

Pornography: A Liberal's Unfinished Business

Rae Langton

Old wars about pornography and censorship have new armies in radical feminists. So Ronald Dworkin once remarked, defending the new relevance of his now classic liberal defense of free speech in his essay, 'Do We Have a Right to Pornography?' Dworkin was right about the new battles, but wrong about his argument, which on the new battle ground not only failed to justify the permissive conclusion he desired, but helped to justify the prohibitive conclusion he despised.¹ Pornography's traditional foes said pornography is immoral. Feminists said pornography is 'the graphic, sexually explicit subordination of women through pictures or words'.² Feminists said that pornography harms women, subordinates women, and silences women. In this context, Dworkin's old anti-moralist defense of pornography missed its mark.

Since then Dworkin has paid feminism the compliment of attacking directly the arguments of her 'armies', or of one soldier at any rate. He says that feminists are dangerously confused. He singles out Catharine MacKinnon for special attention. One of Dworkin's responses is his article 'Liberty and Pornography', which has become a new classic, gaining a wide readership through at least three separate publications; another is an influential review of MacKinnon's most recent book, *Only Words*, published under the title 'Women and Pornography'.³ Dworkin has

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1. Dworkin's remark is in *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) at 1 while 'Do We Have a Right to Pornography' is at 335-72. I have argued that from a Dworkinian theoretical perspective pornography ought to be censored; see 'Whose Right? Ronald Dworkin, Women and Pornographers' (1990) 19 *Phil. & Publ. Affairs* at 311-59, reprinted in Patrick Grim, Gary Mar & Peter Williams, eds., *The Philosopher's Annual 1990* (Atascadero, CA: Ridgeview, 1992) at 121-70, and (in part) in Sue Dwyer, ed., *The Problem of Pornography* (Belmont, CA: Wadsworth, 1995) at 91-107. Page references are to the 1990 version. The 'new armies' of which Dworkin spoke also included the Moral Majority, and against their attack on pornography Dworkin's argument is successful (on his assumptions).
2. Pornography is defined as 'the graphic sexually explicit subordination of women through pictures or words that also includes women dehumanized as sexual objects, things, or commodities; enjoying pain or humiliation or rape; being tied up, cut up, mutilated, bruised, or physically hurt; in postures of sexual submission or servility or display; reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture; shown as filthy or inferior; bleeding, bruised, or hurt in a context that makes these conditions sexual.' Catharine MacKinnon, 'Francis Biddle's Sister' in *Feminism Unmodified* (Cambridge, MA: Harvard University Press, 1987) at 176. cf. also MacKinnon, *Only Words* (Cambridge, MA: Harvard University Press, 1993). That is what I shall take pornography to be, ignoring for the purposes of this essay any political or philosophical problems presented by the definition.
3. 'Ronald Dworkin, 'Liberty and Pornography'' *The New York Review of Books* (15 August 1991) 12-15; published as 'Two Concepts of Liberty' in Edna & Avishai Margalit, eds., *Isaiah Berlin: A Celebration* (Chicago: University of Chicago Press, 1991) at 100-09; reprinted as 'Liberty and Pornography' in *The Problem of Pornography*, supra note 1 at 113-21. Page references are to *The New York Review of Books* version. Dworkin's review of MacKinnon's *Only Words* appeared as 'Women and Pornography' *The New York Review of Books* (21 October 1993) at 36, 38, 40-42.

become a leading figure in the liberal response to MacKinnon's challenge, but despite these more recent efforts he has still failed to refute those feminist arguments about harm, equality, and silence. While his earlier argument was altogether irrelevant to the feminist battles, Dworkin's new arguments are not altogether irrelevant—but they are inconsistent, equivocal, and (yes) dangerously confused. The feminist arguments offered by MacKinnon thus remain unanswered.

To prohibit or censor pornography would be to deprive some people of a liberty, in particular, the freedom to speak. This is not uncontentious, but it can perhaps be taken as common ground between most liberals and most feminists.⁴ In arguing that pornography harms, or subordinates, or silences women, feminists argue that pornographers' freedom to speak must be weighed against the harm it causes women, or the threat it poses to women's equality, or the threat it poses to women's freedom to speak. There are potential conflicts: pornographers' liberty and women's safety from harm; pornographers' liberty and women's equality; pornographers' liberty and women's liberty.

Dworkin considers all three kinds of feminist argument, and there is a special focus on the third. MacKinnon argued that feminist anti-pornography legislation is inspired by the very speech values protected by law: 'The free speech of men silences the free speech of women. It is the same social goal, just other people'.⁵ Dworkin finds this third strategy especially 'paradoxical': a free speech argument *against* pornography? A conflict 'within the idea of liberty'? Dworkin makes much of the alleged paradox, suggesting once that the silencing claim is less than 'cogent'.⁶ This is needless mystery-mongering, as Dworkin's own examples illustrate. A judge who silences a heckler weighs up one person's liberty against another's without implying a contradiction 'within the idea of liberty'. There is no paradox. What is true is that the third feminist argument, that *pornography silences*, is of particular dialectical interest in a context where speech is especially protected; that is why Dworkin is anxious to show that it is 'dangerously confused'. But it is not confused. I have elsewhere offered a defense of MacKinnon's argument that pornography silences, and in the last part of this paper I want to show that Dworkin's attack leaves the silencing argument unscathed.⁷

4. Not everyone agrees that pornography is speech, but for present purposes I accept that it is. Not every feminist is sympathetic to MacKinnon's arguments either, but for present purposes I shall not discuss her feminist critics. And I shall ignore the admittedly important fact that much feminist argument aims not at censorship, but at civil actionability.

5. MacKinnon, *Feminism Unmodified*, *supra* note 2 at 156, italics deleted.

6. 'Women and Pornography', *supra* note 3 at 40.

7. MacKinnon's argument about silence is defended, and Dworkin's response criticized, in my paper 'Speech Acts and Unspeakable Acts' (1993) 22 *Phil. & Publ. Affairs* at 293-330, reprinted in Tom Campbell & Wojciech Sadurski, eds., *Freedom of Communication* (Aldershot: Dartmouth, 1994), and (revised and abridged) in Hugh LaFollette, ed., *Ethics in Practice* (Cambridge, MA and Oxford: Blackwell, 1997) (page references are to the 1993 version); in Jennifer Hornsby & Langton's 'Free Speech and Illocution' (1998) 4 *Legal Theory* at 21-37; and in Hornsby's 'Speech Acts and Pornography' (1993) 10 *Women's Phil. Rev.* at 38-45, reprinted with a postscript in *The Problem of Pornography*, *supra* note 1 at 220-32 (page references are to the latter version), 'Illocution and its Significance' in S.L. Tsohatzidis, ed., *Foundations of Speech Act Theory* (London: Routledge, 1994), and 'Disempowered Speech' (1995) 23 *Phil. Topics* at 127-47.

The feminist arguments about harm and equality both get short shrift from Dworkin in the papers we are considering, and they too (I shall argue) remain likewise unscathed. In Section 1 I attend very briefly to the argument about harm, chiefly to set the record straight on a matter of detail. In Section 2 I attend to the argument about equality: the argument which has traditionally occupied centre stage for a feminist case against pornography, and one whose motivating value—a principle of equality—has also occupied centre stage for Dworkin's own political philosophy. In Section 3 I take up the argument about women's liberty and women's silence. My aim throughout will be to expose some errors in Dworkin's discussion, set the record straight, and more: I want to show that, notwithstanding the ferocity of his attack, Dworkin is ultimately no real foe to the radical feminists—and no real friend to the traditional liberal. For the feminist, he is a sheep in wolf's clothing; for the liberal, the reverse. If Dworkin would like to say otherwise, then his task is barely begun.

1. Harm

There is, says Dworkin, no persuasive evidence that pornography harms women by increasing the danger of sexual violence, though he concedes that it 'weakens critical attitudes' to sexual violence. Some might wonder whether 'attitudes' have implications for actions, but Dworkin is sanguine. He appeals to expert testimony that pornography threatens no harm to women. In both articles he cites the authoritative opinions of the Williams Report, and of the Circuit Court which found MacKinnon's anti-pornography ordinance unconstitutional. Dworkin has a selective ear when he listens to those opinions. We actually find this in the opinion of the Court:

We accept the premises of this legislation. [Pornography] tends to perpetuate subordination [which] in turn leads to ... insult and injury at home, battery and rape on the streets.⁸

And we actually find this in the Williams Report: 'films, even those shown to adults only, should continue to be censored', especially films which

reinforce or sell the idea that it can be highly pleasurable to inflict injury, pain or humiliation (often in a sexual context) on others. It *may* be that this very graphically presented sadistic material serves only as a vivid object of fantasy, and does no harm at all. There is certainly no conclusive evidence to the contrary. But there is no conclusive evidence in favor of that belief either, and in this connection it seems entirely sensible to be cautious.⁹

8. *American Booksellers, Inc. v. Hudnut* 771 F 2d 329 (7th Cir. 1985). This passage is omitted in Dworkin's quotations of the judge's words, although it is alluded to briefly in a footnote, where Dworkin describes the Court's acceptance of the premises of the legislation as 'a confused passage', and then denies in any case that the passage concerns sexual violence ('Liberty and Pornography', *supra* note 3 at 13).

9. Williams Report: Home Office, *Report of the Committee on Obscenity and Film Censorship*. Cmnd. 7772 (London: Her Majesty's Stationery Office, 1979) at 145-46.

These opinions do not say pornography causes no harm. The Williams Report placed the burden of proof against the supposition that (some) pornography causes no harm; the Court said pornography (indirectly) leads to battery and rape. So Dworkin misleads his readers about expert opinion on harm. That is not only a confusion, but a potentially dangerous confusion.

2. Equality

A feminist argument that pornography threatens women's equality deserves careful attention from a philosopher who takes equality to be the starting point of liberal political philosophy—or so one might imagine. The equality argument has always been central to MacKinnon's case against pornography. It is here that MacKinnon challenges the American legal system: she says 'the law of equality and the law of freedom of speech are on a collision course in this country',¹⁰ and some liberals have agreed with her. Bernard Williams, for example, has said that her claim is no exaggeration.¹¹ Despite all this, Dworkin's dismissal of the equality argument is swift, especially in the earlier of the two articles we are considering. But what exactly is the feminist equality argument?

In considering the philosophical aspects of political argument Dworkin, in his broader philosophical work, is sometimes careful to distinguish two distinct roles that equality can play in political argument. He says equality can be invoked as a *right*; and it can be invoked as a *goal*. With this distinction in hand, the feminist argument about equality could potentially be construed in two ways.

(1) Pornography violates women's *right* to equality, so it should be prohibited. This, in Dworkin's terms, would be an argument of *principle*.

(2) Pornography works to undermine women's equality, according to an empirical, causal hypothesis; so a government aiming to promote equality as a *goal* is justified in prohibiting pornography. This, in Dworkin's terms, would be an argument of *policy*.

The stronger of these two argument forms would be the first, for Dworkin. If rights are trumps, the first gives women a trumping argument against pornography. If rights are trumps, the second argument, the argument of policy, is potentially vulnerable to a trumping counter-argument of principle. Now it is a strange but notable fact that Dworkin nowhere, to my knowledge, considers a feminist *rights*-based argument against pornography. This is surprising, given that the courts were obliged to consider precisely the question of whether pornography violates women's *right to equality* under the Fourteenth Amendment of the U.S. Constitution. Dworkin interprets the equality argument in the weaker of the two ways just described. He construes the feminist 'egalitarian' argument in general causal terms, and he appears to accept its causal premise, at least for the sake of argument. The feminist 'egalitarian' argument is that 'pornography is in part responsible ... [for

10. *Only Words*, *supra* note 2 at 71.

11. Bernard Williams, 'Drawing Lines' (Review of MacKinnon's *Only Words*) (1994) 16 (9) *London Review of Books* at 9-10.

a] general and endemic subordination', and this is 'a matter of causal connection'.¹²

If pornography contributes to the general subordination of women ... then eliminating pornography can ... be defended as serving equality.¹³

Thus construed, the feminist argument is analogous to an argument justifying a reverse discrimination policy, a policy that will arguably promote equality.¹⁴ Dworkin himself discusses this kind of argument in an early paper, 'Reverse Discrimination', in which he contrasts the following two cases. Sweatt was denied admission to a law school on the grounds that he was black. De Funis was denied admission to a law school on the grounds that his scores were too low; but had he been a member of a disadvantaged minority group, he would have been admitted under the school's reverse discrimination policy. Each complained that his right to equality had been violated. Dworkin argues that Sweatt complained rightly, and De Funis wrongly.

Sweatt, says Dworkin, complained rightly. The policy of racial segregation which excluded him but not others was broadly utilitarian: the school was probably motivated (in part) by a belief that alumni preferred the school to be white only, and so did the white students. But the alumni and student preferences depended on racist views about the inferior worth of blacks—or at least, given the background of racial prejudice, there is some reason to suspect that they did. Dworkin calls such preferences *external*, and he argues that to count such preferences is to violate the founding principle of political morality, the principle of equality. So Sweatt has a right to equality, which trumps the discriminatory policy that excludes him from the school. He has a right to admission.

De Funis, says Dworkin, complained wrongly. The policy of reverse discrimination which excluded him but not others relevantly like him was motivated by a certain ideal of equality: the school was acting on an (admittedly fallible) causal hypothesis that a reverse discrimination policy was a means towards the goal of improved social equality. The idea was not that members of a disadvantaged group had an equality-based *right* to preferential entry, but that the school could permissibly pursue a *goal* of improved social equality. Does de Funis have a right to equality which is violated by this policy? No, says Dworkin. The policy was not utilitarian, and was not based on racist preferences. It was not based on preferences that are external—preferences that depend on a view that certain groups of people have an inferior worth. Nor was it inegalitarian in some procedural way. So de Funis has no right against the policy, and hence no right to admission.

The rights-based and the goal-based feminist arguments about equality each have

12. 'Liberty and Pornography', *supra* note 3 at 14.

13. 'Women and Pornography', *supra* note 3 at 40.

14. See Ronald Dworkin, 'Reverse Discrimination' in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) at 223-39, for the distinction between rights-based and goal-based arguments of equality. Dworkin defends a goal-based strategy for justifying reverse discrimination policy. The general distinction between goal-based and rights-based arguments, and the relation of the latter to equality, is discussed in much of Dworkin's work, but see especially 'What Rights Do We Have?' in *Taking Rights Seriously* at 266-78.

possible models here. Women may have a right to equality which defeats a policy of permitting pornography, just as Sweatt has a right to equality which defeats the segregation policy. And if an equality-promoting policy of reverse discrimination is permissible, as the case of de Funis shows, then so too may be an equality-promoting policy of prohibiting pornography. That is what I argued in 'Whose Right? Ronald Dworkin, Women and Pornographers', it is worth outlining once again what I present there in detail.¹⁵ Dworkin believes he has answered the feminist argument about equality and pornography. Let us see whether that is so.

First, a feminist rights-based equality argument against pornography. We begin by noting there is already a policy of a certain kind in place: a policy of permitting pornography. Women, *ex hypothesi*, are disadvantaged by this policy. The policy may well be there in part because many people want pornography, and many people want to be able to make a profit from selling pornography. There may well be a broadly utilitarian basis for the policy, just as there was for the policy of racial discrimination which disadvantaged Sweatt. But preferences for pornography seem to depend on a certain view about the inferior worth of a certain group of people, namely women: or at least, given the background of prejudice against women, there is some reason to suspect that they do. If so, they are, by Dworkin's own lights, external preferences, in the way that preferences of white students for company of their own race are external preferences. So the policy of permitting pornography rests on external preferences. So women have rights against the policy, and pornography should not be permitted.

Has Dworkin offered a response to this argument? I think not; certainly not to my knowledge, and certainly not in the two pieces we are considering, which are devoted to answering the feminist challenge. For a philosopher who sets such store by the right to equality this omission is surprising. As we noted, rights-based arguments are, by Dworkin's lights, the strongest arguments, since rights are trumps. If Dworkin has not considered a rights-based argument against pornography, he has not considered the feminist argument which, by his lights, should be the strongest. It is always tempting to find an interpretation of one's target that is not the strongest, by one's own lights. But it is not fair, or even wise. Here, I say, is a further piece of unfinished business.

Now, a feminist goal-based equality argument against pornography. In the two articles we are considering, Dworkin takes seriously the hypothesis that pornography promotes women's inequality: that 'pornography is in part responsible ... [for a] general and endemic subordination', and that this is 'a matter of causal connection'.¹⁶ Pornography works insidiously 'to damage the standing and power of women within the community'. When Dworkin says, 'If pornography contributes to the general subordination of women ... then eliminating pornography can ... be defended as serving equality,'¹⁷ he construes the feminist equality argument as a goal-based argument based on this empirical hypothesis. According to his version

15. Langton, 'Whose Right?', *supra* note 1 at 311.

16. 'Liberty and Pornography', *supra* note 3 at 14.

17. This and the preceding quotation are from 'Women and Pornography', *supra* note 3 at 40.

of the argument, a government which hopes to prevent the inegalitarian effects of pornography, and thereby promote the *goal* of equality, can prohibit pornography. So far the argument resembles one of Dworkin's own: a law school acting in pursuit of the goal of social equality can have a policy of reverse discrimination—provided no rights to equality are violated. The next step should be to think about the pornography argument as Dworkin thought about the reverse discrimination argument. We should ask whether the policy of prohibiting pornography, despite its apparent motivation in the goal of equality, may nonetheless threaten equality by violating someone's right to equality.

Instead, there is a false start. Dworkin initially does something remarkable. In both articles he says: if pornography does pose a conflict between liberty and equality, as feminists allege, then that is a conflict that liberty must win. If there were a conflict between liberty and equality, it could be 'resolved simply on the ground that liberty must be sovereign'.¹⁸

[I]f we must make the choice between liberty and equality that MacKinnon envisages—if the two constitutional values really are on a collision course—we should have to choose liberty.¹⁹

This pronouncement would not be remarkable coming from the Court, which saw the issue in precisely those terms when it trumped women's equality by pornographers' liberty. It would not be remarkable coming from those liberals who take civil liberties such as free speech to be fundamental, and absolute. But it *is* a remarkable pronouncement, coming from Dworkin: from a philosopher who has long taught that if there is ever a conflict between liberty and equality, that is a conflict which liberty must *lose*.²⁰ There is a startling inconsistency here, and 'Liberty and Pornography' leaves the reader with no better answer than this.

In 'Women and Pornography' Dworkin goes further and considers the crucial question of whether the 'egalitarian' feminist policy, despite its apparent motivation in equality, might nonetheless threaten someone else's right to equality. He concludes that there is no actual conflict between pornographers' liberty and women's equality: the right to pornography stems after all from the pornographers' *right to equality*.

First Amendment liberty is not equality's enemy, but the other side of equality's coin.²¹

Pornographers have an equal right to participate in forming the moral environment: no one may be prevented from influencing the shared moral environment on the grounds that his tastes and opinions disgust others. This is the 'right to moral independence' described by Dworkin in his 1981 defence of the right to pornography, and, like all rights, it is derived from the right to equality. So it is censorship, after all, not pornography, which conflicts with equality.

18. 'Liberty and Pornography', *supra* note 3 at 14.

19. 'Women and Pornography', *supra* note 3 at 41.

20. Dworkin, 'What is Equality? Part 3: The Place of Liberty' (1987) 73 Iowa L. Rev. at 9.

21. 'Women and Pornography', *supra* note 3 at 42.

This argument is consistent with Dworkin's general commitment to equality, and hence an improvement on his first false start. There is unfinished business here though. Suppose we grant that there is an equality-based right to moral independence of the kind Dworkin describes, and suppose that everyone, including pornographers, has such a right. How does this right defeat the feminist argument about equality? A superficial glance might suggest it presents, not a trump card, but a competing claim of equality: now we have *two* equality-based arguments to balance, one for women, one for pornographers, with no clue given as to how to balance them. It takes a well-informed and charitable gaze to detect the implicit principle Dworkin states explicitly only elsewhere:²² namely, that any argument which invokes *equality as a right* must trump an argument that invokes *equality as a goal*. Feminists invoke equality as a goal; pornographers invoke equality as a right; so pornographers win.

Not even this well-informed and charitable gaze will save Dworkin's argument, however. Dworkin has shown, let us suppose, that pornographers have, in virtue of their right to equality, a right to moral independence, of the kind demonstrated in 'Do We have a Right to Pornography?'. But this right has no purchase whatsoever on the feminist goal-based equality argument against pornography, as we can show. To see why, we need to consider more closely what this particular right is. It is no absolute right to free speech: it is a right not to be prevented from influencing the moral environment, *on the grounds that one's tastes and opinions disgust others*. Now although Dworkin famously claims to be taking rights seriously, the rights he identifies are very sensitive to context and background conditions, and hence very vulnerable. It is crucial, for Dworkin, that any claims to rights must be identified against the backdrop of the countervailing argument that threatens them. One never has a right, *simpliciter*, but always a right with respect to a particular kind of political argument. In arguing for the pornographer's 'right to moral independence', Dworkin imagined a background utilitarian argument for censorship, based on moralistic preferences of people who have contempt for pornographers and their way of life. Such preferences are external, so pornographers have rights against a utilitarian policy of censorship. (Compare the structurally analogous argument about segregation: the preferences of white law students are external, so Sweatt has rights against a utilitarian segregation policy.) This sensitivity of rights to context makes it important for Dworkin to be precise about just what the feminist argument is. As he has described it, it is an argument of policy, whose goal is social equality: pornography contributes to a climate of inequality, so prohibiting pornography will probably help to make society more equal.

The crucial point is this: the feminist goal-based argument—as described by Dworkin himself—does not say pornography should be prohibited *because it disgusts people*. The argument is based on a causal empirical hypothesis: an admittedly fallible hypothesis about what is likely to happen if pornography is prohibited. On that hypothesis, society will become more equal if pornography is prohibited. The argument is *not* based on a claim that pornography disgusts and offends. Facts about

22. For example, in 'Reverse Discrimination', *supra* note 14.

current attitudes or preferences of people are not part of its justifying reason.

We can put the point again this way. If nobody found pornography to be disgusting or offensive, that would make no difference to the reasoning of this feminist equality argument. It does not depend on women's disgust. It does not depend on women's offense. It depends only on the causal, empirical hypothesis about the likely effect of a prohibitive policy on social equality. One might object to the equality argument by saying that the empirical hypothesis is implausible. One might object by saying that a government should not be in the business of actively pursuing ideals like that of social equality. But one cannot object as Dworkin objects. One cannot object by saying there is a right which protects a group from moralistic preferences. Dworkin's 'right to moral independence' is, despite its generic-sounding label, a specialist tool, a weapon which can be used only against a moralistic threat.

Since the right cited by Dworkin is irrelevant to the goal-based feminist equality argument, it gives us no reason at all to reject it. And since the feminist goal-based equality argument is structurally identical to the argument for reverse discrimination which Dworkin himself endorses,²³ I conclude that Dworkin has every reason to endorse it himself. If Dworkin thinks otherwise, he needs to say why. Here is yet more unfinished business.

There is a possible diagnosis for the trouble here. Dworkin thinks the 'right to moral independence' is relevant to feminist argument, because he has simply assimilated the feminist argument to the old moralistic argument about offense and disgust. This assimilation is apparent in 'Women and Pornography'. An argument about equality simply *slides* into an argument about disgust and offense. From the alien chrysalis of women's equality emerges the ever-familiar moth of moralism, a most peculiar metamorphosis. Just watch.

(a) *Equality*: Dworkin states the feminist goal-based 'egalitarian' argument clearly to begin with. He says, recall, that according to feminist 'egalitarian' argument, pornography works insidiously 'to *damage the standing and power* of women within the community', and that

If pornography contributes to the general *subordination* of women ... then eliminating pornography can ... be defended as serving *equality*.²⁴

As the italicized words show, this is unambiguously an argument about equality.

(b) *The Slide*: Dworkin says that if the feminist 'egalitarian' argument were taken seriously,

Government could then forbid the *graphic or visceral or emotionally charged* expression of any opinion or conviction that might *reasonably offend a disadvantaged group* ... Courts would have to balance the value of such expression ... against the damage it might cause to the *standing or sensibilities* of its targets.²⁵

23. In 'Reverse Discrimination'. Dworkin has not, to my knowledge, changed his mind about the conclusion of that paper.

24. 'Women and Pornography', *supra* note 3 at 40, emphasis added.

25. *Ibid.*, emphasis added.

Here the italicized words show that we have an uneasy mixture: there is talk of equality in the suggestions that women are 'disadvantaged', and that their 'standing' may be damaged by pornography; but the new talk of emotion and offense and sensibilities gives hint of what is to come.

(c) *Disgust and Offense*: Dworkin says that the feminist 'egalitarian' argument violates the principle that

no one may be prevented from influencing the shared moral environment, through his own private choices, tastes, opinions and example, just because these tastes or opinions *disgust* ... [The argument] allows a majority to define some people as *too corrupt or offensive* ... to join in the informal moral life of the nation.²⁶

The italicized words show the final metamorphosis. Dworkin's interpretation of the feminist equality argument is this, in short. Feminists say pornography subordinates women; that is, it damages the standing and power of women; that is, it damages the standing and sensibilities of women; that is, it disgusts and offends women.

Such apparent equivocation, in the work of a leading liberal philosopher, is bewildering. But it disguises two things. First, it disguises Dworkin's continued failure to confront the feminist arguments of equality: so that, for all Dworkin has shown, those arguments do indeed establish the conclusion that pornography should be prohibited. With the disguise gone, we see that Dworkin is not, after all, a foe to radical feminists, but a friend. His principle of equality does not undermine MacKinnon's conclusion, but vindicates it, in the ways I have suggested. This raises the hope of a real rapprochement between feminism and a certain liberalism. Second, it disguises the weakness, for more traditional liberals, of Dworkin's defense of free speech: if liberals want resources to combat the perceived perils of 'political correctness', they will not find them here. For all Dworkin has shown, the right to free speech works only when confronted with moralism, and offers no reply whatsoever to restrictions on speech motivated by equality, even by equality as a goal. With the disguise gone, we see that Dworkin is not, after all, a friend to those liberals, but a foe.

In sum, then, Dworkin has considered a feminist argument about equality and pornography, construed it in the weaker of two possible ways (weaker by his lights, that is), and, through apparent equivocation and bad philosophical management, has failed to answer even this. The goal-based equality argument against pornography stands unrefuted—though not for want of trying. And the rights-based equality argument against pornography stands unrefuted—for want of trying.

So much, then, for Dworkin's dismissal of the argument about equality. I want, now, to focus on the feminist argument he discusses at some length in both articles: the argument that pornography conflicts with women's *liberty*—the argument which pits the pornographers' freedom to speak, not against women's safety, or women's equality, but against women's liberty, and in particular, women's freedom to speak.

²⁶ *Ibid.* at 41, emphasis added.

3. Liberty

One traditional response to a threat to free speech is to say speech should be fought with more speech. This supposes that the parties hurt by the speech are free to fight back: that those hurt are themselves free to speak. But if the speech in question silences the parties who are hurt, then speech cannot be fought with more speech. So the claim that pornography silences women has an important role to play in political argument. In considering the anti-pornography legislation, courts had to consider the force of the argument about silence: they had to ask whether pornography 'operates self-entrenchingly, disabling its natural enemies—its victims—from countering it with effective speech of their own'.²⁷ In what follows I focus on feminist argument about women's liberty, first construed rather generally, and then construed as an argument that pornography silences women. I want to consider the role it plays in Dworkin's thinking about pornography; I want to consider what the silencing argument really amounts to—how, on a certain understanding of speech and silence, pornography might very well disable women's speech; and I want to show how Dworkin's response to the argument fails.

There is a special focus on liberty in Dworkin's 'Liberty and Pornography', since the essay was written for a collection in honour of Isaiah Berlin, whose work on liberty—particularly in 'Two Concepts of Liberty'—has shaped our philosophical landscape.²⁸ Dworkin explains Berlin's 'two concepts' thus. Negative liberty means not being obstructed by others in doing what one would wish to do. Positive liberty means the power to control or participate in public decisions, including the decision how far to curtail negative liberty; positive liberty is self mastery. Berlin said we should distinguish negative from positive liberty. He said gross abuses of negative liberty had historically been made in the name of positive liberty, and this was wrong. Dworkin says that the liberty protected by First Amendment law is a negative liberty: the right to free speech. And he hopes to show the value of Berlin's distinction by using it to unmask a contemporary threat. For in his eyes it is now feminists who threaten liberty with the abuse that Berlin feared: it is feminists who threaten the negative liberty of pornographic free speech in the name of women's liberty. Dworkin thinks Berlin can help us rescue pornography; and he seems to think that showing this would be a fitting tribute.

There is something Procrustean, to put it mildly, about Dworkin's enterprise in this paper. The anti-censorship conclusion is the same as in his 1981 defence of a right to pornography, but the argument has been forced into a frame quite foreign to Dworkin's own political philosophy. Here Dworkin affirms what he elsewhere denies: the sovereignty of liberty, and the independence of liberty from equality. He affirms the sovereignty of liberty in the passage we looked at earlier: a conflict between equality and liberty could be 'resolved simply on the ground that liberty

27. Discussed in Frank Michelman, 'Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation' (1989) 56 *Tenn. L. Rev.* at 299.

28. Isaiah Berlin, 'Two Concepts of Liberty' in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969); the collection is *Isaiah Berlin: A Celebration*, *supra* note 3. In what follows I consider Berlin as interpreted by Dworkin.

must be sovereign'.²⁹ He elsewhere denies it, as I said: if there were a conflict between equality and liberty, liberty would lose.³⁰ Here he affirms the independence of liberty from equality when he celebrates the 'the striking combination of clarity and sweep' in Berlin's famous words:

Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience.³¹

Elsewhere Dworkin denies it. He denies that 'liberty' is 'not equality'. He says liberty *is* equality. Liberties, including freedom of speech, are all to be derived from the founding 'postulate of political morality', which is a principle of equality.³² To celebrate Berlin's words is to celebrate the opposite of what Dworkin believes. The only thing 'Liberty and Pornography' has in common with Dworkin's previous defense of a right to pornography is its conclusion. While the anti-censorship conclusion is just the same, the argument is couched in principles alien to Dworkin's philosophy, principles borrowed from a liberal philosophy that is not his. There is a disquieting lack of fit.

Readers may be forgiven for finding in this lack of fit a hint of disingenuity. Readers may be forgiven for finding a hint of cynicism in Dworkin's apparent readiness to let his conclusions be the constants and his arguments the variables. That readiness is a temptation to which we are all heir, but it is sensible to resist it when the price of succumbing is contradiction. Readers may be forgiven for finding in this strange *mélange* of constancy and inconstancy a philosophy that cares more about agenda than about principle, a philosophy which takes principle seriously only in rhetoric, a philosophy for which argument has the role of *post-hoc* rationalization. But charity demands indulgence. Perhaps a philosopher confronted with the exigencies of a *Festschrift* is entitled to a certain license, entitled to wear a borrowed mantle for a special occasion. And if the mantle does not quite fit? Well, let us turn the blind eye of tact.

Feminists say that the liberty of pornographers must be weighed against the liberty of women. If pornography threatens women's liberty, what liberty does it threaten? Dworkin distinguishes two feminist arguments about liberty, in line with Berlin's two distinctions. There seems to be a feminist argument that pornography deprives women of a *positive* liberty, by preventing them, in a general way, from being 'their own masters'; and there seems to be a feminist argument that pornography deprives women of a *negative* liberty, by *silencing* them.

Dworkin considers the view that pornography thwarts women's positive liberty: that it prevents women from fully participating in public life, by constructing women in the shapes of male fantasy. He quotes MacKinnon: 'Men treat women

29. 'Liberty and Pornography', *supra* note 3 at 14.

30. Dworkin, 'What is Equality?', *supra* note 20 at 9.

31. The celebration, and the quotation of Berlin's words, are in 'Liberty and Pornography', *supra* note 3 at 15.

32. See, e.g., in 'What Rights Do We Have?', *supra* note 14 and, for the free speech case, 'Do We Have a Right to Pornography?', *supra* note 1.

as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be.³³ Women, as a result, do not control their public identities and cannot be taken seriously and become influential in politics. Pornography, says Dworkin, might in this way deny women 'the right to be their own masters'. The feminist argument, thus understood, asserts a conflict not between liberty and equality (which could supposedly be resolved, recall, 'simply on the ground that liberty must be sovereign') but rather, a conflict within liberty itself.

The feminist argument about liberty, thus understood, is mistaken, says Dworkin. Supposing, for the sake of argument, that its causal premise is true, in the law's eyes the negative liberty of freedom of speech outweighs any positive liberty. If there is a conflict between negative liberty and positive liberty, positive liberty must lose. Dworkin finds this reasoning in the opinion of the Circuit Court: the feminist ordinance was rejected, he says, because the point of free speech is precisely to allow ideas to have whatever consequences follow from their dissemination, 'including undesirable consequences for positive liberty'.³⁴

Well, this argument, couched in Berlin's idiom, is far from clear. Berlin's influential distinction was always to be celebrated more for its sweep than its clarity, and Dworkin has not much improved it. Negative liberty is not being obstructed by others in doing what one would wish to do. Positive liberty is at once the power to participate in public life, and self-mastery. As we were reminded, though, everything is what it is. Not being obstructed by others in doing what one would wish to do is one thing. Participation in public life is, to be sure, another. And self-mastery is yet another. One cannot help suspecting there may be more than Two Concepts of Liberty here.

Leaving these suspicions aside, let us consider Dworkin's strategy, which is to say that the liberty which pornography threatens is a mere positive liberty, and that if pornography threatens women's positive liberty, the negative liberty of free speech should win. This strategy is gravely flawed. The claim that pornography threatens a mere positive liberty does not show that pornography should be protected: it would not show that even if it were true, and even if Dworkin were allowed his borrowed principles. The claim is quite beside the point. Its relevance would depend on the assumption that negative liberty trumps positive liberty outright. Its relevance would

33. The quotation is from *Feminism Unmodified*, *supra* note 2 at 172.

34. 'Liberty and Pornography', *supra* note 3 at 14. There seems to be another lack of fit, this time between the facts and the borrowed theoretical lens through which the facts are viewed. It is not obvious that Dworkin should attribute talk of positive liberty to MacKinnon, or to the Court. Is MacKinnon talking about positive liberty when she says, in the passage quoted, that the way men see women defines who a woman can be? There seems to be more to this idea than that of a self out of control (needing 'mastery'), or a self unable to participate in public life. Is the Court talking about positive liberty when it says 'the government must leave to the people the evaluation of ideas ... an idea is as powerful as its audience allows it to be ... [the assumed result] simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental mediation'? It is obscure how Dworkin thinks this passage shows that the Court wants to allow ideas to have whatever consequences follow from their dissemination, 'including undesirable consequences for positive liberty.'

depend on an assumption of *negative liberty absolutism*: that negative liberty is the idol before which all must bow.

Now we have already seen that an assumption of liberty's primacy contradicts Dworkin's own political view. More surprising is that an assumption of negative liberty's primacy contradicts Isaiah Berlin's political view, as explained by Dworkin. Does Berlin say that negative liberties are trumps? Not at all. Negative liberty, as explained by Dworkin, means not being obstructed by others in doing what one might wish to do: but the government is justified in violating the negative liberty of its citizens in all kinds of mundane circumstances, and not only when someone else's negative liberty is at threat. Anyone who wishes to drive at a hundred miles an hour through a thirty mile an hour zone has their negative liberty violated, on 'grounds of safety and convenience'. Berlin does not say that negative liberties should be protected at all costs. He said—and is quoted by Dworkin as saying—that there are other values just as important: that there is 'a paramount need to satisfy the claims of other, no less ultimate, values: justice, happiness, love, the realization of capacities to create new things and experiences and ideas, the discovery of the truth'. Dworkin himself tells us of the defeasibility of negative liberty.

Berlin did not mean that negative liberty was an unalloyed blessing, and should be protected in all its forms in all circumstances at all costs. He said ... that on the contrary the vices of excessive and indiscriminate negative liberty were so evident, particularly in the form of savage economic inequality, that he had not thought it necessary to describe them in much detail.³⁵

Since Berlin does not say negative liberties are trumps, Dworkin is far from establishing the conclusion he wants, even if we allow that a single distinction between positive and negative liberty can be clearly made, even if we allow that pornography threatens a mere positive liberty of women, and even if we allow Dworkin the alien mantle borrowed for the special occasion. Traffic laws violate negative liberty; and that loss is permissibly traded for convenience and safety. Workplace regulation violates negative liberty; and that loss is permissibly traded for economic equality. Censorship violates negative liberty; and that loss can—why not?—be permissibly traded for a gain in positive liberty for women. Berlin, as explained by Dworkin, gives us no reason to think otherwise.

The argumentative strategy is therefore wholly flawed. What is of more interest, though, is Dworkin's ensuing discussion of MacKinnon's argument about silence, which he construes as a quite different argument, one which seems, at first glance, to concern women's negative liberty. Let us turn now to that.

The claim that pornography silences women is at least *prima facie* a claim that pornography deprives women of a *negative* liberty to speak, says Dworkin. It presents a conflict not just within liberty, but within a negative liberty: free speech itself. This argument is more interesting, more important, and more threatening, he says. For when confronted with conflicting negative liberties, the government

35. 'Liberty and Pornography', *supra* note 3 at 12.

may indeed have to balance them, restricting one negative liberty in order to protect another. Confronted with heckling speech that drowns out other speakers the government may restrict the negative liberty of the heckler. On this argument, pornography acts like the heckler. By changing her audience's perceptions of her character, needs, desires, perhaps her own sense of what she is, pornography prevents a woman from being understood by her audience, and perhaps prevents her from speaking at all. Pornography prevents women from expressing their own ideas; and since we want free speech in order to have a society where no idea is barred from entry, we must censor some ideas in order to make room for others.

This is Dworkin's understanding of the feminist argument that pornography silences women. He rejects this argument, attempting to show that, appearances notwithstanding, it is once again an argument about positive liberty. But before we see his reasons, it is worth considering how the silencing argument might best be understood. In what follows I try to convey, very briefly, what I argued in 'Speech Acts and Unspeakable Acts', and, with Jennifer Hornsby, in 'Free Speech and Illocution'.³⁶

In MacKinnon's work we find the thought that speech itself is not 'only words', and correspondingly, the thought that silence is not only a failure to say words. To speak is to act, and failure to speak is failure to act. When MacKinnon says that pornography silences women, she means, I think, that pornography prevents women from *doing* certain things with their words: that pornography prevents women from performing certain speech acts. Sometimes she has in mind the different ways women's speech acts can go wrong, particularly in sexual contexts.³⁷

A woman, in a context where she is trying to refuse sex, says 'no' to a man. She uses the right words for an act of refusal, she performs the appropriate *locutionary* act, to borrow the terminology of J. L. Austin³⁸—she uses a word whose meaning is appropriate for what she is trying to do. But somehow things go wrong. There are a number of ways things could go wrong, but I want to consider just one. The woman says 'no' and the man does not recognize what she is trying to do with her words: does not recognize that she is refusing. She says 'no', using the right locution for refusal, intending to refuse, and yet her speech act fails to achieve what Austin called *uptake*. So, in a sense, she fails to refuse: fails to perform what Austin would call the *illocutionary* act of refusal. She is like an actor whose role in a play is to shout 'Fire!': suddenly faced with a real fire, he shouts 'Fire!' sincerely, intending to warn, using the right locution for warning—but he fails to achieve uptake in his audience, and thus fails to perform the illocutionary act of warning. The actor's speech is disabled; the woman's speech is disabled. The woman's speech fails as an illocutionary speech act. This is an example of the kind of silence I call

36. 'Speech Acts and Unspeakable Acts'; Hornsby & Langton, 'Free Speech and Illocution', *supra* note 7. See also Hornsby, 'Speech Acts and Pornography'. Readers are referred to these articles for a fuller presentation of the argument.

37. See 'Francis Biddle's Sister' in *Feminism Unmodified*, *supra* note 2, and *Only Words*, *supra* note 2 at 63-68.

38. See J. L. Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1962).

illocutionary disablement. Notice that if speech were only words—only a matter of what Austin called ‘locution’—then the actor and the woman would speak. But speech is not only words, and the actor and the woman are silenced.

On Austin’s understanding, speech acts go wrong in this way when speakers somehow fail to satisfy the felicity conditions for the illocutions they try to make. The actor somehow fails to satisfy the felicity conditions for performing the illocution of warning. And we can suppose that the woman likewise somehow fails to satisfy the conditions for the illocutionary act of refusal. How do these conditions—whatever they may be—come about? The answer to that question will be a complicated story, but MacKinnon offers part of it when she says that there can be ‘words that set conditions’.³⁹ Pornographic words may be among the ‘words that set conditions’. MacKinnon may mean that pornographic speech acts set the felicity conditions for women’s speech: that pornography is (partly) responsible for the illocutionary disablement of women in some circumstances, when they try to refuse. MacKinnon may mean that pornography makes some speech acts sometimes unspeakable for women.

For the more informal speech acts, conditions for illocutionary success typically include a speaker’s intention to perform a particular illocution, and a hearer’s recognition of the speaker’s intention (the uptake). Jennifer Hornsby has a helpful way of thinking about the role these conditions play in the phenomenon of illocutionary silencing.⁴⁰ These conditions of speaker intention, and hearer recognition, rely on *reciprocity*, a background condition which she sees as the basic key to communicative illocutions. Reciprocity exists when people have the capacity not simply to understand the words someone is using, but to grasp what illocutionary speech acts they might be trying to make. In Austin’s terms, the idea of reciprocity would perhaps be something like a mutual capacity for uptake; a kind of minimal receptiveness on the part of hearers. Because this receptiveness is minimal, it means that the hearer has a capacity to grasp what speech act a speaker might be intending to perform—but it doesn’t mean that a hearer will agree with what the speaker is saying. When reciprocity is present, a speaker intends to perform an illocution, a hearer recognises that that is what she is intending to do: and this is sufficient for her doing it. A speaker intends to refuse, says ‘no’, her intention is recognized by her hearer, and so she does refuse. Whether the refusal is honoured is another matter, a matter of whether her perlocutionary aim is fulfilled, not a matter of illocution. But when reciprocity fails, speakers are silenced at the illocutionary level: they are, as Hornsby puts it, deprived of illocutionary potential.

If pornography sets the conditions of women’s speech in some contexts, one way it might do so is by undermining reciprocity: by undermining the capacity of hearers to recognize the illocutionary intentions of women. Perhaps it helps to create an expectation that a woman does not intend to refuse when she says ‘no’. Where this expectation prevails, hearers will not recognize a woman’s intention for what

39. *Feminism Unmodified*, *supra* note 2 at 228.

40. Jennifer Hornsby, ‘Speech Acts and Pornography’, *supra* note 7.

it is, and—with the uptake absent—a woman's speech will be silenced. This suggestion helps us understand how pornography might be 'words that set conditions'. It helps us see how pornography might contribute to illocutionary disablement, deprive women of illocutionary potential.⁴¹ If Hornsby and I are right, then the silencing MacKinnon speaks of is not (or not only) a silence of being rendered inaudible, but a silence of being unable to do things with one's words. It is the silence of one who is allowed to utter words, but is unable to do the illocutionary thing she intends to do with those words: and in these respects, it is exactly analogous to the silence of one whose speech is drowned out by a heckler.

Dworkin rejects the argument that pornography silences women. He thinks it is a mistake to suppose pornographic speech is like the speech of a heckler, who really does silence other speakers: for pornography does not after all deprive speakers of a negative liberty to speak, as the heckler does. The strategy here is as it was before: if pornography deprives women of any liberty, it is a mere positive liberty. Dworkin allows that it would be contradictory for a government to protect the negative liberty of pornographic speech at the expense of the negative liberty of women's speech. It would be contradictory for a government to allow pornographers to speak, if women were thereby deprived of a negative liberty to speak. But that is not the conflict. The conflict is between pornographers' negative liberty, and women's positive liberty, and since (on the absolutist assumption) negative liberty trumps positive liberty, pornographers' liberty trumps women's. He says,

It would indeed be contradictory for a constitution to prohibit official censorship while also protecting the right of private citizens physically to prevent other citizens from publishing or broadcasting specified ideas. That would allow private citizens to violate the negative liberty of other citizens by preventing them from saying what they wish. But there is no contradiction in insisting that every idea must be allowed to be heard, even those whose consequence is that other ideas will be misunderstood, or given little consideration, or even not be spoken at all.⁴²

Here we have a crucial piece of conceptual analysis. Dworkin uses Berlin's distinction between two concepts of liberty, and he tries to show that the feminist argument has conflated them.

Only by characterizing certain ideas as themselves 'silencing' ideas—only by supposing that censoring pornography is the same thing as stopping people from drowning out other speakers—can [the feminists] hope to justify censorship within the

41. Hornsby emphasizes that the silencing may go beyond the speech acts having to do with sexual communication: that since reciprocity is a condition for all communicative illocutions, simple illocutionary acts like telling and stating can be affected. She suggests too that the silencing may sometimes be a partial affair: there may be cases where it is not impossible for someone to do a certain illocutionary thing with her words, but the expectations she confronts create obstacles that amount to a partial silencing. And it may be created in the gradual, cumulative way that is common to other aspects of change within language, for example, changes in meanings of words: 'Just as non-standard usages of individual words can cumulatively affect our locutionary acts (our language), so the distribution of pornographic material may affect our illocutionary acts (our use of language)', 'Speech Acts and Pornography', *supra* note 7 at 228.

42. 'Liberty and Pornography', *supra* note 3 at 15.

constitutional scheme that assigns a preeminent place to free speech. But the assimilation is nevertheless a confusion, exactly the kind of confusion Berlin warned against.⁴³

Since the silencing argument is really about positive liberty, it meets the same fate as its predecessor: for when it comes to any conflict between negative and positive liberty, negative liberty wins. Berlin's celebrated distinction has shown us how to rescue pornography from the feminist threat.

This argument evidently depends on the assumption of negative liberty absolutism noted and criticized earlier, an assumption which is neither in Dworkin's broader philosophy, nor in Berlin's. So even if Dworkin were right in his conclusion that pornography silences by depriving women of a positive liberty, the argument would again be wholly flawed, by his own lights. But is Dworkin right in this conclusion: is he right to accuse feminists of conflating Berlin's two concepts of liberty, conflating a negative with a positive?

I think not. To silence someone is to make certain illocutionary speech acts difficult or impossible for a person to perform. A heckler does this by drowning out a person's speech. A heckler prevents a person from performing the illocution they intend by preventing their words from being heard. Pornography makes certain illocutionary speech acts difficult or impossible for some women sometimes to perform: on the understanding that Hornsby and I have suggested, it does so by destroying the conditions for successful illocutions, undermining the reciprocity that is the condition for communicative illocutions. This is relevantly the same as drowning out women's speech. In both cases a speaker intends to make a particular illocution, she uses the right words—the right locution—and yet she fails to perform the illocution she intends, because she has been prevented from doing so by the speech of someone else. The conclusion, on this understanding, must surely be that *if* heckling violates a negative liberty, so too does pornography: both seem to be obstructions by others of someone's doing what they would wish to do.

What then of Dworkin's careful conceptual analysis, the analysis which was supposed to distinguish negative from positive liberty, and show how feminists had conflated them? Let us look again.

It would indeed be contradictory for a constitution to prohibit official censorship while also protecting the right of *private citizens physically to prevent other citizens from publishing or broadcasting specified ideas*. That would allow private citizens to violate the negative liberty of other citizens by preventing them from saying what they wish. But there is no contradiction in insisting that every *idea* must be allowed to be heard, even those *whose consequence is that other ideas will be misunderstood, or given little consideration, or even not be spoken at all*.

Dworkin here imagines two kinds of silencing, and I have italicized them for easy reference. The first is a violation of negative liberty, he says, while the second is a violation of positive liberty. Dworkin says that the silencing of women by pornography is an example of the second, not the first. This is the 'subtle' distinction on

43. *Ibid.*

which the argument hinges. What is the distinction, exactly? The analysis is wobbly, given the weight it needs to bear. Let us attempt to make more precise the two silencings, to see where exactly the difference is supposed to lie.

We can begin by summarizing the broadly sketched distinction.

N1. Negative liberty violation: citizens physically prevent others from publishing or broadcasting specified ideas

P1. Positive liberty violation: citizens express ideas that have the consequence that the ideas of others will be misunderstood, or given little consideration, or even not be spoken at all

We can, for the sake of generality, substitute the notion of expression for the notions of publishing and broadcasting (in N1) and speaking (in P1). We can discard some disjuncts in P1 to help us focus on the claim about expression. This gives us:

N2. Negative liberty violation: citizens physically prevent others from expressing specified ideas

P2. Positive liberty violation: citizens express ideas that have the consequence that the ideas of others will not be expressed

We can delete 'physically' and 'specified' in N2 on grounds of irrelevance. (Think of Dworkin's heckler example, whose heckling is not a physical gag, nor need it be directed against 'specified' ideas). This gives us:

N3. Negative liberty violation: citizens prevent others from expressing ideas

P3. Positive liberty violation: citizens express ideas that have the consequence that the ideas of others will not be expressed

Now consider P3. Suppose I do something whose *consequence* is that your ideas are not expressed: do I thereby *prevent* you from expressing your ideas? Surely I do, on the face of things. But if so, we can make a final substitution, to see at last what Dworkin's distinction—his application of Berlin's distinction to the case of free speech—really amounts to:

N4. Negative liberty violation: citizens prevent others from expressing ideas

P4. Positive liberty violation: citizens prevent others from expressing ideas

Well. It is indeed a subtle distinction. Feminists, indeed anyone, could be forgiven for conflating these. There seemed to be more than Two Concepts of Liberty at the outset; but now there seem to be fewer.

Dworkin's conceptual analysis fails, it seems. There are not, on that analysis, two concepts of liberty involved: and if there ought to be two concepts, the work needed to distinguish them remains to be done. Moreover, if negative liberty means not being obstructed by others in doing what one would wish to do, as Dworkin says, then the outcome of his analysis is that positive liberty has collapsed into negative liberty. One who is prevented by others from expressing his ideas is thereby obstructed by others in doing what he would wish to do. And if pornography does

prevent women from expressing their ideas—as Dworkin accepts for the sake of argument—then it is wrong for a government to permit it, or so he tells us: it is wrong, he says, for a government to allow private citizens to violate the liberty of other citizens by preventing them from saying what they wish.⁴⁴ I conclude that, once again, the upshot of Dworkin's argument is entirely friendly to the argument of MacKinnon. If Dworkin would like to show otherwise, his task is still before him.

This discussion has been cast in Dworkin's terms, according to which silence is an incapacity to express ideas. That is a distortion of the feminist argument, interpreted the speech act way: the point is not that ideas are silencing ideas, but that acts can be silencing acts; and silence is an incapacity to act, to do things with words. It may be, though, that Dworkin's argument can be made relevant after all to the speech act understanding of silence. Perhaps it can be construed as an argument against the notion of silence as illocutionary disablement: perhaps it can be construed as saying that it is this silencing which violates a mere positive liberty. Perhaps his main thought lies in those disjuncts which I (over-hastily?) discarded.

So let us restore those disjuncts. Dworkin says that citizens violate the positive liberty of others when they express ideas that have the consequence that the ideas of others '*will be misunderstood, or given little consideration, or not be spoken at all*'. Perhaps the clauses now italicized convey the essence of thwarted positive liberty. Perhaps Dworkin means that when a woman says 'no', and her word is not taken as refusal, her *ideas are being misunderstood, or her ideas are being given little consideration*: and that while this is a curtailment of liberty, it is a curtailment of mere positive liberty, which is no business of the law.

This hypothesis is borne out by what Dworkin says in 'Women and Pornography', where he considers precisely the example of sexual refusal. Pornography, he says, conditions men to 'misunderstand' what women say:

It conditions them to think, for example—as some stupid judges have instructed juries in rape trials—that when a woman says no she sometimes means yes.⁴⁵

Dworkin here seems to accept, for the sake of argument, the empirical premise that pornography silences in the sense that it conditions men's beliefs and expectations, and thereby affects a woman's capacity for sexual refusal: but this, he says, is not the kind of silencing that the law should prevent. Freedom of speech does not include 'a guarantee of a sympathetic or even competent understanding of what one says'. Feminists say otherwise, but their argument

is premised on an unacceptable proposition: that the right to free speech includes a right to circumstances that encourage one to speak, and a right that others grasp and respect what one means to say. These are obviously not rights that any society can recognize or enforce. Creationists, flat-earthers, and bigots, for example, are ridiculed in many parts of America now; that ridicule undoubtedly dampens the enthusiasm

⁴⁴ *Ibid.*

⁴⁵ 'Women and Pornography', *supra* note 3 at 38.

many of them have for speaking out and limits the attention others pay to what they say.

The 'silencing' argument supposes that everyone—the bigot and the creationist as well as the social reformer—has a right to whatever respectful attention on the part of others is necessary to encourage him to speak his mind and to guarantee that he will be correctly understood.⁴⁶

This can be viewed as an implicit argument against the understanding of silence as illocutionary disablement. If we say that a woman's speech is disabled when she fails to achieve 'uptake', fails to achieve the hearer's *recognition* of what she is intending to do, then perhaps we say (merely) that she fails to gain a 'sympathetic' or 'competent' hearer. Perhaps we say (merely) that she is 'misunderstood'. And Dworkin's argument would be that free speech provides no guarantee of understanding, sympathy, and competence on the part of hearers.

Dworkin's argument, thus interpreted, fails to appreciate the different kinds of understanding that are relevant in thinking about speech and free speech: the minimal understanding required for uptake, and thus for *illocutionary* success; and the substantial understanding which is sympathy and respectful attention, aimed for as a further consequence of one's speech, and thus for *perlocutionary* success. This failure may stem from a conception of speech as 'only words': a conception of speech as mere locution.⁴⁷ On this conception, if someone is free to utter words, they are free to speak. Dworkin is right to suppose that the feminist argument wants something more than this, something more than 'only words'; but, failing to distinguish an illocutionary something from a perlocutionary something, he is wrong in identifying what this 'something more' amounts to. The feminist argument supposes that the 'speech' in 'free speech' includes illocution, which is indeed something more than locution. But the argument does not have to suppose that free speech includes more than illocution: that it includes the perlocutionary features characteristic of positive liberty, as Dworkin describes it here—respect, a sympathetic hearing, and the like.⁴⁸

Whether a feminist inclusion of illocution in free speech amounts to making free speech a positive liberty, as Dworkin alleges (on this interpretation of him), is a question we must at this point leave behind. As a matter of fact, I doubt that that it does. If negative liberty is taken to mean not being obstructed by others in doing what one would wish to do, as Dworkin says, and if pornography prevents a woman from doing the illocutionary things she would wish to do, then, on the

46. *Ibid.* at 38, 40.

47. This is argued by Hornsby in 'Speech Acts and Pornography', and 'Disempowering Speech'; and by Hornsby & Langton in 'Free Speech and Illocution', *supra* note 7. The conception of free speech as a matter of locution only is explicit in Daniel Jacobson, 'Freedom of Speech Acts? A Response to Langton' (1995) 24 *Phil. & Publ. Affairs* at 64-79.

48. There may be an argument, with roots in Mill, to say that free speech does require even more, that it requires attentive, 'listening' audiences (see Hornsby & Langton, 'Free Speech and Illocution', *supra* note 7 at 34), but I do not consider that argument here. Note that on the thin, locutionary conception of speech, a person whose speech is drowned out by the heckler still has his speech. That Dworkin allows that such a person is silenced suggests that a richer conception of speech may sometimes be attributed to him.

face of it, pornography violates her negative liberty.⁴⁹ However, if Dworkin himself proves unable to draw a clear distinction between positive and negative liberty in a paper devoted to the topic, there seems little hope for me adequately to draw and apply one in the space that remains. But this is, at this point, by the by: for once we have seen that the assumption of negative liberty absolutism is to be found neither in Dworkin's philosophy nor in Berlin's, we see how little really hinges on this distinction, for present purposes. The important point is that—positive liberty or not—free speech should be understood to include illocution.

Dworkin's failure to appreciate what is at stake here is plain when we consider his analogies. So let us consider the silenced parties whose silence Dworkin finds comparable—the woman who says no, and the person who says that the earth is flat; and then the silencing parties whose actions of silencing Dworkin finds comparable—the pornographer, and the 'stupid' judge. Take, first of all, the woman and the flat-earthier. The comparison perplexes. A woman's inability to be understood, when she says 'no' to sex, is like the flat-earthier's inability to achieve respectful attention. A woman's inability to act, to perform the illocution of refusal, is like the flat-earthier's inability to gain sympathy for his ideas. The woman is like the flat-earthier, in having her 'ideas misunderstood'. Her 'ideas', like his, are 'being given little consideration'. This comparison is remarkable for its perspective on sexual violence: a woman's capacity to refuse sex is supposed to be as optional, in the law's eyes, as a flat-earthier's capacity to achieve respectful attention—notwithstanding the difference these capacities make to human life, and notwithstanding the fact that the law presupposes the former capacity, but nowhere presupposes the latter. The law presupposes that women have a capacity to perform illocutions of refusal, when the law defines rape as a crime: the capacity for refusal and consent is exactly the capacity which allows the difference between rape and consensual sex.

The comparison is also remarkable for its insistence that speech is expression of ideas: that speech is a matter of saying words, a matter of mere locution. That insistence here reaches ludicrous depths. 'No' is the expression of an idea, that may or may not be understood. 'The earth is flat' is the expression of an idea, that may or may not be understood. Both, in fact, are speech acts: the first, an intended illocution of *refusal*, whose perlocutionary aim is to prevent unwanted sex; the second, an intended illocution of *assertion*, whose perlocutionary aim is, perhaps, is to gain 'respectful attention' from the hearer, and to persuade the hearer that the earth is flat.

When we become alert to the nature of the two speech acts, we see that the confusion in Dworkin's comparison is not just moral but philosophical. Dworkin, thus understood, confuses perlocutionary failure with illocutionary failure. What is

49. If, on the other hand, free speech understood as freedom of locution is a negative liberty, and free speech understood as requiring anything more is a positive liberty, then the feminist argument takes free speech to be a positive liberty. On this assumption—which, as I have indicated, there are grounds for doubting—Dworkin's conception of free speech as a negative liberty is criticized by Hornsby and myself in 'Free Speech and Illocution', and by Hornsby in 'Speech Acts and Pornography', and 'Disempowering Speech', *supra* note 7.

missing in the case of silenced refusal is this: recognition on the hearer's part that the speaker is intending to refuse. What is missing in the case of the silenced flat-earther is this: respectful attention on the hearer's part. The woman who is silenced in the way Dworkin describes *fails* to perform her intended illocution, which is *refusal*. The flat-earther who is silenced in the way Dworkin describes *does not fail* to perform his intended illocution, which is *assertion*. In the situation envisaged by Dworkin, the flat-earther is recognized to be intending to assert, and is moreover recognized to be intending to assert that the earth is flat. But he does fail to achieve his perlocutionary goal of achieving respectful attention. If there is a failure of understanding on the part of hearers, it is not a failure to understand that he is asserting, or even to understand what he is asserting. It is precisely *because* his intended illocution has been recognized by hearers that he fails to find a sympathetic hearing. It is because he is understood that he fails to achieve respectful attention. His failure at the perlocutionary level is explained by his success at the illocutionary level. His action is understood: he achieves uptake. But he fails to achieve his perlocutionary goals. Not so for the woman who says no. She is silenced at the illocutionary level. It is true that in one sense she still has her words: she has freedom of what Austin called locution. But a proper understanding of free speech will include more than 'only words', if it includes freedom of illocution.

Now let us think about Dworkin's comparison of the silencing parties. Pornography, says Dworkin, is like the judge who instructs a jury in a rape trial, 'When a woman says no, she sometimes means yes'. Pornography is like the 'stupid' judge. But when the judge says those words, he may be more than stupid: he may destroy the reciprocity that is a condition of a woman's illocutionary speech, when she testifies about rape. He may create an expectation, in the jury, that the woman did not mean no, when she said no. He may affect what the woman can do with her words, in court: he may prevent her from performing the illocution which is the assertion 'I was raped'. The judge may silence her more effectively than any heckler could. Dworkin might agree that the judge is more than stupid, and that such words by judges should not be sanctioned. But if such words, when said by judges, should not be sanctioned, then perhaps such words, when said by pornographers, should not be sanctioned either. A permissive argument about pornography will need to tell us how the two examples are different. Since Dworkin tells us only that they are alike, his permissive conclusion comes as a surprise.

The example is a reminder of a famous case in British law in which some men were told of a particular woman: when she says no, she means yes.⁵⁰ Mr. Morgan invited three drinking companions to come home with him and have sex with his wife. He told them to expect a struggle, since that was what turned her on; she would say no, and mean yes. When they acted on that invitation, she said no, and meant no. At the trial, the men said (falsely) they believed she meant yes. Suppose their testimony had been true, to this extent: when she said no, the men did not take her to be refusing. Suppose Mr. Morgan's words had really undermined the reciprocity which would have allowed her words to be recognized as refusal. That

50. *Director of Public Prosecutions v. Morgan* [1976] AC 182 (H.L.).

was not so: the friends knew, in fact, that she refused. But suppose it had been so. There has (rightly) been much interest in this hypothetical question, but I am interested in an aspect that is orthogonal to the main discussion.⁵¹ I cannot help wondering what Dworkin would say about Mr. Morgan's lie.

It would be a lie that disabled Mrs. Morgan's refusal, in a way that is analogous to the disablement engendered by pornography, on the argument we have been considering. In the case of pornography, the process is more indirect, more gradual, more cumulative. But that is not Dworkin's stated reason for rejecting the feminist argument. He says that if pornography silences women by leading men to think that when a woman says no, she means yes, that silence is no business of the law, no business of political argument. So what is Dworkin's advice to Mrs. Morgan, when she hopes for redress for her husband's lie? Perhaps he will say that the lie is no business of the law: that the law does not guarantee that those who hear her attempted refusal will have a 'competent understanding' of what she says. Perhaps he will say she is unreasonable to hope that the law cares about whether her hearers 'grasp' what she 'means to say'. Perhaps he will say she is unreasonable to hope for help in removing the obstacle to 'competent understanding'—the obstacle which is Mr. Morgan's lie. Perhaps he will say she is like the flat-earther, who complains that his ideas have failed to gain respectful attention. Perhaps he will say that the freedom she hopes for is a mere positive liberty. Perhaps he will say that the lie expresses an idea, and an idea is as powerful as the audience allows it to be, and that any unhappy effects depend on mental mediation.⁵² Perhaps he will say she should fight speech with more speech, that she should fight the lie with the truth; and perhaps he will offer sympathy when she says she did her best. Perhaps Dworkin will say none of these things: but if not, why not?

If everyone should be free to speak, then women should be free to speak: free not simply to make sounds, say words, but free to do things with words. A person silenced by a heckler is free to make sounds, say words, but he is not free to do things with his words—not free to do the illocutionary things he might wish to do. Dworkin is right to say that, on the feminist argument, pornography is relevantly like the heckler. And he allows that the person silenced by the heckler can hope for legal redress. If the person silenced by the heckler can hope for legal help to enable him to escape—to enable him not just to say his words, but do things with his words—there is no obvious reason why women cannot, in principle, hope for the same. That hope for women's speech is not over-demanding. It is not a hope that women's speech should be effective in a perlocutionary sense, as Dworkin thought: it is not a hope that women's speech should actually persuade others, or provoke sympathy, or generate respect, though these may well be desired perlocutionary goals of speech. What is hoped for is a certain capacity to perform

51. See, for example, E. M. Curley, 'Excusing Rape' (1976) 5 *Phil. & Publ. Affairs* 325; M. T. Thornton, 'Rape and Mens Rea' in Kai Nielsen & Steven C. Patten, eds., *New Essays in Ethics and Public Policy*, *Can. J. of Phil.*, Supp. Vol. 8 (1982) 119-46; C. L. Ten, *Crime, Guilt and Punishment*, (Oxford: Oxford University Press, 1987) at 104-05.

52. This is paraphrased from Easterbrook's judgement about pornography in *Hudnut*, quoted approvingly by Dworkin in 'Liberty and Pornography', *supra* note 3 at 15.

communicative illocutions, especially (perhaps) those of sexual communication. This illocutionary potential requires from hearers only a minimal receptivity: a capacity to recognize the kind of thing a speaker may be trying to do with her words. The hope is modest: for example, successful refusal is no guarantee against rape, if it is illocutionary success we are speaking of. It is no guarantee that a refusal will be honoured, only that it will be recognized for the act it is intended to be. But illocutionary success, for these speech acts, is perhaps a minimum to hope for. Illocutionary success at least gives a speaker a fighting chance. To think this way is, admittedly, to think that free speech is more than a matter of words mouthed against a heckler's din. But free speech is not, after all, freedom to speak only words, if speech itself is not only words.