

IS THERE A RIGHT TO PORNOGRAPHY?†

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I GOALS

1. *The Williams Strategy*

It is an old problem for liberal theory how far people should have the right to do the wrong thing. Liberals insist that people have the legal right to say what they wish on matters of political or social controversy. But should they be free to incite racial hatred, for example? British and American law now give different answers to that specific question. The United Kingdom Race Relations law makes it a crime to advocate racial prejudice, but the First Amendment to the United States Constitution forbids Congress or any of the states from adopting any such law.

Pornography in its various forms presents another instance of the same issue. The majority of people in both countries would prefer (or so it seems) substantial censorship if not outright prohibition of 'sexually explicit' books, magazines, photographs and films, and this majority includes a considerable number of those who are themselves consumers of whatever pornography is on offer. (It is part of the complex psychology of sex that many of those with a fixed taste for the obscene would strongly prefer that their children, for example, not follow them in that taste.) If we assume that the majority is correct, and that people who publish and consume pornography do the wrong thing, or at least display the wrong sort of character, should they nevertheless have the legal right to do so?

Some lawyers and political philosophers consider the problem of pornography to be only an instance of the first problem I mentioned, the problem of freedom to speak unpopular or wicked thoughts. But we should be suspicious of that claim, because the strongest arguments in favor of allowing *Mein Kampf* to be published hardly seem to apply in favor of the novel *Whips Incorporated* or the film *Sex Kittens*. No one (I think) is denied an equal voice in the political process, however broadly conceived, when he is forbidden to circulate photographs of genitals to the public at large, or denied his right to listen to argument when he is forbidden to consider these photographs at his leisure. If we believe it wrong to censor these forms of pornography, then we should try to find the justification for that opinion elsewhere than in the literature celebrating freedom of speech and press.

We should consider two rather different strategies that might be thought to justify a permissive attitude. The first argues that even if the publication and consumption of pornography is bad for the community as a whole, just considered in itself, the consequences of trying to censor or otherwise suppress pornography would be, in the long run, even worse. I shall call this the 'goal-based' strategy.

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The second argues that even if pornography makes the community worse off, even in the very long run, it is nevertheless wrong to censor or restrict it because this violates the individual moral or political rights of citizens who resent the censorship. I shall call this the 'rights-based' strategy.

Which of these strategies (if either) does the recent Report of the Committee on Obscenity and Film Censorship¹ (the 'Williams Report') follow? The Report recommends that the present law on obscenity be revised radically, and provides an important distinction as the centerpiece of the new legal scheme it suggests. Certain forms of pornography are to be prohibited altogether. These include live sex shows (actual rather than merely simulated copulation, fellatio, and the like performed live before an audience) and films and photographs produced through the exploitation of children. Other forms of pornography are to be, not prohibited, but restricted in various ways. These restrictions include rules about offensive displays or advertising in public places, limitation of the sale of pornography to special shops, and an elaborate scheme of previewing and licensing of films. I shall later discuss whether these admirably clear recommendations can all be justified in a coherent way. I want first simply to identify the justification the Report offers.

It sets out and endorses what it calls the harm condition, that 'no conduct should be suppressed by law unless it can be shown to harm someone'. It notes the popularity of that condition, but rightly adds that either the popularity or the power of the condition evaporates when it is made less ambiguous. Everything turns on what 'harm' is taken to be. If 'harm' includes only direct physical damage to particular people, or direct damage to their property or financial interests, then the condition is much too strong, since it would condemn a large part of standing British and American law. It would forbid regulating the commercial development of certain parts of cities, or restricting the private use of natural resources like the sea shore. Almost everyone would reject the harm condition interpreted in that way. But if 'harm' is broadened to include mental distress or annoyance, then the condition becomes much too weak to be of any use in political theory, since any kind of conduct likely to be made criminal in a democracy, at least, is conduct that causes annoyance or distress to someone. Suppose 'harm' is taken to exclude mental distress, but to include damage to the general social and cultural environment. Then the harm condition is in itself no help in considering the problem of pornography, because opponents of pornography argue, with some force, that free traffic in obscenity does damage the general cultural environment.

So the harm condition does not in itself recommend a permissive attitude towards pornography, except in a form much too strong to be accepted, and the Report places little weight on that condition. Its argument begins instead in a special and attractive theory about the general value of free expression. John Stuart Mill suggested, in *On Liberty*, that society has most chance to discover truth, not only in science but about the best conditions for human flourishing as well, if it tolerates a free market-place of ideas. The Report rejects Mill's

1 Cmnd 7772, HMSO, London, 1979.

optimistic (not to say complacent) ideas about the conditions most propitious for the discovery of truth. But it nevertheless accepts something close to Mill's position in the following important passage.

The more basic idea, to which Mill attached the market-place model, remains a correct and profound idea: that we do not know in advance what social, moral or intellectual developments will turn out to be possible, necessary, or desirable for human beings and for their future, and free expression, intellectual and artistic—something which may need to be fostered and protected as well as merely permitted—is essential to human development, as a process which does not merely happen (in some form or another, it will happen anyway) but so far as possible is rationally understood. It is essential to it, moreover, not just as a means to it, but as part of it. Since human beings are not just subject to their history but aspire to be conscious of it, the development of human individuals, of society and of humanity in general, is a process itself properly constituted in part by free expression and the exchange of human communication.²

This account of the value of free expression requires, of course, some supplement before it can provide a justification for much of contemporary pornography, because the offerings of Soho and Eighth Avenue—close up glossies and *Beyond the Green Door*—are not patently expressions about desirable human development. The Report finds that supplement in the topology, familiar to most lawyers, of the slippery slope.³ It is difficult, if not impossible, to devise a form of words that we can be confident will in practice separate useless trash from potentially valuable contributions. Any form of words will be administered by prosecutors, jurors and judges with their own prejudices, their own love or fear of the new, and, in the case of prosecutors, their own warm sense of the political advantages of conformity. In any case, writers and publishers, anxious to avoid risk and trouble, will exercise a self-censorship out of abundant caution, and themselves extend the constraint of any words we find. If we recognize the general value of free expression, therefore, we should accept a presumption against censorship or prohibition of any activity when that activity even arguably expresses a conviction about how people should live or feel, or opposes established or popular convictions. The presumption of course need not be absolute. It might be overcome by some showing that the harm the activity threatens is grave, probable, and uncontroversial, for example. But it should nevertheless be a strong presumption in order to protect the long-term goal of securing, in spite of our ignorance, the best conditions that we can for human development.

This general strategy (which I shall sometimes call the 'Williams strategy') organizes the more specific arguments and distinctions of the Report. The Committee concedes, for example, the relevance of the question whether an increase in the amount of pornography in circulation in the community is likely to produce more violence or more sexual crimes of any particular sort. If harm of this

² Report, p. 55.

³ Legal purists might object that the argument of the Report here depends not on the slippery slope but on that different weapon, the bright line (or absence of same). But it is perfectly clear what argument is meant, and I follow the Report's language.

sort can be demonstrated, then the presumption can be overcome. But the Committee finds no persuasive evidence of this causal influence. The same strategy supports the crucial distinction between outright prohibition and various forms of restriction of pornography. Restriction does not so severely curtail the contribution that pornography might make to the exchange of ideas and attitudes, though of course it will change the character of that contribution. So the slippery slope is not so much of a threat when the question is whether some book must be sold only in special shops as it is when the question is whether it can be published at all.

The Williams strategy is a version of the goal-based strategy that I earlier distinguished from the rights-based strategy. It does not define the goal it seeks to promote as the crude Benthamite might, as the outcome that produces the highest surplus of pleasure over pain, or even as a more sophisticated utilitarian would, perhaps as the outcome in which more people have more of what they want to have. The Report speaks instead of human development, and insists that some social, moral and intellectual developments are more 'desirable' than others. We would not go far wrong, I think, to summarize the Report's conception of the best society as the society that is most conducive to human beings making intelligent decisions about what the best lives for them to lead are, and then flourishing in those lives. The Williams strategy emphasizes, however, an important idea latent in that description. It would be wrong to think of social and political decisions as aimed simply at producing the best society at some particular (and therefore arbitrary) future time, so that the acts and forbearances of people now are merely parts of a development to be judged for its instrumental value in producing the best society then. How a society develops is itself an important part of the value of that society, now conceived in a longer perspective that includes the present and the indefinite future as well. In particular, the social development of ideals of human flourishing must be 'conscious' and 'rationally understood' and 'a process itself properly constituted in part by free expression and the exchange of human communication'. Human development must be self-development or its value is compromised from the start.

2. *Live sex*

This is in many ways a more attractive picture of the good society than either the crude or the more sophisticated utilitarian can provide. But it is nevertheless a theory (as these less attractive pictures are theories) about what outcomes are good as a whole, rather than a theory about what rights must be recognized even at the cost of accepting less than the best outcome on the whole. I want now to ask whether the Report's attractive goal-based theory in fact justifies its recommendations about pornography. I shall begin with a fairly specific and limited question. Does the Williams strategy support the recommendation that live sex shows be prohibited altogether, rather than simply being restricted in their advertising, or in the location or outside display of the theatre in which they take place, or in the age of those who may be admitted? In that way live shows

with unfeigned sex are treated more stringently than live shows with simulated sex or films with actual sex. Can the goal-based Williams strategy show why?

We might, by way of preparation for this question, compose a list of possible justifications for treating different forms of pornography differently. I assume that we do not have any good reason to believe that any of the pornography we are now considering in fact does make a positive and valuable contribution to the free exchange of ideas about human flourishing. (The Report considers the claim that some does, and seems to reject it as humbug. It recommends only that we accept the presumption that some pornography might make such a contribution.) So we cannot discriminate between different forms on the basis of our present beliefs that the positive contribution of some is greater than that of others, that the positive contribution of the film *Deep Throat* is greater, for example, than a cabaret re-enactment of the main events of that film. We may, however, be able to justify discrimination between different forms of pornography, conformably with the Williams strategy, in some other way. After all, if we do think that pornography appeals to the less attractive aspects of human personality, we may very well think that the unrestrained publication and consumption of pornography is very much a wrong turn in human flourishing. We may be persuaded, by the Williams strategy, that the damage to human development might be greater still if all pornography were prohibited, because we cannot be sure about our views of human flourishing, because the slippery slope argument warns us that we may prohibit too much, and because in any case any restraint just in itself damages the process of social development because it makes that process less a matter of rational and deliberate choice. But this is very much a question of balancing, and we may be prepared to restrain some form of pornography rather more than other forms, in spite of these competing arguments of the Williams strategy, if (i) we believe that that form does present a special danger of personal harm narrowly conceived, or (ii) we believe that that form presents some special danger of cultural pollution that will, we believe, do more damage to the prospects for human flourishing than other forms, or (iii) we think that we can be more secure of our footing on the slippery slope in prohibiting that form; that is, that we can draft legislation specifically aimed at that form that will not in practice carry away anything valuable with the dross.

The Report says that live shows are different from films because the former involve the spectator 'being in the same space' as 'people actually engaged in sexual activity'. It is 'from this relationship between actual people that arises the peculiar objectionableness that many find is the idea of the live sex show, and the sense that the kind of voyeurism involved is especially degrading to both audience and performers'.⁴ This last suggestion might be thought ambiguous. It might mean that the justification for prohibiting live sex shows lies in the fact that so many people object to others performing or watching them, that so many others believe that this is degrading. In that case the argument is of the first sort we just distinguished: the harm in question is direct personal harm in the form of the

⁴ Report, p. 138.

mental suffering or pain of those who know that others are behaving in a degrading way. But the Report cannot consistently appeal to that sort of harm as the justification of a prohibition, because it elsewhere explicitly rejects the idea that that kind of harm can count. '... If one accepted, as a basis for coercing one person's actions, the fact that others would be upset even by the thought of his performing those actions, one would be denying any substantive individual liberty at all'.⁵

So we should take the other interpretation of the remarks about live sex shows, which is that they should be prohibited not because many people believe that they are degrading, but because in fact they are degrading. This must then be understood as an appeal to the second sort of justification for restraint: the strong presumption in favor of freedom of expression must yield to prohibition here because the cultural pollution that would be inflicted by live sex shows, and hence the set-back to the achievement of the best conditions for human development, is simply too great to keep such shows within the presumption of the Williams strategy. This is, however, an extraordinary justification for singling out live sex shows in this way. For the Report emphasizes that live sex shows will in any case be so rare, will appeal to so limited an audience, and will be relatively so expensive, that the impact that they could have on the general environment must be very small whether it is for good or bad. Live shows would be very unlikely to offer more of an overall threat of cultural pollution than the all too lifeless and depressingly obscene photographs and films that the Report allows though restricts, each of which can be duplicated and distributed to millions.

Does the third sort of argument just listed provide a better argument here? Is the slippery slope less of a danger in the case of live sex? The Report does say that 'it seems to us, in fact, that the presentation of actual sex on the stage immediately introduces a presumption that the motives no longer have any artistic pretension'.⁶ But that seems an ill-considered remark. I am not aware of any serious dramatic presentation that uses 'actual sex'. But that is, apart from obvious casting problems, because it would not now be permitted. Certainly serious dramatic work uses simulated sex, as the Report recognizes, and it can hardly be maintained that a passion for realism on the stage is inconsistent with 'artistic pretension'. An entire school of dramatic theory argues just the contrary. At one point the Report, apparently as an argument for prohibition, observes that 'the live show is a contemporary happening with an unknown future end, which the audience may be capable of influencing or in which they might participate'.⁷ But that passage might have been lifted from an essay on the aims of Artaud or Genet or even Brecht or dozens of other ambitious playwrights, and any director who was wholly indifferent to that conception of theatre would probably be a boring hack. In fact, the slippery slope argument seems especially strong rather than especially weak in the case of live sex on the stage. The continuing flat

⁵ Report, p. 100.

⁶ Report, p. 139.

⁷ Report, p. 138.

prohibition of actual copulation undoubtedly limits the drama in its examination of the relation between art and taboo; and the assumption that the consequences of live sex in serious theatre are both predictable and very bad betrays, I think, exactly the claim to omniscience that the Williams strategy deplores. It is not my present purpose to suggest that the ban should be relaxed, of course, but only that the strategy of the Report provides no very clear or very effective argument why it should not be.

3. *Why restrict?*

The Report's difficulties in disposing of live sex shows are not in themselves of any general importance. Though the Report is an outstanding example of a political argument, it is a political argument nevertheless, both in the sense that it hopes to encourage legislation and in the different sense that it is the joint product of many people with diverse points of view. Perhaps the members of the Committee simply felt that live sex shows even in a restricted form were intolerable, good arguments or not. But the point is important because it illustrates the great force of the different assumptions embedded in the Williams strategy, and how difficult it is to justify, within that strategy, any exception to the permissive policy it generally recommends.

We might therefore turn to a much more important part of the Report's recommendations, which is the distinction it draws between the restriction and the prohibition of pornography. If the Williams strategy argues against the outright prohibition of pornographic pictures and films, except in very limited cases, can it consistently accept the restrictions the Report commends? The Report offers different arguments proposing to justify the distinction. These arguments fall into groups rather like the different kinds of arguments we considered justifying the special treatment of live sex shows. It argues in favor of the restrictions it urges on the open display and advertising of pornography, for example, (i) that the personal harm caused by such display is much greater than the harm caused by private consumption alone, (ii) that the cultural pollution is also greater, and (iii) that the slippery slope is less of a danger in the case of restriction because if genuinely valuable material is caught by the restriction it is nevertheless still allowed to enter the exchange of ideas in a sufficiently effective way. We must look at each of these claims, and I shall consider them in reverse order.

(i) The Report puts the last claim by arguing that restricting a pornographic publication to a volunteer audience does not defeat the aims of the publication, as distinct, perhaps, from the aims of its author who may make less money. But this personification takes a rather narrow view of the aims of publication, a view that does not sit comfortably with the Williams strategy. From the standpoint of that strategy, which emphasizes the contribution that expression may make to the reflective search for new possibilities of social and cultural practice, the manner in which pornography is presented to the public may be equally important as its content. Though pornography may not itself be a form of art (the Report speaks

instructively to that troublesome issue) the analogy is appropriate here. When Duchamp hung a urinal on the wall of an art gallery he made a claim about the nature of art—a claim that was to occupy criticism for many years—that he could not have made by inviting a volunteer audience to view the same object in a public convenience. His medium was certainly his message. If we attend only to the immediate purpose of pornography, and we take that purpose to be the gratification of those who are willing to take trouble and risk embarrassment to secure it, then restricted publication may serve that purpose. But if we are concerned—as the Williams strategy says we must be—with the consequences of publication for the exploration of forms of life, then restricted publication is not simply less publication. It is publication of something different. Restricted publication leaves a certain hypothesis entirely unmade: the hypothesis that sex should enter all levels of public culture on the same standing as soap opera romance or movie trivia, for example, and play the role in day-to-day life that it then would. There may be good reason for not allowing that hypothesis to be presented in the most natural and effective way. But this cannot be the reason now given, that those who are already converted may not complain so long as their own needs are (perhaps inconveniently) met.

(ii) Is there more power in the second kind of argument, that even though the danger of cultural pollution is not strong enough to justify prohibition it is nevertheless strong enough to justify restriction? The argument here is contained, I think, in the following comments of the Report:

One witness whom we saw made it clear that she looked forward to a society in which nothing one saw going on in the park would be more surprising than anything else, except perhaps in the sense of being more improbable. Most of us doubt whether this day will come, or that nothing would have been lost if it did. Still less do we look forward to a world in which sexual activity is not only freely conducted in public and can be viewed, but is offered to be viewed, copulating parties soliciting the interest of the passer-by. But this is, in effect, what publicly displayed pornography does. . . . The basic point that pornography involves by its nature some violation of lines between public and private is compounded when the pornography not only exists for private consumption, but is publicly displayed.⁸

The 'basic point' of this last sentence suggests that public display threatens to break down the culturally important distinction between public and private activity. But that seems an overstatement. It would be more accurate, I think, to say that public display of pornography trades on that distinction—what it displays would not be shocking or (to those who might find it so) attractive without that distinction—but that it trades on it in a way that might (or might not) rearrange the boundaries, so that people used to (perhaps we should say hardened by) public display of pictures of copulation would no longer think that such displays were wholly inappropriate to the public space. It does not follow that if the boundaries were rearranged in that way they would be rearranged

⁸ Report, pp. 96–7.

further so that people would take the same attitude to copulation in the open spaces of parks. The Report itself (as we noticed) insists on the special character of live sex just because being 'in the same space' as people actually copulating is so different from looking at pictures of such people. But suppose that the public display of photographs would indeed bring the day nearer in which the boundaries were further rearranged so that copulation itself became much more a public activity than now it is. That does not mean that the distinction between public and private, which is certainly of great cultural importance, would itself fall. We have seen great rearrangements of these boundaries even in recent years. People now eat in public streets, kiss and embrace in public and play naked on at least certain public beaches, and these activities belonged much more firmly to the private space not long ago. The boundaries culture sets on what is public have in other ways contracted in the same period: people are much less likely now than once to pray in public, for example, because the attitude that prayer is a more private than a public activity, limited to the home or special places of worship, has become much more widespread. Surely, the dimensions and contours of the public space properly belong to the dialogue through example about the possibilities of human development, the dialogue the Williams strategy wishes to protect. Indeed the vitality and character of the basic distinction, the basic idea that there must be a private space, is more threatened by any legally enforced freeze on the boundaries set at any particular time than by allowing the market of expression constantly to re-examine and redraw those boundaries. The Committee says that it would not like to see a world in which the contours of the private were set in the particular way it describes and fears. But that seems exactly the sort of opinion which the Williams strategy argues should be treated with respectful scepticism. It is not plain why it deserves to be enforced through law any more than the opinion of others who dread a world in which their children will be free to fantasize over obscene photographs in private.

(iii) What of the first kind of reason that might support the central distinction between prohibition and restriction? This appeals to greater personal harm. The Report argues that if pornography were not restricted in the way it suggests, then the personal harm it would cause would be much greater, or would be of a character that the law should attend to more, than the personal harm that pornography restricted and made essentially a private activity would cause. If this is correct, then it might indeed supply an argument for restriction that does not hold for outright prohibition. If it can be shown that the public display of pornography in the form of advertisements, for example, causes special or great harm to passers-by, then even though the presumption of the Williams strategy is strong enough to defeat arguments of prohibition it might fall before the claims for restriction. But what is this special or serious harm that public display might cause? It is not the danger of violent assault or sexual abuse. The Report rejects the evidence offered to it, that even unrestricted pornography would cause an increase in such crimes, as at best inconclusive. The harm is rather of the sort suggested by the word the Report adopts: 'offensiveness'.

Once again it is worth setting out the clear and concise language of the Report itself:

Laws against public sex would generally be thought to be consistent with the harm condition, in the sense that if members of the public are upset, distressed, disgusted, outraged or put out by witnessing some class of acts, then that constitutes a respect in which the public performance of those acts harms their interests and gives them a reason to object. . . . The offensiveness of publicly displayed pornography seems to us . . . to be in line with traditionally accepted rules protecting the interest in public decency. Restrictions on the open sale of these publications, and analogous arrangements for films, thus seem to us to be justified. . . . If one goes all the way down this line, however, one arrives at the situation in which people objected to even knowing that pornography was being read in private; and if one accepted as a basis for coercing one person's actions, the fact that others would be upset even by the thought of his performing these actions, one would be denying any substantive liberty at all.* Any offence caused by such shops would clearly be much less vivid, direct and serious than that caused by the display of the publications, and we do not accept that it could outweigh the rights of those who do wish to see this material, or more generally the argument in favour of restricting, rather than suppressing, pornography.⁹

The last sentence (if I understand it correctly) raises one argument distinct from the others, which is that the disgust or other offense likely to be caused to people who are affected just by the knowledge that pornography exists will be 'less vivid, direct and serious' than the disgust caused by directly encountering indecent displays. But this seems far from clear, particularly if we take the numbers likely to suffer these different injuries into account. Everything depends, of course, on how much display the market would bear, and where the market would put that display, if pornography were wholly unrestricted. But if we take the present situation in New York as a useful guide, then only a very small part of the population of Britain would often be forced to encounter displays if they did exist or have to adjust their lives much to avoid them altogether. No doubt a much larger part of the population would be very upset indeed simply at the fact that public displays of pornography existed, even though not in their ordinary paths; but this would be an instance of being upset by knowledge of what others were doing, not by the sight of it. Even if my guess is wrong (as it well might be) and the misadventure of actually stumbling on pornography would in fact be a great source of mental distress in a society that permitted pornography without restriction, this is hardly so obvious and so readily predictable as to justify the Report's crucial distinction without a good deal more empirical evidence.

But it is wrong to pursue this point, because the Report plainly places more weight on the preceding point, that the distress of those who are disgusted by the bare knowledge of pornography should not be counted at all in any overall calculation of the personal harm pornography does. But why should it not be

*This point is very clearly shown by Hart: *Law, Liberty and Morality*, pp. 45 following.

⁹ Report, pp. 99-100.

counted? The Report says only that if this kind of harm was allowed to count one would be denying all individual liberty. We might well ask why, if this observation makes sense, it argues only against counting disgust-harm arising from the bare knowledge of what is thought disgusting. Why does it not argue instead against counting any disgust-harm at all, including disgust-harm from actual sighting of the allegedly disgusting act? The point seems to be that we must stop somewhere short of counting all disgust-harm; but this does not justify the particular stopping point the Report chooses.

But I shall not pursue this issue either, because I cannot in fact make much sense of the Report's initial claim. Of course individual liberty would be very restricted if no one was allowed to do anything that any single other person found offensive. But the suggestion now in question, which the Committee believes would deny 'any substantive liberty', is very much weaker than that.¹⁰ The suggestion is only that the disgust that people feel when they learn that others are doing what they regard as offensive should figure along with other kinds of mental and physical distress in the calculation whether the presumption in favor of liberty should be overturned. So the question is whether the harm to those who find offense would outweigh the desire of all those who wish to do what would offend them. If only one or a few people took offense there would be little danger of that. It would be different, of course, if a large majority found some activity disgusting. But whether the majority's outrage would then leave much substantive individual liberty would depend on what, in fact, that majority found outrageous. If the majority found it disgusting that anyone practice a religion other than the established religion, then liberty would be invaded in a way that we have independent reasons for thinking grave. (That is why we speak of a right to religious freedom.) But suppose the majority merely thinks it disgusting if people read or contemplate pornography in private. The slippery slope argument calls our attention to the fact that if the majority is allowed to have its way individuals might be prevented from reading some things that are in fact valuable for them to read. But even so it would surely overstate the facts to say that if people were not allowed any sexually explicit literature or art at all, they would lose their liberty altogether.

The Report may mean to say something different from this. It may mean that if the suggestion were adopted, that people may not do whatever the majority finds deeply disgusting, even in private, then people would have lost their *right* to liberty—because they may no longer insist that it is always wrong for the majority to restrict them for that reason—even if their actual loss of liberty turns out not to

¹⁰ The Report cites Hart to support its argument here. But Hart's argument seems to consist only in the mistake just identified. 'To punish people for causing this form of distress would be tantamount to punishing them simply because others object to what they do; and the only liberty that would coexist with this extension of the utilitarian principle is liberty to do those things to which *no one* seriously objects. Such liberty is plainly quite nugatory'. Hart, *Law, Liberty and Morality*, OUP (1963) 47 (emphasis added). The first of these sentences is a non-sequitur, and provides no argument against the suggestion described in the text.

be very great. I agree that some such right is important (even though I would hesitate to call it a right to liberty as such).¹¹ But whether people have that right, as a matter of principle, is exactly what is now in dispute. Lord Devlin, for example, and presumably Mrs. Whitehouse, Lord Longford and the other members of the putative 'moral majority' as well, may be understood as challenging the proposition that they do. In any case, if it is some right to liberty, rather than liberty itself, that is in play here, then the Report has departed from the Williams strategy, unless it can be shown that that right, and not merely a large area of liberty, is essential to reflective social development. The Report does not provide arguments why this is so. In the next section I shall argue that that idea is in fact antagonistic to the Williams strategy's goal-based character. But even if we assume that such a right can indeed be extracted from that strategy, then the question I set aside a moment ago reappears. If the right to liberty is the right not to be limited in one's freedom simply because others are disgusted by what one proposes to do, why does that right not include the right to do what one wants in public free from the majority's possible offense at actually viewing it? Nothing, I think, in the subjective character of the harm the majority suffers from seeing what it finds disgusting can provide the necessary distinction here. For the offense in question is not simply offense to the majority's aesthetic tastes, like the offense people might find in a pink house in Belgravia. The offense is freighted with moral convictions, particularly with convictions about what kinds of sights are indecent rather than simply regrettable in the public space, so that people would be offended by a pornographic billboard amongst the already ugly and cheap displays of Picadilly or Times Square. The Report does not explain why allowing moral convictions to count in this way, through the offense that people suffer in public displays because of their moral beliefs, does not invade the individual right that is, however, invaded when the majority protects itself from being offended, perhaps more painfully, through its knowledge of what happens behind closed doors.

4. *Why not prohibit?*

So the Williams strategy does not in fact offer very persuasive grounds for the operating distinction the Report makes fundamental to its recommendations, the distinction between prohibition and restriction. But the situation is, I think, even worse than that, because it is unclear that the strategy even provides a good argument for the generally permissive recommendations of the Report about the use of pornography in private. The strategy adopts an attitude of tolerant scepticism on the question of which 'social, moral or intellectual developments' will turn out to be 'most desirable' for human flourishing. It urges something like a free market in the expression of ideas about what people should be like and how they should live, not because freedom of expression is a good in itself, but because it enables a variety of hypotheses about the best developments to be formulated

¹¹ See Part II below, and see also Dworkin, *Taking Rights Seriously*, Duckworth, paperback edn., 1978, ch. 12.

and tested in experience. But does this strategy leave sufficient room for the hypothesis that now has (or seems to have) the widest appeal? This is the hypothesis that humans will develop differently and in fact best, and find the most suitable conditions for their own flourishing, if their law cultivates an ennobling rather than a degrading attitude towards their sexual activity by prohibiting, even in private, practices that are in fact perversions or corruptions of the sexual experience. We cannot be sure that this hypothesis, which I shall call the enforcement hypothesis, is sound. Many of us may believe that it is unsound. But can we be sure of that? The Report sometimes suggests that only those who 'think that fundamental human moral truths have been laid down unchangeably for all time, for instance in religious terms'¹² will wish to urge the enforcement hypothesis. But I do not see why that must be so. Those who find the enforcement hypothesis plausible may simply say that it represents their best judgment, though of course they might be wrong, just as those who reject the hypothesis should concede that they might be wrong.

Suppose we reply that prohibition freezes the market in expression, so that the enforcement hypothesis is the one view that should not be allowed to be tested, because it will then make itself immune to re-examination. Experience hardly supports this claim, at least in democracies. For though the law of obscenity in Great Britain has been relatively repressive since Victorian times, it has become steadily more liberal, on the whole, in practice if not in text, as the result of non-pornographic political debate about pornography, and also as a result of the acts of those who feel strongly enough about the principle, or are greedy enough, to break the law. In any case, this is a compliment that can easily be returned. Perhaps a society dulled by conformity in matters of sexual practice and expression would become a society in which more liberal attitudes are less likely to find a voice or a hearing in politics. But a society weakened by permissiveness is correspondingly a society less likely to attend to the advantages of a public and publicly enforced morality.

This is not, of course, an argument that the Williams strategy actually recommends prohibition; but rather an argument that it should be neutral between prohibition and permissiveness. Scepticism about the most desirable developments for human beings, or about the most desirable conditions for their flourishing, should not rule out a set of conditions that a great many people believe to be the most promising of all. It does recommend an open political process, with no substantive part of the criminal law, for example, privileged against change. But that (as I just said) does not argue for present permissiveness any more than present prohibition. Scepticism may, perhaps, provide an argument for giving the present advantage to one rather than another hypothesis through something like Louis Brandeis's 'fifty laboratories' theory. That famous Justice proposed that the different states (and territories) of the United States experiment with different economic and social models so that the best system might emerge by comparison.

¹² Report, p. 55.

But no particular country need now, I think, eschew prohibition of pornography for that reason. There is already enough experimentation in the level of permissiveness the Report recommends, if not in more radical alternatives, in other countries.

But I have so far ignored the Williams strategy's insistence that cultural development must be conscious and reflective, must be, that is, self-development. That might be thought to suggest that cultural development should be the product of individuals deciding for themselves what form of life best suits their own condition or (if that seems too grand) what shoe seems to fit; and therefore to rule the enforcement hypothesis out of order from the start. But it is hard to see why the admittedly attractive idea, that society's search for the best conditions for fulfilment must be reflective and self-conscious, demands this particular form of individualism. For in a democracy politics is an appropriate (some would say the appropriate) vehicle through which people strive to determine the circumstances of their situation and to give effect to their own convictions about the conditions of human flourishing. It is only in politics, for example, that people can express in any effective way their sense of justice, or of conservation of the art of the past, or of the design of the space in which they will live and work, or the education their children will, at least for the most part, receive. Of course there are losers in politics, but we cannot say that a society's development of its own culture is unreflective or unconscious or otherwise not self-development simply because the convictions of some people do not triumph.

Once we admit that political activity is part of the idea of social self-determination then we cannot draw, simply from the idea that human beings should be conscious actors in the process of developing their own culture, any disqualification of the enforcement hypothesis as a theory about human flourishing to be given equal room with other theories. The Report states, as I said earlier, that it follows from this idea that human development is 'a process itself properly constituted in part by free expression and the exchange of human communication'.¹³ But it is suddenly unclear what this means. This inference is unexceptionable, I think, if it means only that free speech as conventionally defined should be protected. But the inference does not hold if it means that people must have a right to privacy that prevents the majority from achieving the cultural environment that it, after full reflection, believes best. Suppose that the community is persuaded such a right exists, and that in consequence it would be wrong to forbid the use of pornography in private. That decision would sharply limit the ability of individuals consciously and reflectively to influence the conditions of their own and their children's development. It would limit their ability to bring about the cultural structure they think best, a structure in which sexual experience generally has dignity and beauty, without which structure their own and their families' sexual experience are likely to have these qualities in less degree. They would not be free to campaign for the enforcement hypothesis in politics on the same basis as others would be free to campaign, for example, for

¹³ Report, p. 55, quoted *supra*, 179.

programs of conservation or of state aid to the arts; that is, simply by providing their reasons for believing that enforcement provided the best conditions for human fulfillment. They would meet the reply that a society that chose enforcement would become, for that reason, a society of automatons led by blind forces rather than a society in charge of its own affairs. But that reply is wrong. If we are concerned only with the power of individuals to influence the conditions in which they must try to thrive, any theory of self-development that forbids the majority the use of politics and the law, even the criminal law, is at least *prima facie* self-defeating.

All this points up the importance of not conflating the argument of the Williams strategy, that people should be in charge of the development of the social conditions in which they try to flourish, rather than the unknowing objects of social forces, with the very different argument that each person, for some other reason, should have some sphere private to himself in which he is solely responsible, answerable only to his own character, about what he does. These two ideas are not (as is sometimes thought) two sides of the same coin, but are in fact antagonistic ideas because the protection of a private sphere, the recognition of an individual right to privacy of that sort, in fact reduces the power of people generally to put into play their own ideas about the best circumstances for human flourishing. Their power to do this is reduced whether this right is given legal standing, through incorporation in some constitution like that of the United States, or is simply accepted as part of a moral constitution. The concept of a right to privacy therefore belongs not to the class of goal-based strategies for defending a permissive attitude to pornography, but to the very different class of right-based strategies, because that concept argues that people should have a private sphere even if this in fact damages rather than advances society's long-term goals, and therefore gives most people less rather than more actual control over the design of their environment. The right to privacy cannot be extracted from even the sophisticated Williams version of a goal-based strategy, at least as it now stands.

So the main point remains. The Williams strategy should be as hospitable to the enforcement hypothesis as to the more permissive scheme of the Report. I must be careful not to misdescribe this point. I am not arguing (in the spirit of those who make this argument against liberalism) that the strategy is circular or self-contradictory. It is not my point, for example, that the strategy must apply the same scepticism to itself that it applies to theories about the desirable conditions for human development. Any political theory is entitled (indeed obliged) to claim truth for itself, and so to exempt itself from any scepticism it endorses. My point instead depends on distinguishing the content from the consequences of the Williams strategy. Those who favor the outright prohibition of pornography might, I agree, put their position on the same level as, and in flat opposition to, that strategy. They might argue that we can indeed be certain that the best possibility for human development lies in a society that forbids all pornography everywhere, so that we should not allow even political discussion of

alternatives. But they *need* not defend prohibition in that way. They might accept the Williams strategy, and appeal to it as warrant for political action aimed at testing their own convictions about the best developments for human flourishing (in which of course they believe though they cannot be certain). If they pitch their argument on this level, it is no answer that if they succeed they make the campaign for opposing views much more difficult or much less effective. For they can answer that any political decision, including the decision that prohibition is wrong in principle, will have exactly that consequence for other views.

Opponents of prohibition would then be remitted to one or another of two substantive arguments the Report recognizes as possible arguments but does not itself make. They may make the heroic claim that a society in which people actually do read pornography in private will for that reason provide more desirable conditions for human excellence. The Report steadily and deliberately avoids that claim. Or they may make the different and perhaps more plausible claim that a society in which people are legally free to read pornography in private, even if some people actually do so, provides better conditions than a society in which no one does because no one can. This claim, of course, goes far beyond the argument of the Williams strategy, that different theories about the best conditions should be free to compete, because it argues that one such theory is in fact better than other theories, not simply that it might be. No doubt some members of the Committee do believe this, but the Report offers no grounds. We need a positive argument that freedom of individual choice whether or not to read sadistic novels or study photographs of oral sex is an essential or highly desirable condition for human flourishing. Or at least that it is an undesirable condition that people who want to do these things should be told that they cannot. The general scepticism of the Williams strategy does not even begin to make out such an argument, even as bolstered by the proposition that human development should be self-conscious rather than automatic.

5. *A new start*

I hope it is now clear what fish I am trying to fry. It is not my present purpose to suggest that the Report's conclusions are too conservative, and certainly not that they are too liberal. I want only to suggest that the goal-based strategy the Report uses is inadequate to support its conclusions. It does not follow from this, of course, that no better, more refined goal-based strategy could do so. But we should remember that the Committee included several members of great intellectual and practical ability, and that it had as its chairman a famous philosopher of unusual power and subtlety. It is evident why a goal-based strategy, which promises that things will go better for everyone in the long run if we accept what we do not like now, would seem an attractive premise for a political document. But it does not seem likely that any committee could extract much better arguments from that premise than this committee was able to do.

In any case, my arguments point up a general weakness of goal-based arguments that may be especially evident when these arguments are used to

defend a liberal attitude to pornography, but which is latent even when they are used to defend the protection of other unpopular activities like, for example, bogus or hateful political speech. Most of us feel, for reasons we perhaps cannot fully formulate, that it would be wrong to prevent Communists from defending the Russian invasion of Afghanistan on Hyde Park soapboxes, or neo-Nazis from publishing tracts celebrating Hitler. The goal-based justification of these convictions proposes that even though we might be worse off in the short run by tolerating distasteful political speech, because it distresses us and because there is always some chance that it will prove persuasive to others, there are reasons why we shall nevertheless be better off in the long run—come nearer to fulfilling the goals we ought to set for ourselves—if we do tolerate that speech. This argument has the weakness of providing contingent reasons for convictions that we do not hold contingently. For the story usually told about why free speech is in our long-term interests is not drawn from any deep physical necessity like the laws of motion, or even deep facts about the genetic structure or psychic constitution of human beings; the argument is highly problematical, speculative and in any case marginal. If the story is true, we might say, it is only just true, and no one can have any overwhelming ground for accepting it. But our convictions about free speech are not tentative or half-hearted or marginal. They are not just barely convictions. Of course, we can easily construct a goal-based *explanation* of why people like us would develop convictions we thought deep and lasting, even though the advantages to us of having these convictions were both temporary and contingent. But that is beside the present point, which is rather that these explanations do not provide a *justification* of the meaning these convictions have for us.

This problem in all goal-based justifications of fundamental political convictions is aggravated, in the case of liberal convictions about pornography, because the goal-based story seems not only speculative and marginal, but implausible as well. In the case of free political speech, we might well concede, to the goal-based theory, that each person has an important interest in developing his own independent political convictions, because that is an essential part of his personality, and because his political convictions will be more authentically his own, more the product of his own personality, the more varied the opinions of others he encounters. We might also concede that political activity in a community is made more vigorous by variety, even by the entry, that is, of wholly despicable points of view. These are decent arguments why both individuals and the community as a whole are at least in certain respects better off when the Nazi has spoken his piece; they are arguments not simply for liberty of political expression but also for more political speech rather than less. But the parallel arguments in the case of most pornography seem silly, and very few of those who defend peoples' right to read pornography in private would actually claim that the community or any individual is better off with more pornography rather than less. So a goal-based argument for pornography must do without what seem the strongest (though still contingent) strands in the goal-based argument for free

speech. The Williams strategy ingeniously ignores that defect by providing an argument for tolerance of pornography that, unlike the standard arguments for tolerance of speech, does not suppose that more of what is to be tolerated is better for everyone. But that argument fails (as we have seen) precisely because it does not include that supposition or anything like it. Its claim of scepticism towards the value of pornography (even assisted by the slippery slope) produces nothing stronger than impartial scepticism about the value of prohibiting it.

I want to consider what sort of an argument might be found in the other kind of strategy I mentioned at the outset, the rights-based strategy. Do people have moral or political rights such that it would be wrong to prohibit them from either publishing or reading or contemplating dirty books or pictures or films even if the community would be better off—provide more suitable conditions within which its members might develop—if they did not? Would these rights nevertheless permit the limited sorts of prohibitions that the Report accepts? Would these rights also permit restrictions like those the Report recommends on the public display of pornography that it does not prohibit altogether? I want to take the occasion of the Report, not only to ask these special questions about the proper attitude of the law to pornography, but also to ask something more general, about what questions like these mean, and how they might even in principle be answered.

II RIGHTS

Consider the following suggestion. People have the right not to suffer disadvantage in the distribution of social goods and opportunities, including disadvantage in the liberties permitted to them by the criminal law, just on the ground that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong. I shall call this (putative) right the right to moral independence, and in this part I shall consider what force this right would have on the law of pornography if it were recognized. In the next part I shall consider what grounds we might have to recognize it.

The right to moral independence is a very abstract right (or, if you prefer, the statement of the right I gave is a very abstract statement of the right) because this statement takes no account of the impact of competing rights. It does not attempt to decide whether the right can always be jointly satisfied for everyone, or how conflicts with other rights, if they arise, are to be settled. These further questions, along with other related questions, are left for more concrete statements of the right. Or (what comes to the same thing) for statements of the more concrete rights that people have in virtue of the abstract right. Nevertheless the questions I wish to put may usefully be asked even about the abstract statement or the abstract right.

Someone who appeals to the right of moral independence in order to justify a permissive legal regime of obscenity does not suppose that the community will be better off in the long run (according to some description of what makes a

community better off like, for example, the description offered in the Williams strategy) if people are free to look at obscene pictures in private. He does not, of course, deny this. His argument is in the conditional mood: even if conditions will not then be so suitable for human flourishing as they might be, for example, nevertheless the right must be respected. But what force does the right then have? When does the government violate that right?

It violates the right, we may say, at least in this case: when the only apparent or plausible justification for a scheme of regulation of pornography includes the hypothesis that the attitudes about sex displayed or nurtured in pornography are demeaning or bestial or otherwise unsuitable to human beings of the best sort, even though this hypothesis may, in fact, be true. It also violates that right when that justification includes the proposition that most people in the society accept that hypothesis, and are therefore pained or disgusted when other members of their own community, for whose lives they understandably feel special responsibility, do read dirty books or look at dirty pictures. The right is therefore a powerful constraint on the regulation of pornography, or at least so it seems, because it prohibits giving weight to exactly the arguments most people think are the best arguments for even a mild and enlightened policy of restriction of obscenity. What room is left, by the apparently powerful right, for the government to do anything at all about pornography?

Suppose it is discovered that the private consumption of pornography does in fact significantly increase the danger of crimes of violence, either generally or specifically crimes of sexual violence. Or suppose that private consumption has some special and deleterious effect on the general economy, by causing great absenteeism from work, for example, as drink or breakfast television is sometimes said to do. Then government would have, in these facts, a justification for the restraint and perhaps even for the prohibition of pornography that does not include the offending hypothesis either directly, by the assumption that the hypothesis is true, or indirectly, in the proposition that many people think it true. After all (as is often pointed out in discussions of obscenity, including the Williams Report) the Bible or Shakespeare might turn out to have these unfortunate consequences, in which case government would have a reason for banning these books that did not require a comparable hypothesis about them.

This possibility raises a slightly more subtle point. Suppose it were indeed discovered that all forms of moving or arousing literature (including Shakespeare, the Bible and many forms of pornography) contributed significantly to crime. But the government responded to this discovery selectively, banning most examples of pornography and other literature it considered worthless but allowing Shakespeare and the Bible nevertheless on the ground that these were of such literary and cultural value that it was worth the crime they caused to preserve them. Nothing in this selection and discrimination (as so far stated) violates the right to moral independence. The judgment in question—that pornography does not in fact contribute enough of literary value, or that it is not sufficiently informative or imaginative about the different ways in which people might express

themselves or find value in their lives, to justify accepting the damage of crime as the cost of its publication—is not the judgment that those who do enjoy pornography have worse character on that account. Of course, any judgment of literary or cultural value will be a judgment about which honest and reasonable people will disagree. But this is true of many other kinds of judgments that government must nevertheless make. The present judgment is no doubt special because it may be used as a screen to hide a different judgment that would offend the right to independence, the judgment that pornography should be treated differently from the Bible because the people who prefer it are worse people. That danger might be sufficiently strong so that a society jealous of the right of moral independence will, for prophylactic reasons, forbid officials to make the literary judgment that would distinguish *Sex Kittens* from *Hamlet* if both were found to provoke crime. That does not touch the present point, that the literary judgment is different, and does not itself threaten the right of independence; and it is worth adding that very few of the people who do admit to enjoying pornography claim distinct literary merit for it. They claim at most the kind of merit that others, with more conventional ideas about amusement, claim for thrillers.

But this is, in any case, only academic speculation, because there is no reason to suppose a sufficiently direct connection between crime and either *Sex Kittens* or *Hamlet* to provide a ground for banning either one as private entertainment. But what about public display? Can we find a plausible justification for restricting the display of pornography that does not violate the right of moral independence? We can, obviously, construct a certain argument in that direction, as follows. 'Many people do not like to encounter genital displays on the way to the grocer. This taste is not, nor does it necessarily reflect, any adverse view of the character of those who do not mind such encounters. Someone who would not like to find pornography in his ordinary paths may not even object to finding it elsewhere. He may simply have tastes and preferences that reject certain combinations in his experience, like someone who likes pink sunsets but not pink houses in Belgravia, who does not object to neon in Leicester Square but would hate it in the Cotswolds. Or he may have a more structured or more consequentialist scheme of preferences about his environment. He may find or believe, for example, that his own delight in other peoples' bodies is lessened or made less sharp and special if nakedness becomes either too familiar to him or less peculiar to those occasions in which it provides him special pleasure, which may be in museums or his own bedroom or both. Or that sex will come to be different and less valuable for him if he is too often or too forcefully reminded that it has different, more commercial or more sadistic, meaning for others. Or that his goal that his children develop certain similar tastes and opinions will be thwarted by the display or advertising that he opposes. None of these different opinions and complaints *must* be the product of some conviction that those with other opinions and tastes are people of bad character, any more than those who hope that state supported theatre will produce the classics exclusively must think that those who prefer experimental theatre are less worthy people'.

This picture of the motives people might have for not wanting to encounter pornography on the streets is a conceivable picture. But I suspect, as I suggested earlier, that it is far too crude and one-dimensional as a picture of what these motives actually are. The discomfort many people find in encountering blatant nudity on the hoardings is rarely so independent of their moral convictions as these various descriptions suggest. It is at least part of the offense, for many people, that they detest themselves for taking the interest in the proceedings that they do. It is a major part of the offense, for others, that they are so forcefully reminded of what their neighbors are like, and, more particularly, of what their neighbors are getting away with. People object to the display of naked men and women in erotic poses, that is, even when these displays occur (as for commercial reasons they inevitably do) in those parts of cities that would be in no sense beautiful or enlightening even without the pornography. Even if we took the descriptions of peoples' motives in the argument I set out at face value, moreover, we should be forced to recognize the substantial influence of moral convictions just in those motives, for someone's sense of what he wants his own attitudes to sex to be, and certainly his sense of what attitudes he hopes to encourage in his children, are not only influenced by, but constitute, his moral opinions in the broad sense.

We therefore encounter, in peoples' motives for objecting to the advertising or display of pornography, at least a mix and interaction of attitudes, beliefs and tastes that rule out any confident assertion that regulation justified by appeal to these motives would not violate the right to moral independence. We simply do not know whether, if we could disentangle the different strands of taste, ambition and belief, so as to winnow out those that express moral condemnation or would not exist but for it, the remaining strands would justify any particular scheme of regulation of display. This is not simply a failure of information that would be expensive to obtain. The problem is more conceptual than that: the vocabulary we use to identify and individuate motives (our own as well as those of others) cannot provide the discrimination we need.

A society anxious to defend the abstract right to moral independence, in the face of this complexity, has two options, at least. It might decide that if popular attitudes towards a minority or a minority practice are mixed in this way, so that the impact of adverse moral convictions can be neither excluded nor measured, then these attitudes should all be deemed to be corrupted by such convictions, and no regulation is permissible. Or it might decide that the case of mixed attitudes is a special kind of case in the administration of the abstract right, so that more concrete statements of what people are entitled to have under the right must take the fact of mixed attitudes into account. It might do this, for example, by stipulating, at the more concrete level, that no one should suffer *serious* damage through legal restraint when this can only be justified by the fact that what he proposes to do will frustrate or defeat preferences of others that we have reason to believe are mixed with or are consequences of the conviction that people who act in that way are people of bad character. This second option, which defines a

concrete right tailored to the problem of mixed preferences, is not a relaxation or compromise of the abstract right, but rather a (no doubt controversial) application of it to that special situation. Which of the two options (or which further option) provides the best response to the problem of mixed motives is part, of course, of the more general problem of justification that I postponed to the next part. The process of making an abstract right successively more concrete is not simply a process of deduction or interpretation of the abstract statement, but a fresh step in political theory.

If society takes the second option just described in the case of pornography (as I think it should for reasons I describe later) then its officials must undertake to decide what damage to those who wish to publish or read pornography is serious and what is trivial. Once again reasonable and honest officials will disagree about this, but we are trying to discover, not an algorithm for a law of obscenity, but rather whether a plausible concrete conception of a plausible abstract right will yield a sensible scheme of regulation. We should therefore consider the character of the damage that would be inflicted on consumers of pornography by (let us say) a scheme of zoning which requires that pornographic materials be sold and films shown only in particular areas, a scheme of advertising which prohibits in public places advertisements that would widely be regarded as indecent, and a scheme of labeling so that those entering films or shops whose contents they might find indecent would be warned. There are three main heads of damage that such a regime might inflict on consumers: inconvenience, expense and embarrassment. Whether the inconvenience is serious will depend on the details of, for example, the zoning. But it should not be considered serious if shoppers for pornography need travel on average only as far as, say, shoppers for stereo equipment or diamonds or second-hand books need travel to find the centers of such trade. How far this scheme of restriction would increase the price of pornography is harder to predict. Perhaps the constraint on advertising would decrease volume of sales and therefore increase unit costs. But it seems unlikely that this effect would be very great, particularly if the legal ban runs to the character not to the extent of the advertising, and permits, as it should, not only stark 'tombstone' notices, but the full range of the depressingly effective techniques through which manufacturers sell soap and video cassette recorders.

Embarrassment raises a more interesting and important question. Some states and countries have required people to identify themselves as belonging to a particular religion or holding certain political convictions just for the sake of that identification, and for the sake of the disadvantage it brings in its train. The Nazi's regime of yellow armbands for Jews, for example, or the registry of members of civil rights groups that some southern states established and the Supreme Court ruled unconstitutional in *NAACP v Alabama ex rel Patterson*.¹⁴ Since in cases like these identification is required just as a mark of public contempt, or just to provide the social and economic pressure that follows from that contempt, these laws are ruled out by even the abstract form of the right. But

¹⁴ 357 US 449 (1958).

the situation is rather different if identification is simply a by-product rather than the purpose of a scheme of regulation, and is as voluntary as the distinct goals of regulation permit. It would violate the right of moral independence, plainly, if pornography houses were not allowed to use plain-brown-wrapper mail for customers who preferred anonymity, because embarrassment would be the point of that restriction, not a by-product. Also, I think, if the law forbade pornography shops from selling anything but pornography, so that a shy pornographer could not walk out of the shop with a new umbrella as well as a bulge in his coat pocket. But the right of moral independence does not carry with it any government obligation to insure that people may exercise that right in public places without it being known by the public that they do. Perhaps the government would be obliged to take special measures to guard against embarrassment in a society in which people actually were likely to suffer serious economic harm if they were seen leaving a shop carrying the wrong sign. But that is unlikely to be true about shy pornographers in this country now, who might sensibly be required to bear the social burden of being known to be the kind of people they are.

I conclude that the right to moral independence, if it is a genuine right, requires a permissive legal attitude to the consumption of pornography in private, but that a certain concrete conception of that right nevertheless permits a scheme of restriction rather like the scheme that the Williams Report recommends. It remains to consider whether that right and that conception can themselves be justified in political theory. But I might first observe that nothing in my conclusion collides with my earlier claim that the Williams strategy, on which the Report relies, cannot support either its permissive attitude or its restrictive scheme. For I did not argue, in support of that claim, that the restrictive scheme would impose great damage on individuals. I said only that the Williams strategy as a whole, which based its arguments not on the interests of pornographers but on the contribution they might make to a beneficial exchange of communication, failed to provide the necessary distinction. Nor do I now appeal to the ideal that is the nerve of that strategy—that the community be free to develop the best conditions for human flourishing—in support of my own conclusions about the law of pornography. I argue rather that, whether or not the instrumental claims of the Williams Report are sound, private liberty is required and public constraint permitted by an appealing conception of an important political right.

III EQUALITY

1. *A trump over utility*

The rest of this essay considers the question of how the right to moral independence might be defended, both in its abstract form and in the more concrete conception we discussed in considering public display of pornography. This question is important beyond the relatively trivial problem of obscenity itself: the right has other and more important applications, and the question of

what kinds of arguments support a claim of right is an urgent question in political theory.

Rights (I have argued elsewhere)¹⁵ are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole. If someone has a right to moral independence, this means that it is for some reason wrong for officials to act in violation of that right, even if they (correctly) believe that the community as a whole would be better off if they did. Of course, there are many different theories in the field about what makes a community better off on the whole; many different theories, that is, about what the goal of political action should be. One prominent theory (or rather group of theories) is utilitarianism in its familiar forms, which suppose that the community is better off if its members are on average happier or have more of their preferences satisfied. Another, and in certain ways different, theory is the theory we found in the Williams strategy, which argues that the community is better off if it provides the most desirable conditions for human development. There are of course many other theories about the true goal of politics, many of them much more different from either of these two theories than these are from each other. To some extent, the argument in favor of a particular right must depend on which of these theories about desirable goals has been accepted; it must depend, that is, on what general background justification for political decisions the right in question proposes to trump. In the following discussion I shall assume that the background justification with which we are concerned is some form of utilitarianism, which takes, as the goal of politics, the fulfillment of as many of peoples' goals for their own lives as possible. This remains, I think, the most influential background justification, at least in the informal way in which it presently figures in politics in the Western democracies.¹⁶

15 Dworkin, *Taking Rights Seriously*.

16 I leave, for another occasion perhaps, the question of what background rights we should accept as trumps if we chose, as our background justification, something closer to the best-conditions-for-human-flourishing goal of the Williams strategy. But we might notice that that theory may not be so far from the more sophisticated forms of utilitarianism than at first appears, at least on the following assumption. The goal of human flourishing admits of two interpretations, which we might call a platonic and a liberal interpretation. The platonic interpretation insists that the best conditions are those in which it is most likely that people will in fact choose and lead the lives that are the most valuable lives for them to lead. The liberal interpretation holds instead that the best conditions are those that provide people the best and most informed choice about how to lead their lives. The best conditions for choice, in this liberal sense, require not simply a wide choice of possibilities permitted by law, but also a public environment in which examples of different ways to live are in evidence, a cultural tradition in which these are imaginatively explored in various forms of art, and a system of laws that both provides the institutions and relationships that many of these ways of life require and protects them from various forms of corruption. The Williams strategy tries to bring these the platonic and liberal interpretations together in its claim that the best means for discovering which lives are in fact best lies in supplying the best conditions for choice in the liberal sense. But this is only an hypothesis: we found reasons for doubting it, and the world about us does not lend it much support. So the choice between the two interpretations is a genuine choice. The platonic interpretation does not necessarily justify brainwashing or the other techniques of thought control that we have learned

Suppose we accept then that, at least in general, a political decision is justified if it promises to make citizens happier, or to fulfill more of their preferences, on average, than any other decision could. Suppose we assume that the decision to prohibit pornography altogether does, in fact, meet that test, because the desires and preferences of publishers and consumers are outweighed by the desires and preferences of the majority, including their preferences about how others should lead their lives. How could any contrary decision, permitting even the private use of pornography, then be justified?

Two modes of argument might be thought capable of supplying such a justification. First, we might argue that, though the utilitarian goal states one important political ideal, it is not the only important ideal, and pornography must be permitted in order to protect some other ideal that is, in the circumstances, more important. Second, we might argue that further analysis of the grounds that we have for accepting utilitarianism as a background justification in the first place—further reflection of why we wish to pursue that goal—shows that utility must yield to some right of moral independence here. The first form of argument is pluralistic: it argues for a trump over utility on the ground that though utility is always important, it is not the only thing that matters, and other goals or ideals are sometimes more important. The second supposes that proper understanding of what utilitarianism is, and why it is important, will itself justify the right in question.

I do not believe that the first, or pluralistic, mode of argument has much prospect of success, at least as applied to the problem of pornography. But I shall not develop the arguments now that would be necessary to support that opinion. I want instead to offer an argument in the second mode, which is, in summary, this. Utilitarianism owes whatever appeal it has to what we might call its egalitarian cast. (Or, if that is too strong, would lose whatever appeal it has but for that cast.)

to fear. But I doubt that it appeals to many people, and I shall assume that the liberal interpretation is the theory now in question. We saw, in the first part of this essay, that the various features of a good environment for choice might conflict with one another. If the law forbids pornography even in private, then it limits choice in an important way. But if it does not then it limits choice in another way: those who wish to form sexual relationships based on culturally supported attitudes of respect and beauty, and to raise their children to that ideal, may find their plans much harder to achieve if pornography has taken too firm a hold in popular culture, which it may do even without public display. So the goal of best conditions for human flourishing, at least in the liberal interpretation, requires trade offs and compromises much as any form of utilitarianism does. In that case we might plausibly (at least for some purposes) take the goal of providing these conditions to be a particularly enlightened form of utilitarianism, which measures the value of a community, not by the opportunity it offers people overall, in the aggregate, to fulfill whatever preferences in fact they have, but rather by the opportunity it offers them, again in the aggregate, to develop and fulfill coherent and informed conceptions of the most valuable lives for them to lead. (Though we should remember that Professor Williams rejects, at least as theory of personal morality, more traditional forms of utilitarianism. See Smart, J.J.C and Williams, B., *Utilitarianism: For and Against*, CUP (1973).) But I shall not insist on that assimilation here, or consider how the argument I give might have to be modified if we did take this generous interpretation of the boundaries of utilitarianism.

Suppose some version of utilitarianism provided that the preferences of some people were to count for less than those of others in the calculation how best to fulfill most preferences overall either because these people were in themselves less worthy or less attractive or less well loved people, or because the preferences in question combined to form a contemptible way of life. This would strike us as flatly unacceptable, and in any case much less appealing than standard forms of utilitarianism. In any of its standard versions, utilitarianism can claim to provide a conception of how government treats people as equals, or, in any case, how government respects the fundamental requirement that it must treat people as equals. Utilitarianism claims that people are treated as equals when the preferences of each, weighted only for intensity, are balanced in the same scales, with no distinctions for persons or merit. The corrupt version of utilitarianism just described, which gives less weight to some persons than to others, or discounts some preferences because these are ignoble, forfeits that claim. But if utilitarianism in practice is not checked by something like the right of moral independence (and by other allied rights) it will disintegrate, for all practical purposes, into exactly that version.

Suppose a community of many people including Sarah. If the constitution sets out a version of utilitarianism which provides in terms that Sarah's preferences are to count for twice as much as those of others, then this would be the unacceptable, non-egalitarian version of utilitarianism. But now suppose that the constitutional provision is the standard form of utilitarianism, that is, that it is neutral towards all people and preferences, but that a surprising number of people love Sarah very much, and therefore strongly prefer that her preferences count for twice as much in the day-to-day political decisions made in the utilitarian calculus. When Sarah does not receive what she would have if her preferences counted for twice as much as those of others, then these people are unhappy, because their special Sarah-loving preferences are unfulfilled. If these special preferences are themselves allowed to count, therefore, Sarah will receive much more in the distribution of goods and opportunities than she otherwise would. I argue that this defeats the egalitarian cast of the apparently neutral utilitarian constitution as much as if the neutral provision were replaced by the rejected version. Indeed, the apparently neutral provision is then self-undermining because it gives a critical weight, in deciding which distribution best promotes utility, to the views of those who hold the profoundly un-neutral (some would say anti-utilitarian) theory that the preferences of some should count for more than those of others.

The reply that a utilitarian anxious to resist the right to moral independence would give to this argument is obvious: utilitarianism does not give weight to the truth of that theory, but just to the fact that many people (wrongly) hold that theory and so are disappointed when the distribution the government achieves is not the distribution they believe is right. It is the fact of their disappointment, not the truth of their views, that counts, and there is no inconsistency, logical or pragmatic, in that. But this reply is too quick. For there is in fact a particularly deep kind of contradiction here. Utilitarianism must claim (as I said earlier any

political theory must claim) truth for itself, and therefore must claim the falsity of any theory that contradicts it. It must itself occupy, that is, all the logical space that its content requires. But neutral utilitarianism claims (or in any case presupposes) that no one is, in principle, any more entitled to have any of his preferences fulfilled than anyone else is. It argues that the only reason for denying the fulfillment of one person's desires, whatever these are, is that more or more intense desires must be satisfied instead. It insists that justice and political morality can supply no other reason. This is, we might say, the neutral utilitarian's *case* for trying to achieve a political structure in which the average fulfillment of preferences is as high as possible. The question is not whether a government can achieve that political structure if it counts political preferences like the preferences of the Sarah lovers¹⁷ or whether the government will in fact then have counted any particular preference twice and so contradicted utilitarianism in that direct way. It is rather whether the government can achieve all this without implicitly contradicting that case.

Suppose the community contains a Nazi, for example, whose set of preferences includes the preference that Aryans have more and Jews less of their preferences fulfilled just because of who they are. A neutral utilitarian cannot say that there is no reason in political morality for rejecting or dishonoring that preference, for not dismissing it as simply wrong, for not striving to fulfill it with all the dedication that officials devote to fulfilling any other sort of preference. For utilitarianism itself supplies such a reason: its most fundamental tenet is that peoples' preferences should be weighed on an equal basis in the same scales, that the Nazi theory of justice is profoundly wrong, and that officials should oppose the Nazi theory and strive to defeat rather than fulfill it. A neutral utilitarian is in fact barred, for reasons of consistency, from taking the same politically neutral attitude to the Nazi's political preference that he takes to other sorts of preferences. But then he cannot make the case just described in favor of highest average utility computed taking that preference into account.

I do not mean to suggest, of course, that endorsing someone's right to have his preference satisfied automatically endorses his preference as good or noble. The good utilitarian, who says that the push-pin player is equally entitled to satisfaction of that taste as the poet is entitled to the satisfaction of his, is not for that reason committed to the proposition that a life of push-pin is as good as a life of poetry. Only vulgar critics of utilitarianism would insist on that inference. The utilitarian says only that nothing in the theory of justice provides any reason why the political and economic arrangements and decisions of society should be any closer to those the poet would prefer than those the push-pin player would like. It is just a matter, from the standpoint of political justice, of how many people prefer the one to the other and how strongly. But he cannot say that about the conflict between the Nazi and the neutral utilitarian opponent of Naziism, because the correct political theory, his political theory, the very political theory to which he

¹⁷ Though there are obvious dangers of a circle here. See Dworkin, 'What is Equality? Part I: Equality of Welfare', forthcoming in *Philosophy and Public Affairs*.

appeals in attending to the fact of the Nazi's claim, does speak to the conflict. It says that what the neutral utilitarian prefers is just and accurately describes what people are, as a matter of political morality, entitled to have, but that what the Nazi prefers is deeply unjust and describes what no one is entitled, as a matter of political morality, to have. But then it is contradictory to say, again as a matter of political morality, that the Nazi is as much entitled to the political system he prefers as is the utilitarian.

The point might be put this way. Political preferences, like the Nazi's preference, are on the same level—purport to occupy the same space—as the utilitarian theory itself. Therefore, though the utilitarian theory must be neutral between personal preferences like the preferences for push-pin and poetry, as a matter of the theory of justice, it cannot, without contradiction, be neutral between itself and Naziism. It cannot accept at once a duty to defeat the false theory that some peoples' preferences should count for more than other peoples' and a duty to strive to fulfill the political preferences of those who passionately accept that false theory, as energetically as it strives for any other preferences. The distinction on which the reply to my argument rests, the distinction between the truth and the fact of the Nazi's political preferences, collapses, because if utilitarianism counts the fact of these preferences it has denied what it cannot deny, which is that justice requires it to oppose them.

We could escape this point, of course, by distinguishing two different forms or levels of utilitarianism. The first would be presented simply as a thin theory about how a political constitution should be selected in a community whose members prefer different kinds of political theories. The second would be a candidate for the constitution to be so chosen; it might argue for a distribution that maximized aggregate satisfaction of personal preferences in the actual distribution of goods and opportunities, for example. In that case the first theory would argue only that the preferences of the Nazi should be given equal weight with the preferences of the second sort of utilitarian in the choice of a constitution, because each is equally entitled to the constitution he prefers, and there would be no contradiction in that proposition. But of course the neutral utilitarian theory we are now considering is not simply a thin theory of that sort. It proposes a theory of justice as a full political constitution, not simply a theory about how to choose one, and so it cannot escape contradiction through modesty.

Now the same argument holds (though perhaps less evidently) when the political preferences are not familiar and despicable, like the Nazi theory, but more informal and cheerful, like the preferences of the Sarah lovers who think that her preferences should be counted twice. The latter might, indeed, be Sarahocrats who believe that she is entitled to the treatment they recommend by virtue of birth or other characteristics unique to her. But even if their preferences rise from special affection rather than from political theory, these preferences nevertheless invade the space claimed by neutral utilitarianism and so cannot be counted without defeating the case utilitarianism provides. My argument, therefore, comes to this. If utilitarianism is to figure as part of an attractive working political

theory, then it must be qualified so as to restrict the preferences that count by excluding political preferences of both the formal and informal sort. One very practical way to achieve this restriction is provided by the idea of rights as trumps over unrestricted utilitarianism. A society committed to utilitarianism as a general background justification which does not in terms disqualify any preferences might achieve that disqualification by adopting a right to political independence: the right that no one suffer disadvantage in the distribution of goods or opportunities on the ground that others think he should have less because of who he is or is not, or that others care less for him than they do for other people. The right of political independence would have the effect of insulating Jews from the preferences of Nazis, and those who are not Sarah from the preferences of those who adore her.

The right of moral independence (which I am supposed to be discussing) can be defended in a parallel way. Neutral utilitarianism rejects the idea that some ambitions that people might have for their own lives should have less command over social resources and opportunities than others, except as this is the consequence of weighing all preferences on an equal basis in the same scales. It rejects the argument, for example, that some peoples' conception of what sexual experience should be like, and of what part fantasy should play in that experience, and of what the character of that fantasy should be, are inherently degrading or unwholesome. But then it cannot (for the reasons just canvassed) count the moral preferences of those who do hold such opinions in the calculation whether individuals who form some sexual minority, including homosexuals and pornographers, should be prohibited from the sexual experiences they want to have. The right of moral independence is part of the same collection of rights as the right of political independence, and it is to be justified as a trump over an unrestricted utilitarian defense of prohibitory laws against pornography, in a community of those who find offense just in the idea that their neighbors are reading dirty books, in much the same way as the latter right is justified as a trump over a utilitarian justification of giving Jews less or Sarah more in a society of Nazis or Sarah lovers.

It remains to consider whether the abstract right to moral independence, defended in this way, would nevertheless permit restriction of public display of pornography in a society whose preferences against that display were backed by the mixed motives we reviewed in the last part. This is a situation in which the egalitarian cast of utilitarianism is threatened from not one but two directions. To the extent to which the motives in question are moral preferences about how others should behave, and these motives are counted, then the neutrality of utilitarianism is compromised. But to the extent to which these are the rather different sort of motives we reviewed, which emphasize not how others should lead their lives, but rather the character of the sexual experience people want for themselves, and these motives are disregarded, the neutrality of utilitarianism is compromised in the other direction, for it becomes unnecessarily inhospitable to the special and important ambitions of those who then lose control of a crucial

aspect of their own self-development. The situation is therefore not an appropriate case for a prophylactic refusal to count any motive whenever we cannot be sure that that motive is unmixed with moralism, because the danger of unfairness lies on both sides rather than only on one. The alternative I described in the last part is at least better than that. This argues that restriction may be justified even though we cannot be sure that the preferences people have for restriction are untainted by the kind of preferences we should exclude, provided that the damage done to those who are affected adversely is not serious damage, even in their own eyes. Allowing restrictions on public display is in one sense a compromise; but it is a compromise recommended by the right of moral independence, once the case for that right is set out, not a compromise of that right.

2. Hart's objections

There are, then, good grounds for those who accept utilitarianism as a general background justification for political decisions also to accept, as part of the same package, a right of moral independence in the form that I argued, in the last part, would support or permit the major recommendations of the Williams Report. I shall end this essay by considering certain objections that Professor H. L. A. Hart has made, in a recent article,¹⁸ to a similar argument that I made some years ago about the connection between utilitarianism and these rights.¹⁹ Hart's objections show what I think is a comprehensive misunderstanding of this argument, which my earlier statement, as I now see, encouraged, and it might therefore be helpful, as insurance against a similar misunderstanding now, to report these objections and my reasons for thinking that they misconceive my argument.

I suggested, in my earlier formulation of the present argument, that if a utilitarian counts preferences like the preferences of the Sarah lovers, then this is a 'form' of double-counting because, in effect, Sarah's preferences are counted twice, once on her own account, and once through the second-order preferences of others that incorporate her preferences by reference. Hart says that this is a mistake, because in fact no one's preferences are counted twice, and it would *undercount* the Sarah lovers' preferences, and so fail to treat them as equals, if their preferences in her favor were discarded. There would be something in this last point if votes rather than preferences were in issue, because if someone wished to vote for Sarah's success rather than his own, his role in the calculation would be exhausted by this gift, and if his vote was then discarded he might well complain that he had been cheated of his equal power over political decision. But preferences (as these figure in utilitarian calculations) are not like votes in that way. Someone who reports more preferences to the utilitarian computer does not (except trivially) diminish the impact of other preferences he also reports; he

¹⁸ Hart, 'Between Utility and Rights', 79 *Col L Rev* 828, 836ff (1980).

¹⁹ See Dworkin, *Taking Rights Seriously*, Introduction, Ch 12, and Appendix, 357-358. See also Dworkin, 'Liberalism', in Hampshire (ed) *Public and Private Morality*, Cambridge University Press 1978, and Dworkin, 'Social Science and Constitutional Rights: the Consequences of Uncertainty', 6 *J of L & Educ* 3 (1977).

rather increases the role of his preferences overall, compared with the role of other peoples' preferences, in the giant calculation. So someone who prefers Sarah's success to the success of people generally, and through the contribution of that preference to an unrestricted utilitarian calculation secures more for her, does not have any less for himself—for the fulfillment of his more personal preferences—than someone else who is indifferent to Sarah's fortunes.

I do not think that my description, that counting his preferences in favor of Sarah is a form of double counting, is misleading or unfair. But this description was meant to summarize the argument, not to make it, and I will not press that particular characterization. (Indeed, as Hart notices, I made it only about some of the examples I gave in which unrestricted utilitarianism produced obviously inequalitarian results.) Hart makes more substantial points about a different example I used, which raised the question of whether homosexuals have the right to practice their sexual tastes in private. He thinks I want to say 'that if, as a result of [preferences that express moral disapproval of homosexuals] tipping the balance, persons are denied some liberty, say to form some sexual relations, those so deprived suffer because by this result their concept of a proper or desirable form of life is despised by others, and this is tantamount to treating them as inferior to or of less worth than others, or not deserving of equal concern and respect'.²⁰

But this misstates my point. It is not the result (or as Hart later describes it the 'upshot') of the utilitarian calculation that causes or achieves the fact that homosexuals are despised by others. It is rather the other way round: if someone is denied liberty of sexual practice in virtue of a utilitarian justification that depends critically on other peoples' moralistic preferences, then he suffers disadvantage in virtue of the fact that his concept of a proper life is already despised by others. Hart says that the 'main weakness' in my argument—the feature that makes it 'fundamentally wrong'—is that I assume that if someone's liberty is restricted this must be interpreted as a denial of his treatment as an equal. But my argument is that this is not inevitably or even usually so, but only when the constraint is justified in some way that depends on the fact that others condemn his convictions or values. Hart says that the interpretation of denial of liberty as a denial of equal concern is 'least credible' in exactly the case I discuss, that is, when the denial is justified through a utilitarian argument, because (he says) the message of that justification is not that the defeated minority or their moral convictions are inferior, but only that they are too few to outweigh the preferences of the majority, which can only be achieved if the minority is in fact denied the liberty it wishes. But once again this ignores the distinction I want to make. If the utilitarian justification for denying liberty of sexual practice to homosexuals can succeed without counting the moralistic preferences of the majority in the balance (as it might if there was good reason to believe what is in fact incredible, that the spread of homosexuality fosters violent crime) then the message of prohibition would, indeed, be only the message Hart finds, which

20 Hart, *supra*, 842.

might be put this way: 'It is impossible that everyone be protected in all his interests, and the interests of the minority must yield, regrettably, to the concern of the majority for its safety.' There is (at least in my present argument) no denial of treatment as an equal in that message. But if the utilitarian justification cannot succeed without relying on the majority's moralistic preferences about how the minority should live, and the government nevertheless urges that justification, then the message is very different and, in my view, nastier. It is exactly that the minority must suffer because others find the lives they propose to lead disgusting, which seems no more justifiable, in a society committed to treating people as equals, than the proposition we earlier considered and rejected, as incompatible with equality, that some people must suffer disadvantage under the law because others do not like them.

Hart makes further points. He suggests, for example, that it was the 'disinterested' political preferences of liberals that tipped the balance in favor of repealing laws against homosexual relationships in 1967 in England, and asks how anyone could object that counting *those* preferences at that time offended anyone's rights to be treated as an equal. But this question misunderstands my point in a fundamental way. I do not argue—how could anyone argue?—that citizens in a democracy should not campaign and vote for what they think is just. The question is not whether people should work for justice, but rather what test we and they should apply to determine what is just. Utilitarianism holds that we should apply this test: we should work to achieve the maximum possible satisfaction of the preferences we find distributed in our community. If we accepted this test in an unrestricted way, then we would count the attractive political convictions of the 60's liberals simply as data, to be balanced against the less attractive convictions of others, to see which carried the day in the contest of number and intensity. Conceivably the liberal position would have won this contest. Probably it would not have.

But I have been arguing that this is a false test, which in fact undermines the case for utilitarianism, if political preferences of either the liberals or their opponents are counted and balanced to determine what justice requires. That is why I recommend, as part of any overall political theory in which utilitarianism figures as a background justification, rights to political and moral independence. But the liberals who campaigned in the interests of homosexuals in England in the 60's most certainly did not embrace the test I reject. They of course *expressed* their own political preferences in their votes and arguments, but they did not *appeal* to the popularity of these preferences as providing an argument in itself for what they wanted, as the unrestricted utilitarian argument I oppose would have encouraged them to do. Perhaps they appealed instead to something like the right of moral independence. In any case they did not rely on any argument inconsistent with that right. Nor is it necessary for us to rely on any such argument to say that what they did was right, and treated people as equals. The proof is this: the case for reform would have been just as strong in political theory even if there had been very few or no heterosexuals who wanted reform, though of course reform would

not then have been practically possible. If so, then we cannot condemn the procedure that in fact produced reform on the ground that that procedure offended anyone's right to independence.

Hart's misunderstanding here was no doubt encouraged by my own description of how rights like the right to moral independence function in a constitutional system, like that of the United States, which uses rights as a test of the legality of legislation. I said that a constitutional system of this sort is valuable when the community as a whole harbors prejudices against some minority or convictions that the way of life of that minority is offensive to people of good character. In that situation, the ordinary political process is antecedently likely to reach decisions that would fail the test we have constructed, because these decisions would limit the freedom of the minority and yet could not be justified, in political theory, except by assuming that some ways of living are inherently wrong or degrading, or by counting the fact that the majority thinks them so as itself part of the justification. Since these *repressive* decisions would then be wrong, for the reasons I offer, the constitutional right forbids them in advance.

Of course the decision for reform that Hart describes would not—could not—be a decision justified only on these offending grounds. Even if the benign liberal preferences figured as data rather than argument, as I think they should not, no one would be in a position to claim the right to moral or political independence as a shield against the decision that was in fact reached. But someone might have been led to suppose, by my discussion, that what I condemn is any political process that would allow any decision to be taken if peoples' reasons for supporting one decision rather than another are likely to lie beyond their own personal interests. I hope it is now plain why this is wrong. *That* position would not allow a democracy to vote for social welfare programs, or foreign aid, or conservation for later generations. Indeed, in the absence of an adequate constitutional system, the only hope for justice is precisely that people will vote with a disinterested sense of fairness. I condemn a political process that assumes that the fact that people have such reasons is itself part of the case in political morality for what they favor. Hart's heterosexual liberals may have been making the following argument to their fellow citizens. 'We know that many of you find the idea of homosexual relationships troubling and even offensive. Some of us do as well. But you must recognize that it would deny equality, in the form of moral independence, to count the fact that we have these feelings as a justification for penal legislation. Since that is so, we in fact have no justification for the present law, and we ought, in all justice, to reform it'. Nothing in this argument counts the fact that either the liberals or those they address happen to have any particular political preferences or convictions as itself an argument: the argument is made by appeal to justice not to the fact that many people want justice. There is nothing in that argument that fails to treat homosexuals as equals. Quite the contrary. But that is just my point.

I shall consider certain of the remaining objections Hart makes together. He notices my claim, that the rights people have depend on the background

justification and political institutions that are also in play, because the argument for any particular right must recognize that right as part of a complex package of other assumptions and practices that it trumps. But he finds this odd. It may make sense to say, he remarks, that people *need* rights less under some forms of government than others. But does it make sense to say that they *have* less rights in one situation rather than another? He also objects to my suggestion (which is of course at the center of the argument I made in the last section) that rights that have long been thought to be rights to liberty, like the right of homosexuals to freedom of sexual practice or the right of pornographers to look at what they like in private, are in fact (at least in the circumstances of modern democracies) rights to treatment as an equal. That proposition, which Hart calls 'fantastic', would have the consequence, he says, that a tyrant who had forbidden one form of sexual activity or the practice of one religion would actually eliminate the evil rather than increase it if he broadened his ban to include all sex and all religions, and in this way removed the inequality of treatment. The vice in prohibitions of sexual or religious activity, he says, is in fact that these diminish liberty, not equal liberty; adding a violation of equality to the charge makes equality an empty and idle idea with no work to do.

These different objections are plainly connected, because they suppose that whatever rights people have are at least in large part timeless rights necessary to protect enduring and important interests fixed by human nature and fundamental to human development, like interests in the choice of sexual partners and acts and choice of religious conviction. That is a familiar theory of what rights are and what they are for, and I said that I would not give my reasons, in this essay, for thinking that it is in the end an inadequate theory of rights. I did say that this theory is unlikely to produce a defense of the right I have been considering, which is the right of moral independence as applied to the use of pornography, because it seems implausible that any important human interests are damaged by denying dirty books or films. But that is not much of an argument against the general fundamental-interests theory of rights, because those who accept that theory might be ready to concede (or perhaps even to insist) that the appeal to rights in favor of pornographers is an error that cheapens the idea of rights, and that there is nothing in political morality that condemns the prohibition of pornography altogether if that is what will best fulfill the preferences of the community as a whole.

My aim is to develop a theory of rights that is relative to the other elements of a political theory, and to explore how far that theory might be constructed from the exceedingly abstract (but far from empty) idea that government must treat people as equals. Of course that theory makes rights relative in only one way. I am anxious to show how rights fit into different packages, so that I want to see, for example, which rights should be accepted as trumps over utility if utility is accepted, as many people think it should be accepted, as the proper background justification. That is an important question because, as I said, at least an informal kind of utilitarianism has for some time been accepted in practical politics. It has

supplied, for example, the working justification of most of the constraints on our liberty through law that we accept as proper. But it does not follow from this investigation that I must endorse (as I am sometimes said to endorse)²¹ the package of utilitarianism together with the rights that utilitarianism requires as the best package that can be constructed. In fact I do not. Though rights are relative to packages, one package might still be chosen over others as better, and I doubt that in the end any package based on any familiar form of utilitarianism will turn out to be best. Nor does it follow from my argument that there are no rights that any defensible package must contain—no rights that are in this sense natural rights—though the argument that there are such rights, and the explanation of what these are, must obviously proceed in a rather different way from the route I followed in arguing for the right to moral independence as a trump over utilitarian justifications.

But if rights figure in complex packages of political theory, it is both unnecessary and too crude to look to rights for the only defense against either stupid or wicked political decisions. No doubt Hitler and Nero violated whatever rights any plausible political theory would provide; but it is also true that the evil these monsters caused could find no support even in the background justification of any such theory. Suppose some tyrant (an Angelo gone even more mad) did forbid sex altogether on penalty of death, or banned all religious practice in a community whose members were all devout. We should say that what he did (or tried to do) was insane or wicked or that he was wholly lacking in the concern for his subjects which is the most basic requirement that political morality imposes on those who govern. Perhaps we do not need the idea of equality to explain that last requirement. (I am deliberately cautious here.) But neither do we need the idea of rights.

We need rights, as a distinct element in political theory, only when some decision that injures some people nevertheless finds *prima facie* support in the claim that it will make the community as a whole better off on some plausible account of where the community's general welfare lies. But the most natural source of any objection we might have to such a decision is that, in its concern with the welfare or prosperity or flourishing of people on the whole, or in the fulfillment of some interest widespread within the community, the decision pays insufficient attention to its impact on the minority; and some appeal to equality seems a natural expression of an objection from that source. We want to say that the decision is wrong, in spite of its apparent merit, because it does not take the damage it causes to some into account in the right way and therefore does not treat these people as equals entitled to the same concern as others.

Of course, that charge is never self-validating. It must be developed through some theory about what equal concern requires, or, as in the case of the argument I offered, about what the background justification itself supposes that equal concern requires. Others will inevitably reject any such theory. Someone may claim, for example, that equal concern requires only that people be given what

21 See, e.g., Hart, *supra* 845 n 43.

they are entitled to have when their preferences are weighed in the scales with the preferences, including the political and moral preferences, of others. In that case (if I am correct that the right to sexual freedom is based in equality) he would no longer support that right. But how could he? Suppose the decision to ban homosexuality even in private is the decision that is reached by the balance of preferences that he thinks respects equality. He could not say that, though the decision treats homosexuals as equals, by giving them all that equal concern for their situation requires, the decision is nevertheless wrong because it invades their liberty. If some constraints on liberty can be justified by the balance of preferences, why not this one?²² Suppose he falls back on the idea that sexual freedom is a fundamental interest. But does it treat people as equals to invade their fundamental interests for the sake of minor gains to a very large number of other citizens? Perhaps he will say that it does, because the fundamental character of the interests invaded have been taken into account in the balancing process, so that if these are outweighed the gains to others, at least in the aggregate, were shown to be too large in all fairness to be ignored. But if this is so, then deferring to the interests of the outweighed minority would be giving the minority more attention than equality allows, which is favoritism. How can he then object to the decision the balancing process reached? So if anyone really does think that banning homosexual relationships treats homosexuals as equals, when this is the decision reached by an unrestricted utilitarian balance, he seems to have no very persuasive grounds left to say that that decision nevertheless invades their rights. My hypothesis, that the rights which have traditionally been described as consequences of a general right to liberty are in fact the consequences of equality instead, may in the end prove to be wrong. But it is not, as Hart says it is, 'fantastic'.

22 See Dworkin, *Taking Rights Seriously*, *supra*, 266-72.