argued that many speech acts can become misfires or be rendered moot if the hearer does not respond in the right way; Austin called these responses "uptake."[74] This Article argues that uptake can be construed weakly or strongly. Weak uptake is simply a matter of grasping the speech act, recognizing the assertion, or understanding the illocutionary act. This is an epistemic recognizing. It occurs if the hearer "gets it," but it does not require further engagement or use. On a weak uptake analysis, an apology is still an apology even if the victim does not offer forgiveness in return. As long as the hearer understands what is being said and grasps that it is an apology (whether effective or not), the speech act counts as apologizing. Uttering apologetic words when the victim is asleep or knocked out, or in a language the speaker knows the victim does not understand, would make weak uptake impossible. If weak uptake is impossible, the very speech act is called into

66. SIMONE DE BEAUVOIR, THE ETHICS OF AMBIGUITY 82–83 (Bernard Frechtman trans., The Citadel Press 2d ed. 1964) (1948).

67. *See* Lynne Tirrell, *Authority and Gender: Flipping the F-Switch*, 4 FEMINIST PHIL. Q., no. 3, 2018, at 1, 16.

68. Langton, *supra* note 65, at 315–16.

69. J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 5 (1962). Locution and illocution are distinct from "perlocution" (for example, upsetting one's mom by marrying).

70. *See* Langton, *supra* note 65, at 315–16.

71. *See id.*

72. *See generally, e.g.*, Rebecca Kukla, *Performative Force, Convention, and Discursive Injustice*, 29 HYPATIA 440 (2014); Ishani Maitra, *Silencing Speech*, 39 CANADIAN J. PHIL. 309 (2009); Mary Kate McGowan, *Oppressive Speech*, 87 AUSTRALASIAN J. PHIL. 389 (2009).

73. MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 17 (2007); José Medina, *The Relevance of Credibility Excess in a Proportional View of Epistemic Injustice: Differential Epistemic Authority and the Social Imaginary*, 25 SOC. EPISTEMOLOGY 15, 16 (2011).

74. AUSTIN, *supra* note 69, at 138.

question as a misfire or perhaps an abuse of the conventions associated with that kind of action.

Strong uptake, conversely, adds appropriate engagement and completes the illocutionary act. A strong uptake requirement would say the apology only counts if the victim offers forgiveness in return. To illustrate a speech act that requires the hearer to reply in a particular way, a variety of what I am calling strong uptake, Austin gives the example of betting.[75] Sam can say, "I bet you $5 that it rains tomorrow," but the bet is only completed if Jordan gives it strong uptake by saying, "You're on!"[76] Thus the illocutionary act of betting is completed. Strong uptake requires consequent discursive action. One must use the illocution, either endorsing it or rejecting it. If Jordan said, "No deal," that would be strong uptake that *blocks* Sam's move. If Jordan wanted to *challenge* Sam's offer of a bet, he might say, "You don't even have $5." Blocking and challenging, as we will see in the next section, both undermine the completion of the speech act and, if successful, make it unavailable for use going forward.

Rae Langton has developed a conception of blocking harmful speech according to which the hearer resists what I am calling strong uptake.[77] David Lewis argued that hearers tend to accommodate the speaker's moves, which makes them count as fair play within the game and, thereby, changes permissible next moves.[78] Langton's concept of blocking is less direct than Robert Brandom's challenges, for the blocker refuses to accommodate the speaker's move and resists incorporating it into fair play.[79] Often this is by denying the speaker's presupposition. So, for example, if Fred says, "You throw like a girl," Ethel might block his presupposition (that this is a bad thing) by saying, "If you practice really hard, maybe you can throw this well someday." A direct challenge would be "What do you mean, 'throw like a girl?'" or "You shouldn't say 'throw like a girl.'" Blocking and challenging allow weak uptake and offer negations of what strong uptake would provide.

Credibility deficits are less direct than blocking or challenging, and they come in many forms. Consider Dr. Christine Blasey Ford's testimony at the Senate Judiciary Committee hearings on the nomination of Justice Kavanaugh to the U.S. Supreme Court.[80] Many of the men who sat in judgment said they believed her, thus admitting that they saw her clear

75. *Id.* at 36.

76. *Id.*

77. *See generally* Rae Langton, *Blocking as Counter-Speech*, *in* NEW WORK ON SPEECH ACTS 144 (Daniel Fogal et al. eds., 2018).

78. *See generally* David Lewis, *Scorekeeping in a Language Game*, 8 J. PHIL. LOGIC 339 (1979).

79. *See generally* Langton, *supra* note 77.

80. *See* Written Testimony of Dr. Christine Blasey Ford (Sept. 26, 2018), https://www.judiciary.senate.gov/imo/media/doc/09-27-18%20Ford%20Testimony%20Updated.pdf [https://perma.cc/SJ2A-N62Q].

credibility.[81] Yet their judgment was that her testimony did not matter.[82] The candidate could indeed have committed a crime—attempted rape—and they deemed that he would still be worthy of a lifetime seat on the Supreme Court. The message to women is clear: crimes against you are not evidence of unfitness for power and are not evidence of failed character or poor judgment. There was also the dicey political ploy of arguing, after the fact, that the Senate needed *evidence*, a move that Benjamin C. Zipursky shows to be ignorant of the law.[83] Zipursky reminds us,

> Dr. Ford's testimony, under oath, *was* evidence. It was not just allegations and accusations. Part of having a system of justice is having law that defines what can count as "evidence." Under the law of any state in the nation and federal law, her testimony counts as evidence. Once upon a time, a woman's testimony actually did not count as evidence. Today it does, because of centuries' old legal changes dismantling our profoundly sexist system.[84]

The broad sexism of American society weakened the force of Dr. Ford's speech. For all those who saw her as needing strong corroboration, for whom her words did not carry sufficient weight, she was speaking with a credibility deficit. The depth of misogyny and male privilege is shown in the fact that the senators did not even regard Justice Kavanaugh's behavior at the hearing to be conduct unbecoming of a judge.[85] It was actually in clear violation of the ABA Model Code of Judicial Conduct, especially canon 1.[86]

Misogynist speech takes many forms. Each delivers a dose of toxicity, but not all doses matter. Many could be brushed off, not taken up by those they aim to keep in place. Remember Manne's view that misogyny is the law enforcement branch of patriarchy; those who stay within bounds might not even notice such enforcement.[87]

"Toxicity" is the degree to which a substance can harm an organism,[88] so there will be variations in impact depending upon the state of the organism

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81. Britt Peterson, *Why Senators Believe Ford—but Still Side with Kavanaugh*, WASH. POST (Sept. 28, 2018), https://www.washingtonpost.com/outlook/why-senators-believe-ford--but-still-side-with-kavanaugh/2018/09/28/b0d9c68e-c27d-11e8-b338-a3289f6cb742_story.html [https://perma.cc/5ZSP-VDDZ].

82. *See id.*

83. Benjamin C. Zipursky, *Allegations and Evidence*, FORDHAM L. NEWS (Oct. 5, 2018), https://news.law.fordham.edu/blog/2018/10/05/allegations-and-evidence-the-basics/ [https://perma.cc/JU4P-E5YZ].

84. *Id.*

85. *See* 115 CONG. REC. S6637–43 (daily ed. Oct. 5, 2018) (statement of Sen. Murphy); *see also* Deanna Paul, *Kavanaugh's Evasive Behavior Probably Wouldn't Have Been Allowed in His Own Courtroom*, WASH. POST (Sept. 28, 2018), https://www.washingtonpost.com/politics/2018/09/28/kavanaughs-evasive-testimony-probably-wouldnt-have-been-allowed-his-own-courtroom/ [https://perma.cc/ZF26-V7GU].

86. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (AM. BAR ASS'N 2011) ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.").

87. MANNE, *supra* note 20, at 63.

88. *Medical Definition of Toxicity*, MEDICINENET, https://www.medicinenet.com/script/main/art.asp?articlekey=34093 [https://perma.cc/GU67-6H6R] (last visited Apr. 10, 2019).

encountering the toxin. A strong organism encountering a weak dose might not even notice it. This fits with linguist Victor Klemperer's observation that "[w]ords can be like tiny doses of arsenic: they are swallowed unnoticed, appear to have no effect, and then after a little time the toxic reaction sets in after all."[89] Writing as the Nazis were consolidating power in Germany, Klemperer raised the question: "And what happens if the cultivated language is made up of poisonous elements or has been made the bearer of poisons?"[90] Misogyny is just such a toxic element, omnipresent but with varying strains and degrees of virulence. Toxins have routes of delivery—via contact, ingestion, and the like—and so do discursive toxins.

Misogyny is delivered through words, images, and discriminatory actions, enforcing women's lower status, diminished authority and autonomy, and so much more. Calling misogyny "toxic" does not require that it feel like a punch in the nose. Keep the arsenic metaphor in mind: it helps remind us that ubiquitously accepted, even customary, harmful speech is taken without awareness of the cumulative effect of multiple doses. It is not clear how legally actionable such individual doses might be.

II. SPEECH AND COUNTERSPEECH

The classic location of the counterspeech position lies in a well-known statement by Justice Brandeis: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[91] Time matters. The context must allow for discussion and processes of mutual education. These high standards are not always available to the victim of toxic misogynist speech. Even accepting, for the moment, the Supreme Court's received opinion, we must recognize that the occasions on which counterspeech is appropriate are limited. This approach might assume (falsely) that participants have equal standing in the speech situation, and yet Mill actually argued that inequality was a strong reason to favor freedom of expression.[92] We should tackle the case of a vulnerable person facing a more powerful person or persons whose speech unjustly damages their well-being.[93]

This raises the issue of which kinds of counterspeech might stand a chance of blocking or challenging bad speech. Effective counterspeech might be an antidote to the toxins spread by the misogynist message. Not all counterspeech is effective, so it helps to understand what it takes to respond. Some background conditions, like identity factors and social position,

89. VICTOR KLEMPERER, THE LANGUAGE OF THE THIRD REICH 15–16 (Martin Brady trans., The Athlone Press 2000) (1975).

90. *Id.* at 15.

91. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

92. MILL, *supra* note 15, at 20–61.

93. This sets aside, for example, a judge's speech imposing a prison sentence on a defendant found guilty. The power imbalance would exist in this case, but the harm inflicted is considered to be what justice demands.

influence the impact of one's speech in a context. These conditions also influence what the initial speech act was doing. In this Part, I introduce some concepts from the philosophy of language as tools that might help in considering remedies. Robert Brandom has developed an account of challenges to assertions and inferences; if effective, these challenges deny the licenses that would otherwise be issued.[94] Similarly, Rae Langton is developing an account of blocking bad speech.[95] For Langton, blocking does not refute the bad speech or demand justification; instead, it refuses to accommodate its presuppositions, which takes away its power to influence further moves in the language game.[96] Those seeking to design remedies to toxic speech could be helped by considering challenges and blocking.

First, some very basic concepts are needed to understand how language works. Language is a social practice, probably our most constitutive one. It shapes and defines us. We enact norms and laws in language. This is why Lugones and Spelman argue for the importance of self-articulation.[97] Within discursive practices, think of the various subpractices as language games, as Ludwig Wittgenstein has taught us to do.[98] Language games are part of our way of life. Calling structured discursive behavior a "game" does not signify that it is frivolous or playful. Language games tend to be serious, purposive, and goal-oriented. They arise within and contribute to the activities that make our lives possible. Wittgenstein famously said that a language is a "form of life"; similarly, a language game must be considered in the context of the actions with which it is interwoven.[99]

Usually, language games have three main types of actions.[100] "Entrances" get us into the game, taking us from the world to language. Moving from perceptual observations to speech, our observations serve as evidence we can use once in the game. Within the game, some actions count as "internal moves" that license further actions and help us to get closer to our goals. These internal moves are patterns of inferences. Some actions do not count as moves, as when one scratches an itch while delivering a speech. It might distract, but unless it has been explicitly set up to do so, it does not count as a move. Finally, "exit moves" take us out of the game, moving from language to the world. With exit moves we see the power of language to

94. *See generally* ROBERT BRANDOM, MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT (1994) (investigating the nature of human language).

95. *See generally* Langton, *supra* note 77.

96. *See generally id.*

97. Lugones & Spelman, *supra* note 9, at 576.

98. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 11 (G. E. M. Anscombe et al. trans., Blackwell Publ'g 4th ed. 2009) (1953).

99. *Id.*

100. These three types of moves in language games were first articulated by Wilfrid Sellars. *See* Wilfrid Sellars, *Some Reflections on Language Games*, 21 PHIL. SCI. 204, 222 (1954). They were later developed by Robert Brandom. *See generally* BRANDOM, *supra* note 94. More recently, I have used both sources. *See* Lynne Tirrell, *Genocidal Language Games*, *in* SPEECH AND HARM: CONTROVERSIES OVER FREE SPEECH 174, 174–221 (2012) [hereinafter Tirrell, *Genocidal Language Games*]; Lynne Tirrell, *Toxic Speech: Toward an Epidemiology of Discursive Harm*, 45 PHIL. TOPICS 139, 142 (2017).

license actions and we see the causal harms that can be enacted by the inferential moves we make within the game.

These concepts work with all sorts of language games. Roughly applied to the legal system, we can see that a witness reporting a crime makes an entrance move into the criminal justice language game. An officer takes the witness's statements and writes a report. Perhaps the officer follows up with an investigation of her own and adds another report. These reports are sent to the district attorney, who draws inferences based on what has been said. Notice that the district attorney only has reports. If the case is deemed credible, maybe it goes to trial. We are still in the realm of inferences drawn from observations and testimonies. Along the way, though, some of these inferences compel physical actions such as collecting forensic evidence, executing search warrants, and so on. These actions result in more reports. To jump ahead, a trial judge issuing a sentence makes an exit move from all the evidence presented through discourse. This sentence results in compelled behavior for many parties involved in the case. The majority opinion issued by the Supreme Court is an exit move. It settles law for a long while.

In most arenas of life, not everyone enters every speech situation equally. This is sometimes appropriate and sometimes unjust. Taking the game metaphor seriously, I have developed the notion of "*game-assigned powers*."[101] These apply to positions taken or assigned as one enters a game and generally govern the moves one can make within the game as well.[102] In tennis, everyone enters the same way, and each player is entitled to make the same moves.[103] In soccer, if you enter as a goalie, you get the special power of being able to pick up the ball with your hands without penalty, as long as you are within a certain area of the field.[104] Game-assigned powers are obvious in a courtroom where, for example, entering as a witness, an attorney, or a judge generates different game-assigned powers to each party. Differential game-assigned powers become unjust when they are based on gender, race, sexual orientation, class, and other often socially salient identity factors.[105]

The rules of testimony—who can speak when, what can be said, what has to be asked, what counts as an answer, and so on—are highly codified by precedent, practice, and sometimes by law. For women, misogyny shapes our entry to nearly all speech situations. Identity factors often serve as what philosophers call "felicity conditions"[106] for game-assigned powers, and some identity factors disable moves that should be open to all players. The question arises, then, of how the law might make women's entrance to speech situations more just.

101. Tirrell, *supra* note 67, at 5–12.
102. *See id.*
103. *See id.* at 8.
104. *See id.*
105. *See id.* at 13.
106. *See, e.g.*, AUSTIN, *supra* note 69, at 105; Langton, *supra* note 65, at 301.

Misogynistic damage to our game-assigned powers is so ubiquitous, entrenched, and rarely noted that I doubt the law can do much. On the other hand, Zipursky's point that the law used to disallow all testimony from women, but now allows it, might generate hope for further improvements.[107] Also, one might think about the great inroads brought about by Title IX, which is not specifically about speech but about gendered activities in educational contexts.[108] Conceptual changes and increased testimony by women have, indeed, made inroads in the fight against misogynist speech. The development of the concept of sexual harassment,[109] laws that recognize that nonconsensual sex within marriage is actually rape,[110] and rape shield laws that prohibit questioning the rape victim about her sexual history[111] have all made enormous differences to the lives of women. Years before #MeToo, MacKinnon explained that "each woman who said she was abused looked incredible or exceptional; now, the abuse appears deadeningly commonplace. Before, what was done to her was sex; now, it is sexual abuse."[112] This kind of reconceptualization is important to fighting the injustices of misogyny and fostering greater equality. Even with shield laws in place, a deeper problem is how cross-examination proceeds.[113] Our tools from philosophy of language can help explain why. Equality in everyday life and equality before the law are both undermined by misogyny, which is expressed and enacted through words, speech acts, and the norms of acceptable engagement.

Speech is a special case, less amenable to monitoring and management than Title IX compliance. The problem of discursive practices is tremendously fine-grained. A woman might be able to speak and have her speech count as credible in some sense, and yet it might not actually count as the speech act that it would have been if issued by a man. It is not that illocutionary disablement stops her speech from achieving goals but that it stops her speech from being what it was issued as. MacKinnon explained this with respect to women testifying about their abuse in the pornography industry, and she expressed outrage and frustration that their testimony just became more pornography.[114] There's a cruel twist to the logic of such illocutionary disablement. Counterspeech might be able to create trends of resistance to illocutionary disablement. Highlighting unjust game-assigned powers in specific speech situations might be able to wear away these

107. *See supra* note 83 and accompanying text.
108. 20 U.S.C. § 1681 (2012).
109. *See* MACKINNON, *supra* note 41, at 32–47.
110. *See, e.g.*, Michele Goodwin, *Marital Rape: The Long Arch of Sexual Violence Against Women and Girls*, 109 AM. J. INT'L L. UNBOUND 326, 328 (2016).
111. *See, e.g.*, Kim Loewen, Note, *Rejecting the Purity Myth: Reforming Rape Shield Laws in the Age of Social Media*, 22 UCLA WOMEN'S L.J. 151, 151–53 (2015).
112. MACKINNON, *supra* note at 24, at 9.
113. *See* JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE, AND POWER 31 (2d ed. 2005).
114. MACKINNON, *supra* note 24, at 3–6.

automatic assignments. Two key forms of resistance are challenging and blocking.[115]

Each move within a language game changes the possible next moves that are available to other players. David Lewis argued that, with every conversational move we make, hearers tend to *accommodate* the presuppositions and assertions of speakers, which creates "permissibility facts" that serve as permissions for further speech.[116] Accommodating a move makes it count as fair play. Think of case law where the judicial affirmation of an argument makes it count as fair play in relevant future cases. Developing this further, Brandom identified a more robust theory of the moves within language games, treating each speech act as a licensing inference that in turn licenses further inferences, and so on.[117] For example, if I start talking about my sister, Pat, you can then talk about her based solely on my reference. Also, what I say *about* her will issue further licenses, entitling you to say more detailed things. If you are challenged on your claims, you can defer justification and say you got it from me. If you draw some additional inferences of your own, those inferences are still based on my speech. Counterspeech is built into this model in the challenges we are each entitled to make when our interlocutors make assertions. Challenges tackle bad speech head-on. If I start talking about my cat, you might say, "What are you talking about?! I know you have dogs!" This requires me to clarify, justify, or admit to the lie.

Internal moves can be toxic in many ways: through reductive classification, through highlighting or introducing nasty inferences, and through fostering unjust social divisions. The elements and moves within an inferential role can be everyday toxins, even if the exit-move actions are not yet undertaken. But their toxicity is most evident in the exit moves they license. As we have seen, challenging is something we tend to do within the language game, and it tends to address the assertions others make. We can also challenge licensed exit moves, and we can challenge someone's expressive commitments—commitments to the viability and value of whole modes of discourse. A student once told me that our feminism class, Feminism and Philosophy, enabled her to decide to challenge her boyfriend addressing her as "Bitch," as in "Yo, Bitch! Bring me another beer!" This awful speech act is interesting because it conveys misogyny through both its diction and demand. These are intertwined. His disrespectful terms of address cast her as lesser, and the demand casts her as his servant. Her response was, "There's no 'Bitch' around here. You will find the beer in the refrigerator." Her challenge to him is clear, and it hits on both the referential front ("don't refer to me that way, don't call me that") and the exit move ("you are not licensed to order me to serve you"). There is still something indirect in the challenge, which speaks to an important risk.

115. *See supra* notes 94–96 and accompanying text.
116. Lewis, *supra* note 78, at 346–47 (discussing the rules of accommodation).
117. *See generally* BRANDOM, *supra* note 94.

The speaker who insults and commands, as in this case, is certainly a bully. There is a risk that challenging him will result in a violent outburst. Bystanders often are not in a position to assess such risks and must respect that each hearer has to decide what to challenge, whether the challenge should be direct or indirect, and how to phrase it.

Focusing on exit moves emphasizes the actions speech can license and puts conduct in the forefront. My research into the changing speech practices in Rwanda in the years prior to the 1994 genocide of the Tutsi led me to focus on the action-engendering power of deeply derogatory terms.[118] Calling someone a snake or a cockroach is not ipso facto embarking on a campaign of genocidal extermination, but the licenses issued by such discursive moves include licenses for extermination and, thus, murder. It is a simpler step to go from calling someone "Bitch" to then demanding she serve you a beer.

On this picture of speech as action, misogyny lives in every step. First, women's entry to speech situations is limited, often quite dramatically. Once in a practice or game, we often face derogatory networks of inferences, assumptions, and presuppositions that deprive our speech of authority. In such cases, we think we are making the same moves as our male counterparts, and yet our speech is deprived of its legitimate force. That sometimes results from entering the speech situation with truncated game-assigned powers and sometimes from the accumulation of toxic inferences within the speech situation in the language game. Finally, we often are deprived of the power to make the exit moves we think we are making, such as explicitly withholding sexual consent.

Counterspeech in the individual case requires careful judgment of what was said, understanding what the speech act was (i.e., its illocution: whether it was, for example, an assertion, promise, threat, or imperative), and assessments of likely outcomes. Such determinations are complicated, but they matter. If we do not challenge false assertions, biased presuppositions, and sexist, racist, or other biased speech, we let their licenses stand. Others can easily take them up and run with them. For example, Ethel challenging Fred will not mean that Ricky cannot take up Fred's sexist license, but her challenge could render the license null and void or could require Ricky to work for it. Counterspeech is the primary way that we stop bad inferences in their tracks, and it is stronger than blocking.

CONCLUSION: LAW, LANGUAGE, AND NORMATIVE CHANGE

My concern has been widespread cases of gender-based disrespect, explicit claims as well as intimations that the rights of some do not matter, and other subtler expressions. Sandra Bartky calls these "intimations of inferiority";[119] we can see such intimations everywhere around us, targeting women, people of color, the physically and mentally disabled, those with

118. *See generally* Tirrell, *Genocidal Language Games*, *supra* note 100; Lynne Tirrell, *'Listen to What You Say': Rwanda's Postgenocide Language Policies*, 27 NEW ENG. J. PUB. POL'Y, no. 1, 2015, at 1.

119. Bartky, *supra* note 45, at 7.

fluid gender identities, and more. Such intimations are thoroughly normative and embedded in presuppositions and in practices of what can or cannot be said. Every society uses them to set boundaries of power, acceptability, and access. When these intimations are accompanied by a crime, like rape or sexual assault, the law clearly has a role (even if it is not particularly effective in either deterrence or punishment).

I have been suggesting that counterspeech is complicated, and yet important, by focusing more at the arena of private interactions, outside legal cases or questions of speech codes and bans. It would be hard to tailor such bans appropriately, even where they are most needed. We must remember that words are used in speech acts, acts of expression that are also actions done to and about other people. To treat speech as "only words" is to fail to grasp why we speak, what we do with our speech, and the impact speech has in the world. As MacKinnon argued,

> Words and images are how people are placed in hierarchies, how social stratification is made to seem inevitable and right, how feelings of inferiority and superiority are engendered, and how indifference to violence against those on the bottom is rationalized and normalized. Social supremacy is made, inside and between people, through making meanings. To unmake it, these meanings and their technologies have to be unmade.[120]

Laws could intervene at each stage of the three-part picture of language. The law might demand equal entry, like Title IX's demand for parity in educational and athletic opportunities[121] and the way women's testimony has been increasingly taken seriously at all stages of the legal system.[122] Getting members of socially vulnerable groups into the game matters, but then one has to make moves. The range of moves is often laid out by inferential roles already established by past speech acts and constrained by social hierarchies. Trying to find remedies against nasty internal moves—from language to language—will run afoul of the principle of viewpoint neutrality.[123] In sexual harassment cases, for instance, much of the nasty language and gossip that leads to actionable events is itself not actionable. Norms need to change. Changing our discursive practices is a crucial step in improving the climate and forestalling actionable events before the law can step in.

Those focused on legal remedies, like tort claims or speech prohibitions, are likely to focus on exit moves because these reveal the harms that our practices enact. Too often, however, a focus on exit moves shifts the focus onto conduct rather than speech. The law is designed for regulating conduct, but our question is about how to protect and promote gender equality within contexts of grave inequality. Protecting and promoting equality requires backpedaling to make changes in the action-engendering internal moves of

120. MACKINNON, *supra* note 24, at 31.

121. *See supra* note 108 and accompanying text.

122. *See supra* notes 83–84 and accompanying text.

123. Kagan, *supra* note 13, at 897–99 (distinguishing between viewpoint neutrality and low-value content, but ultimately concluding that determinations of low-value content cannot alone justify abandoning the principle of viewpoint neutrality).

our language games. We need to listen to what we say, unearth disparaging presuppositions, and challenge inferential roles that entrench inequality.

Through challenges we can recraft the inferential roles of our terms, the licenses we issue and revoke, and so on. In this way, we can change the norms that govern the language games we play. We have seen this with the loss of acceptability in using "boy" for grown men of any color. We have not yet seen it for "girl" or for images that subordinate and oppress women. Do we need laws to change the norms that govern language? Sometimes. Law is a special kind of speech that has enforcement power—it is backed by the power of the state, so it forces strong uptake. We cite the law, use it to structure other practices, and live and die within its limits. Without feminist legal theorists and activists, we would not have the grasp of sexual harassment that we now have. Gaining the words did not stop the crimes, but it did give us a framework for crafting new laws that have had an important impact on schools and workplaces. The power of law should not be gainsaid, but to end misogyny and rein in the steady onslaught of misogynist discourse and images, we need so much more than what law can do. We need to change the norms that govern our speech acts, images, and other discursive practices.