

upon implausible views about language and agency. The illocutionary ways in which pornography is implicated in the subordinating 'social construction' of women, are in some ways less exciting—but correspondingly less mysterious—than Butler takes them to be; which is probably all to the good.

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Whose Right? Ronald Dworkin, Women, and Pornographers

Amidst the heated and often acrimonious controversies about pornography and government policy, the answer to one question at least has always seemed obvious. Should liberal theorists be in favor of permitting pornography? As champions of our basic liberties, and as champions especially of free speech, liberals have found it easy to answer this question with a simple 'yes'. They are of course accustomed to viewing their opponents in this debate as conservatives, who want pornography prohibited because it is immoral; liberals view moralistic motives of this kind with deep (and doubtless justified) suspicion. But there are other voices in the debate, too, voices arguing that we have reason to be concerned about pornography, not because it is morally suspect, but because we care about equality and the rights of women. This aspect of the debate between liberals and their opponents can begin to look like an argument about liberty and equality—freedom of speech versus women's rights—and so, apparently, it has been regarded by the courts.¹

Ronald Dworkin is one liberal theorist who has defended a right to pornography, addressing the topic in 'Do We Have a Right to Pornography?'² He is, in addition, a liberal who thinks that there can be no real conflict between liberty and equality.³ Given that the pornography issue can be seen as apparently posing just such a conflict, it is natural to wonder whether Dworkin is right. In this article I put to Dworkin the question raised at

¹ This essay first appeared in *Philosophy and Public Affairs* 19 (1990), 311–59. 'Courts'—see *American Booksellers, Inc. v. Hudnut*, 598 F. Supp. 1327 (S.D. Ind. 1984) (hereafter Hudnut).

² Ronald Dworkin, 'Do We Have a Right to Pornography?' *Oxford Journal of Legal Studies* 1 (1981): 177–212; reprinted in *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), 335–72. Page references are to the reprint in *A Matter of Principle*.

³ Dworkin, 'What Is Equality? Part 3: The Place of Liberty', *Iowa Law Review* 73 (1987), 9.

the outset: Should liberals, or should Dworkin, at any rate, be in favor of permitting pornography? In the light of Dworkin's general theoretical commitments, the answer is not as obvious as it might appear.

In commenting elsewhere on the topical relevance of the argument he presented in 'Do We Have a Right to Pornography?' Dworkin remarks that the controversy it deals with is one that has been given 'fresh shape and importance' by recent history. 'Old wars over pornography and censorship have new armies', he writes, 'in radical feminists and the Moral Majority'.⁴ The recent history here alluded to presumably includes the controversy over a feminist antipornography ordinance that was passed in 1984 by the Indianapolis City Council, was swiftly challenged, and was judged by the district court to be unconstitutional.⁵

One modest aim of this essay is to show that, whatever success Dworkin's argument may have against the armies of the Moral Majority, it does not even begin to address the approach he labels 'radical feminist'. A second and more substantial aim is to show that the latter 'feminist' argument is not only consistent with Dworkin's liberalism, but is, so far as I can tell, demanded by it. My strategy here will be to work entirely within the Dworkinian theoretical system, and to show how that system yields a conclusion about pornography that is radically at odds with Dworkin's own, as expressed in his article on this topic. I argue that Dworkin's principle of equal concern and respect requires a policy about pornography that conflicts with commonly held liberal views about the subject, and that coincides instead with the restrictive or prohibitive policy favored by his feminist foes. In the course of my argument I restrict my attention to pornography of a certain kind and I make use of certain empirical claims that Dworkin does not consider. But, granted these not overly controversial claims, Dworkin's theoretical commitments appear to supply ample resources for the justification of a prohibitive strategy. Dworkin, of course, agrees that some empirical premises would be sufficient to support a prohibitive argument. If, for example, there were conclusive evidence linking pornography to violence, one could justify a prohibitive strategy on the basis of a simple harm principle. However, the prohibitive arguments advanced in this article do not require empirical premises as

⁴ Dworkin, *A Matter of Principle*, 1.

⁵ See *Hudnut*; see also 771 F.2d 323 (7th Cir. 1985), affirmed 106 S.Ct. 1172 (1986).

strong as this, nor do they rely on a simple harm principle. They rely instead on the notion of equality that forms the linchpin of Dworkinian liberal theory.

Section I of this essay sets out Dworkin's theoretical framework as it appears in *Taking Rights Seriously*⁶ and, in particular, as it appears in 'What Rights Do We Have?'⁷ In Section 2 I examine the way Dworkin applies this framework in a civil rights context in the essay 'Reverse Discrimination'.⁸ In Section 3 I turn to the issue of pornography, considering Dworkin's own treatment of the subject in 'Do We Have a Right to Pornography?' Section 4 draws together the two issues of civil rights and pornography, presenting a feminist case against pornography, largely as it was argued by those who supported the above-mentioned ordinance—in particular, by Catherine MacKinnon.⁹ Armed with some insights from this latter perspective on the pornography question, I return in Section 5 to the Dworkinian theoretical framework, showing that the civil rights approach that Dworkin uses in 'Reverse Discrimination' is an appropriate approach for pornography. I construct two independent arguments, modeled closely on Dworkin's own, for the conclusion that pornography should be prohibited. In Dworkinian terms, the first is an argument of principle, the second an argument of policy. Each argument is, I believe, as strong as its model in 'Reverse Discrimination'; and the conjunction of the two appears to constitute a powerful argument for a prohibitive policy. It should, however, be evident from what I have said that I am not advocating a particular legal strategy in this essay. I am not arguing that prohibition is an appropriate response to some kinds of pornography, still less that it is the best response. On such matters I remain agnostic for the present purposes, content to argue that, whatever its merits, a prohibitive strategy can apparently be justified by Dworkinian liberal theory.

Suppose I am right: what then? The question of what to conclude from this happy if unexpected marriage of Dworkinian theory and radical

⁶ Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977).

⁷ Dworkin, 'What Rights Do We Have?' in *Taking Rights Seriously*, 266–78.

⁸ Dworkin, 'Reverse Discrimination', in *Taking Rights Seriously*, 223–39.

⁹ Catharine MacKinnon, *Feminism Unmodified* (Cambridge, Mass.: Harvard University Press 1987), especially 'Francis Biddle's Sister: Pornography, Civil Rights and Speech', 163–97. Note that MacKinnon's argument is different to the 'Dworkinian' argument in favor of prohibition which I advance, although the two arguments share some common premises and have similar conclusions. I take it that if my argument succeeds, it might offer support for MacKinnon's conclusion; but if my argument fails, it does not undermine hers.

feminism would still be a matter for open debate, and in the final section of the essay (Section 6) I briefly explore some of the possibilities. Does the result represent a liberal vindication of a certain feminist argument? Or does it represent a kind of reductio of Dworkin's brand of liberalism? Either response is possible. But if we want to accept Dworkin's general theory, we must also accept the radical feminist conclusion about pornography; and if we want to reject that conclusion, we must also reject Dworkin's theory, or some part thereof. What we cannot do, if I am right, is hold on to the Dworkinian theory, and maintain at the same time a traditionally liberal stance toward pornography. An apparent corollary of the result about pornography is that Dworkin's theory seems incapable of defending a right to certain other kinds of constitutionally protected speech; indeed, it can apparently be used to construct strong arguments for their prohibition. I discuss this possibility toward the end of the article, leaving the implications of the result open, once again, to the reader's interpretation.

I. Theoretical Framework

In 'What Rights Do We Have?' Dworkin sets out some basic elements of his political theory, and the role that rights have to play in that theory. Since I need to draw on these views in some detail later on, I will take the opportunity to summarize some aspects that will become relevant.

Dworkin takes as his starting point certain 'postulates of political morality' that are central, he says, to a liberal conception of equality.¹⁰ They can be summed up in the slogan 'Government must treat those whom it governs with equal concern and respect'. To treat citizens with concern is to treat them as creatures capable of suffering and frustration; to treat citizens with respect is to treat them as human beings capable of forming their own intelligent views about how their lives should be lived, and of acting on those views.¹¹

This notion of equality, which Dworkin takes to be a straightforward explication of the common notion we all have, turns out, on closer

¹⁰ Dworkin, 'What Rights Do We Have?', 272.

¹¹ Ibid., 272-73. (The slogan slightly paraphrases Dworkin's description of the equality principle in this passage.)

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inspection, to be rather complex. First of all, the right of citizens to be treated with equal concern by no means commits the state to the equal treatment of its citizens, if by that is meant that each citizen is entitled to the same distribution of goods and opportunities as everyone else. The right to equality is simply a right to treatment as an equal; the right to have one's interests treated as fully and as sympathetically as the interests of anyone else. Second, the Dworkinian notion of equality appears to have a principle of neutrality at its heart: to treat people with equal respect is to treat each citizen's view of the good life with equal respect. While the principle of equal concern dictates that the government 'must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern', the principle of equal respect dictates that the government 'must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's'.¹² So Dworkin's principle of equality is double-pronged: a government subscribing to it will, first, treat its citizens as persons equally worthy of concern, and, second, treat them as persons whose conceptions of the good life are equally worthy of respect.¹³

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Dworkin goes on to distinguish two kinds of political argument: arguments of principle and arguments of policy. Arguments of principle invoke the notion of a right that is central to Dworkin's theory. Arguments of policy, on the other hand, do not involve rights: they are goal-based arguments, which attempt to justify a particular course of action by showing that it will achieve a state of affairs in which the community as a whole will be better off. Arguments of policy come in two varieties, depending on the character of the goal to be achieved. Utilitarian arguments of policy typically have as their end the maximal satisfaction of citizens' preferences. Ideal arguments of policy have a different end: they are not concerned with the preferences of citizens, but attempt instead to arrange things so that the community will be 'in some way closer to an ideal community.'¹⁴

Arguments of policy are vulnerable in a way that arguments of principle are not. While arguments of principle are rights-based, and therefore embody the conception of equality that Dworkin takes as foundational,

¹² Ibid., 273.

¹³ Ibid., 273, 275.

¹⁴ Ibid., 274.

arguments of policy, by contrast, do not always yield conclusions that are consistent with that conception; and where there is conflict, it is the 'equal concern and respect' principle that must triumph. In other words, the conception of equality that Dworkin takes as his starting point is one that places constraints on any argument of policy. Where the argument of policy is ideal in character, urging us to constrain liberty in order to pursue a goal that many citizens do not in fact want, the 'neutrality' aspect of the notion of equality comes into play: a government that is committed to treating its citizens with equal concern and respect is thereby committed to treating competing accounts of the good life with equal respect; it cannot do this and claim that a particular form of life is 'inherently more valuable' than another.¹⁵ Dworkin's example of an argument of policy that might be defeated in this way is one supporting the goal of achieving a culturally sophisticated community, in a situation in which nobody in fact wants such sophistication.¹⁶ If citizens value the pushpin way of life, it might be wrong to force poetry on them.

Where the argument of policy is utilitarian in character, the notion of equality places constraints upon it in a rather more sophisticated way. After all, utilitarian arguments give every appearance of being thoroughly egalitarian; this was a feature evident in the original Benthamite idea that each man is to count for one and no one for more than one. Dworkin notes that this egalitarian appearance is what gives utilitarianism its appeal. But he goes on to explain the way in which such an appearance is sometimes misleading: utilitarian arguments themselves may yield conclusions that conflict with principles of equal concern and respect. Consider, he says, the goal of utilitarian argument. The goal is simply the maximal satisfaction of citizens' preferences, taking into account both the number and the intensity of the preferences to be considered. Such a goal fails to take into account the status of citizens' preferences: it fails to attend to the important distinction between the preference of a citizen for his own enjoyment of goods and opportunities and the preference of a citizen for the assignment of goods and opportunities to others.¹⁷

This distinction between personal and external preferences is one that is crucial to the development of Dworkin's theory of rights. One simple way to see that theory (at least in the essays we are considering here) is

¹⁵ Dworkin, 'What Rights Do We Have?', 274.

¹⁶ Ibid.

¹⁷ Ibid., 275.

as a response to the inadequacies of unrestricted utilitarianism when it is confronted with the demands of a liberal principle of equality.¹⁸ In brief: utilitarianism tells us to maximize the satisfaction of preferences; but if we do that without first disqualifying the preferences of any citizen for the assignment of goods and opportunities to citizens other than himself, the calculations may be distorted, a form of 'double counting' may result, and the final outcome may be one that does not treat each citizen with equal concern and respect.¹⁹ Rights are a useful theoretical means of preventing this unwelcome result: rights are a means of protecting individuals from the external preferences of other individuals.

What counts as an external preference? And how do such preferences disrupt the otherwise egalitarian character of utilitarian arguments? We can, says Dworkin, distinguish two ways in which the preferences of a citizen can be external, ways that correspond to the twin aspects of the equality principle. The citizen may, first, prefer that another citizen be assigned fewer goods and opportunities than others because he thinks that that *person* is simply worth less concern than others.²⁰ Consider, for example, a group of citizens who believe that blacks are simply worth less concern than whites, and whose preferences manifest this prejudice. They prefer, say, that the preferences of blacks be worth half those of whites in the utilitarian calculus. If such racist preferences are taken into account, says Dworkin, the utilitarian calculus will be distorted, and blacks will suffer unjustly as a result.

Alternatively, and here we have the second kind of preference, a citizen may prefer that another citizen be assigned fewer goods and opportunities than others because he believes the person's *conception of the good life* to be worthy of less respect than the conceptions of others. Dworkin gives as examples of this second variety the moralistic preferences of people

¹⁸ My concern in this essay is almost exclusively with Dworkin's theory as it appears in *Taking Rights Seriously* and *A Matter of Principle*. Since then Dworkin's views have undergone some changes (e.g., in 'What Is Equality?'), but these are not, I think, changes that substantially affect the points I want to make here. It seems to me that both Dworkin's arguments in 'Reverse Discrimination' and the 'Dworkinian' antipornography arguments presented in this article are compatible with the equality of resources scheme presented by Dworkin in his later work.

¹⁹ For brevity's sake I am omitting further discussion of the 'double counting' aspect of Dworkin's theory, a feature that has attracted a good deal of critical attention in its own right.

²⁰ Again, for the sake of brevity I am omitting Dworkin's discussion of altruistic external preferences, which have their origins in views that another citizen is worth more (rather than less) concern than others.

who disapprove of various practices (such as homosexuality, pornography, Communist party adherence) and prefer that no one in society pursue such practices. If such preferences are taken into account, the individuals in question (homosexuals, pornographers, communists) will suffer, not simply because in the competing demands for scarce resources some preferences must lose out, and they happen to be the unlucky ones. They suffer, rather, because their own views about how to live their lives are thought to be deserving of less respect.²¹

It is often difficult in practice, says Dworkin, to distinguish personal from external preferences. Democratic institutions usually do not have the resources to discriminate between them; and it is because of these pragmatic difficulties that the concept of a right comes into play. 'The concept of an individual political right . . . is a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not. It allows us to enjoy the institutions of political democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental right of citizens to equal concern and respect by prohibiting decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals.'²² This characterization of rights provides a means of arguing for a further central Dworkinian thesis: namely, that rights to particular liberties—freedom of speech, religion, and so on—are derivable from the fundamental right to equality. A policy that constrains a particular liberty in the interests of utility may be shown to be probably based upon an argument utilizing external preferences; equality demands that such preferences be discounted; and in such cases the threatened citizen has a right to that liberty which will trump the opposing argument of utility. This approach (contrasts) sharply with a commonly held view that liberalism requires a right to liberty itself amongst its basic theoretical underpinnings. It is also an approach that attempts to answer the challenge that the right to liberty and the right to equality are often in conflict. Far from being antagonistic, says Dworkin, the one would not exist but for the other.

²¹ Dworkin, 'What Rights Do We Have?', 276.

²² Ibid., 277.

2. Dworkin on Civil Rights

In 'Reverse Discrimination' Dworkin applies his general principles to a particular civil rights issue, in this instance, racial discrimination. He addresses the question: Must laws and practices, if they are to be consistent with the principle of equal concern and respect, always be 'color-blind'? Is discrimination on the basis of race—that is, taking race into account in making decisions about the distribution of goods and opportunities—always unjust?

He considers two cases, the first focusing on the issue of racial segregation, the second on that of an affirmative action program. In the former, a black man, Sweatt, was denied admission to the Law School at the University of Texas on the grounds that the school was for whites only. In the latter, a white, DeFunis, was denied admission to the Law School at the University of Washington on the grounds that his grades and test scores were too low; however, the school had an affirmative action policy that granted admission to certain minority candidates with similar scores and grades. Both Sweatt and DeFunis argued that their rights to equal protection of the law under the Fourteenth Amendment had been violated. Each found, or might have found, the policy to which he objected deeply insulting.²³ In terms of these cases, the question just raised amounts to: Do Sweatt and DeFunis stand or fall together?

Dworkin's analysis of the issues aims to show that the two cases do indeed differ in very significant ways. The practice of segregation, as it appears in Sweatt, does conflict with the principle of equal concern and respect, and is therefore (given that this is the principle behind the Fourteenth Amendment) unconstitutional. Such a policy is inherently insulting, and there is a powerful rights-based argument—that is, an argument of principle—to be mounted against it. On the other hand, the practice of affirmative action, as it appears in DeFunis, does not conflict with the equality principle, is not inherently insulting, and indeed there is a powerful argument of policy to be presented in its favor. Since my

²³ Dworkin, 'Reverse Discrimination', 231.

own argument in Section 5 will draw on some general structural features of these two arguments, it will be worth looking at them in a little more detail.

Let us begin with Sweatt. What kind of argument might be used to justify the discriminatory practice of the University of Texas? According to Dworkin, it would be an argument of policy, and a utilitarian one at that.²⁴ It might take the following form: Segregation of the Law School benefits society as a whole, and any resulting disadvantage to blacks is simply the unfortunate price that must be paid for the overall gain. There are—it might be argued—many ways in which society benefits from the practice: the economy needs white lawyers and needs no black lawyers; black lawyers would only be a liability to any corporation that hired them; alumni gifts to the school would plummet if blacks were admitted; the school's white students prefer the company of their own kind.

Such claims may have had considerable plausibility at the time, and may indeed point to the conclusion that segregation of the Law School offered a means of satisfying more citizens' preferences than any alternative. But what kind of preferences do we have here? Dworkin replies that the utilitarian argument relies crucially on the *external* preferences of its citizens, that is, preferences that members of a certain group be assigned fewer opportunities because those people are worth less concern. We have already seen that such preferences must be disqualified if justice is to prevail. But are the preferences in question really external? On the face of it, many of those mentioned above appear to be personal. For example, a preference for the kind of company one keeps is not explicitly a preference for the assignment of goods or opportunities to others, nor does it, at first blush, seem to commit one to any views about the *worth* of other people.

At this point Dworkin has a more detailed discussion of what is to count as an external preference in a situation in which prejudice abounds, that is, a situation in which beliefs about the inferior worth of another class of citizens are strong and pervasive. In such circumstances, says Dworkin, we have to take special care. It is not enough to ask: Are the preferences explicitly for a certain allocation of goods or opportunities to an individual or group other than themselves? One must also ask a further question: If the prejudice did not exist, would the preferences justifying the policy

exist? If it can be shown that the preferences in question exist only as a result of the racist views of those who have them, then such preferences must be counted as external. The thought here seems to be that there is an important connection between certain beliefs and desires and that this connection has implications for political theory. The equality principle demands that preferences that depend on certain beliefs (beliefs about the inferior worth of some other people, for instance) should not be counted.

Dworkin thinks that in cases of widespread prejudice, it will often be impossible to answer this counterfactual question. When preferences are affected by prejudice it is often the case that 'personal and external preferences are so inextricably tied together, and so mutually dependent, that no practical test for measuring preferences will be able to discriminate the personal and external elements in any individual's overall preference. . . . In any community in which prejudice against a particular minority is strong, then the personal preferences upon which a utilitarian argument must fix will be saturated with that prejudice; it follows that in such a community, no utilitarian argument purporting to justify a disadvantage to that minority can be fair'.²⁵ In such situations one must regard the relevant personal preferences as effectively corrupted by prejudice, and count them as external. Associational preferences for the company of whites offer an example of this kind of preference, in Dworkin's view. Such preferences manifest, however indirectly, 'contempt for blacks as a group'.²⁶ And since the utilitarian argument of policy in favor of Texas's practice of segregation must rely critically on preferences of this kind, it is in conflict with the principle of equal concern and respect, and unconstitutional. In opposition to such an argument, we can raise an argument of principle: Sweatt has a right to treatment as an equal, and he therefore has rights protecting him from the influence of the external preferences of others, in this case, rights against the University of Texas and its policy of segregation.

The pattern of argument Dworkin uses here for identifying Sweatt's rights is very similar to the pattern he uses to identify rights in other contexts. One notes first of all that there is an apparent utilitarian argument for a particular policy, and that this policy appears to disadvantage some person or group. One investigates the preferences exploited by the utilitarian argument and discovers that a crucial set of them are, according to some

²⁴ Ibid., 230–4.

²⁵ Ibid., 236–7.

²⁶ Ibid., 236.

criterion, external preferences. One concludes, finally, that the individual or group has rights against the policy. However, there is something a little different in Dworkin's application of this general pattern in the civil rights context of Sweatt, and it amounts, I suggest, to a certain shifting of the burden of proof.

Consider, first of all, the notion of an external preference that Dworkin invokes in his analysis of Sweatt. It is important to see that he has extended rather dramatically the notion of an external preference that we saw at work in 'What Rights Do We Have?' I noted in Section 1 that preferences are external if they explicitly concern the allocation of resources to another citizen, whether because that citizen is thought to be worthy of less concern, or because his conception of the good life is thought to be worthy of less respect. But that notion alone seems too weak to supply the resources necessary for dealing with certain special cases of prejudice. An associational preference of white law students for company of their own kind is *not* explicitly a preference for the allocation of fewer opportunities to others, but seems rather a personal preference. In order to take such cases into account, Dworkin has elaborated the notion of an external preference here in ways that we can summarize, in a rough-and-ready fashion, as follows. Preferences are to be counted as external if they satisfy any of the following three conditions. (Conditions [2] and [3] come into play when prejudice against the group in question is strong and pervasive.)

- (1) The preferences concern the allocation of resources to another citizen, *simpliciter*.²⁷
- (2) The following counterfactual holds: Were the prejudice not to exist, the preferences in question would not exist.
- (3) We find that the truth of the counterfactual in (2) is difficult to determine, and there is some likelihood that prejudice has affected the preferences.²⁸

So, while not denying that there may be many personal components in the preferences underlying the Texas policy, given that there is widespread prejudice against blacks, our *presumption* is that the relevant preferences are affected by prejudice, therefore external, and therefore to be dismissed. It is

²⁷ e.g., Dworkin, 'What Rights Do We Have?', 275.

²⁸ Dworkin, 'Reverse Discrimination', 236-8. It is not entirely clear that Dworkin wants to separate these two, but it seems to me that they ought to be distinguished.

only by using this extended conception of an external preference that one can succeed in raising an argument of principle against the policy.

Consider, second, the question of whether Sweatt is disadvantaged by the Texas policy. There is no doubt that Sweatt is disadvantaged in this particular instance: he wants to enter the Law School, but he cannot, and in denying him admission the Law School is denying him opportunities that are not otherwise open to him. Although there was a black law school to which Sweatt could have gained admission, it was much inferior to the white school.²⁹ But how important to Dworkin's argument of principle is establishing this fact of Sweatt's disadvantage? Suppose the Sweatt case were being made against a backdrop of a so-called separate-but-equal segregatory social policy whereby blacks and whites were channeled into separate but—arguably—equally good law schools. In such a situation it would be much more difficult to establish that Sweatt was disadvantaged by the Texas policy. Dworkin mentions such a possibility in a footnote, remarking with evident approval that even in such circumstances a policy like that of Texas would be found unconstitutional: 'There is no doubt that an all-white law school would be unconstitutional today, even if an all-black law school were provided that was, in a material sense, the equal of that provided for whites.'³⁰

I infer from this that Dworkin would want to raise an argument of principle in Sweatt's favor even in a 'separate-but-equal' social context, as one surely would. But if this is so, then it seems that Sweatt's right does not depend on Sweatt's being clearly disadvantaged, 'in a material sense', by the Texas policy. If one were to begin nevertheless by assuming that Sweatt is disadvantaged by the policy, the Law School's hypocritical cries of 'separate but equal' notwithstanding, one would in effect be placing the burden of proof in Sweatt's favor. And there is surely a great deal to be said for placing the burden of proof in this way: even if it is true that 'separate-but-equal' social policies are invariably 'equal' in name only, and in practice harm blacks, the onus should not have to be on blacks such as Sweatt to produce empirical arguments establishing that this is so. One could accept that Sweatt had *prima facie* cause for complaining about the policy (without supposing that this was in itself sufficient to justify the conclusion that he had been unjustly treated); and the ensuing

²⁹ Ibid., 229 n. 1.

³⁰ Ibid.

investigation into the nature of the preferences upon which the policy was based would reveal, assuming Dworkin's analysis is right, that this complaint was justified. The important step is the latter one. The important fact, says Dworkin, is that the policy of segregation has a certain 'objective feature',³¹ a feature that is quite independent of the disadvantage the policy causes blacks such as Sweatt, and quite independent of the insult blacks feel because of it. The policy has its roots in racism: it has its justification in an argument that rests on racist (and therefore external) preferences. And *this* is the crucial factor, the 'objective feature that would disqualify the policy even if the insult [to blacks] were not felt'.³² It is this feature that entitles us to conclude that Sweatt can mount an argument of principle against the Texas policy.

Can DeFunis mount a similar argument of principle against the University of Washington? Since rights, for Dworkin, can be identified only relative to background theoretical justifications, one can answer this question only after one has considered another. What *grounds* does the Law School have for its affirmative action policy?

According to Dworkin, the Law School might plausibly raise an ideal argument of policy in support of its affirmative action program, an argument that has equality as its goal.³³ The school might argue that regardless of people's preferences, and even if the general welfare were to deteriorate as a result, affirmative action programs in fact work to produce a more equal society, and that is what counts. This ideal argument rests on a particular empirical hypothesis: it may, as Dworkin says, be 'controversial whether a preferential admissions program will in fact promote [the goal of equality], but it cannot be said to be implausible that it will'.³⁴

Bearing in mind that rights are trumps, and that arguments of principle defeat arguments of policy, we can now ask: Is it possible for DeFunis to offer an argument of principle against the practice of affirmative action in a manner analogous to that of Sweatt? The Fourteenth Amendment guarantees him a right to treatment as an equal; has that been violated?

³¹ Dworkin, *Ibid.*, 231. ³² *Ibid.*

³³ *Ibid.*, 232. Dworkin also thinks it might be possible to mount a utilitarian argument of policy in favor of affirmative action; since such a policy probably would not rest on external preferences, DeFunis would have no right against that policy either (p. 239).

³⁴ *Ibid.*, 228.

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Dworkin reminds us that the right to equal concern and respect should not be seen as the right to equal treatment per se. DeFunis has no right to admission simply on the grounds that others have been granted admission. What he does have is a right to treatment as an equal: a right to be considered as fully and sympathetically as any other applicant.³⁵

Dworkin goes on to discuss various criteria by which applicants are judged, concluding, for reasons we need not go into here, that there is nothing in the notion of race itself to make it more suspect as a criterion than intelligence or industriousness. What is important is the reasoning behind such a policy, in this case, the ideal argument. This argument is a strong one, and although its empirical premise (that this course of action *will* indeed work to bring about a more equal society) may be questioned, it is not, says Dworkin, 'the business of judges, particularly in constitutional cases, to overthrow decisions of other officials because the judges disagree about the efficiency of social policies'.³⁶ The 'business of judges' (and presumably of legal philosophers) is to determine whether DeFunis's rights have been violated, and, says Dworkin, they have not. The ideal argument does not conflict with the notion of equal concern and respect; it does not rely on external preferences, since it does not rely on any preferences at all, 'but on the independent argument that a more equal society is a better society even if its citizens prefer inequality. That argument does not deny anyone's right to be treated as an equal himself'.³⁷

The argument for affirmative action presents us with a potent combination. Notice that here again there is a certain assumption about burdens of proof, concerning, this time, the effectiveness of the proposed policy. The ideal argument makes use of an empirical hypothesis that may well be 'controversial', but this is no bar to the constitutionality of the policy relying on it. The structure of the overall argument consists essentially of the following: an ideal argument of policy, with equality as its goal, conjoined with the complete absence of any opposing rights-based argument. I will be drawing on some of the strengths of this form of Dworkinian argument in discussing the pornography question in Section 5.

³⁵ *Ibid.*, 227.

³⁶ *Ibid.*, 224.

³⁷ *Ibid.*, 239.

3. Dworkin on Pornography

In 'Do We Have a Right to Pornography?' Dworkin considers a question that has attracted attention from many political theorists, from liberals at one end of the spectrum to the redoubtable 'new armies' of conservatives and feminists at the other. What might we expect Dworkin's approach to be? On the one hand, Dworkin is first and foremost a liberal theorist, and the freedom to produce and consume pornography has long been a liberal cause. But he is at the same time a writer famous for taking the principle of equality to be the starting point for sound political thinking; a writer whose sensitivity in dealing with the complex issues surrounding prejudice against an oppressed group we have already witnessed; and a writer who begins his discussion of the pornography question by drawing an analogy between laws concerning pornography and laws concerning racist speech. 'Should we be free to incite racial hatred?' he asks his readers in the opening paragraph—an interesting question and one whose implications seem worth pursuing.

Given this hopeful start, and given also that the feminist 'armies' had already begun to mass at the time of his writing,³⁸ we might reasonably expect that a rights-based argument *against* pornography would merit at least some brief mention in the essay. Such hopes, as it turns out, are disappointed, and Dworkin's question in the opening paragraph is not pursued in any detail. He considers, at various points throughout the essay, a vast number of ways in which pornography might more or less plausibly be construed as a harm. The sample that follows is by no means exhaustive, but I can assure my reader that there is one construal that is conspicuous by its absence, namely, that women as a group might be harmed by pornography.

Here is the quick sample. Since most people would prefer censorship, permitting pornography harms general utility by leaving the majority of preferences unsatisfied.³⁹ Pornography damages the cultural environment.⁴⁰ It upsets and disgusts people.⁴¹ It limits people's ability to lead the kind of lives they would want for themselves and their children.⁴² It makes sex

seem less valuable.⁴³ People find discomfort in encountering blatant nudity because they detest themselves for taking an interest in the proceedings, and they are forcefully reminded of what their neighbors are like and of what their neighbors are getting away with.⁴⁴

To be fair, Dworkin does indeed raise the issue of whether pornography ever presents a 'special danger of personal harm narrowly conceived',⁴⁵ and although he usually takes this to be a question about people's responses when directly confronted with pornography, he, along with the Williams Committee, 'concedes . . . 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. . . .'⁴⁶ This is as close as Dworkin ever gets to considering whether or not it may be women who are, in the end, the ones hurt by the pornography industry. As a rule, when he raises the possibility of any link between pornography and harm to women of a concrete and familiar sort, he fails to take it seriously. Indeed, were it not for the evidence we already have of Dworkin's awareness of the subtle complexities surrounding questions of group oppression, the reader might be tempted to suppose that Dworkin's chief interest is to lampoon the idea. Imagining that pornography might lead to violence is like imagining that reading *Hamlet* might lead to violence.⁴⁷ Or, in another passage, he wonders whether pornography might be like 'breakfast television': both might be found to encourage absenteeism from work, and thereby have (perish the thought!) 'some special and deleterious effect on the general economy'.⁴⁸ But as he continues with such comparisons, we begin to discover that he thinks that questions about concrete harm are mere 'academic speculation';⁴⁹ the pornography issue is itself a 'relatively trivial' problem.⁵⁰ By contrast, embarrassment—that is, embarrassment on the part of the 'shy pornographer'—he describes as raising an 'interesting and important question'.⁵¹ When it comes to the plight of the shy pornographer, Dworkin displays a touching concern; he suggests that legislators should make sure that the consumer can, should he so desire, buy an umbrella at his favorite adult bookstore, so as to disguise his secret and perhaps shameful habits.

³⁸ As demonstrated, for example, in the classic collection of essays *Take Back the Night: Women on Pornography*, ed., Laura Lederer (New York: William Morrow, 1980), containing essays published earlier.

³⁹ Dworkin, 'Right to Pornography?', 335.

⁴⁰ Ibid., 337, 340.

⁴¹ Ibid., 344–45.

⁴² Ibid., 349.

⁴³ Ibid., 356.

⁴⁴ Ibid.

⁴⁵ Ibid., 340.

⁴⁶ Ibid., 338.

⁴⁷ Ibid., 355.

⁴⁸ Ibid., 354.

⁴⁹ Ibid., 355.

⁵⁰ Ibid., 359.

⁵¹ Ibid., 358. Note that Dworkin uses the term *pornographer* to mean 'consumer of pornography'; I follow his usage for the purposes of this essay.

Readers may have gathered by now that Dworkin and I do not share exactly the same view about what is and what is not an important question. Embarrassment is not, all things considered, a very important question; the well-being of women is. Leaving such sympathies aside, there are of course some relevant empirical questions to be addressed here. And on certain questions of this kind Dworkin accepts the findings of the Williams Committee, namely, that there is no persuasive evidence that pornography causes violent crime.⁵² On other empirical questions—for example, questions about pornography's possible role in a society in which women happen to be widely oppressed—Dworkin is comfortably silent. One wonders whether he would have been as comfortable had Sweatt's opponents cited, in support of their case, similar findings that had reached a similarly happy conclusion that there was no persuasive evidence that the practice of racial segregation causes violent crime. One does not always need conclusive evidence about crime to have cause for concern, nor is violence the only worry in situations in which there is widespread prejudice and discrimination against a particular group. In such situations, as Dworkin has already taught us, our investigation must take special care.

Readers of 'Do We Have a Right to Pornography?' may be a little puzzled at this point. Why, we may be forgiven for asking, does Dworkin consider this 'relatively trivial' issue to be worthy of serious attention, worthy in fact of a full forty-five pages of sophisticated political analysis? If we look again at the first of Dworkin's suggestions about the harm pornography brings about, we will find our answer. Most people, he says, would *prefer* censorship; if, in spite of this, we permit pornography, *general utility* will be harmed, since the majority preferences will be left unsatisfied.

This is enough to give us a fair idea of Dworkin's special interest in the question. We have the starting point for a familiar Dworkinian recipe for identifying rights, where one begins by noting that there is a good utilitarian argument for a certain policy, and that certain individuals will suffer as a result of this policy; investigates the preferences upon which the utilitarian argument is based; shows that they are external preferences; and finally concludes that the individuals concerned have rights that must

⁵² Dworkin, 'Right to Pornography?', 338. As we will see later, this finding did not prevent the Williams Committee from making prohibitive recommendations with respect to pornography of certain kinds.

defeat the policy in question. This was Dworkin's response to Sweatt; and this is his response to pornography also.

Before offering this analysis in any detail, however, Dworkin is anxious to show the inadequacies of competing attempts to argue for the permission of pornography.⁵³ The Williams Committee, says Dworkin, attempted to do so by invoking a certain goal-based strategy, according to which free expression is a means to an important social end. Free expression is necessary if we are to have 'a 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'.⁵⁴ Given the value of free expression, we should accept a presumption against any prohibition of it. Dworkin goes on to argue that a goal-based strategy of this kind, however admirable, simply does not have the resources to support an argument for permitting pornography; what one needs, instead of this argument of policy, is an argument of principle, that is, an argument that uses the concept of a right.

Dworkin's verdict on the Williams Report is not vital to our present inquiry, but it strikes me that he may have mischaracterized the difference between his own approach and that of the Williams Committee. Rather than presenting a contrast between goal-based and rights-based strategies for the defense of free expression, a more plausible analysis of the difference might be that it consists in a contrast between two rights-based strategies, Dworkin seeing a need to derive the right in question from a basic right to equality, and the Williams Committee seeing no such need. The following passage from the Williams Report can surely be read as an explicit rejection of the merely goal-based strategy that Dworkin attributes to the committee: 'The value of free expression *does not lie solely in its consequences*. . . . It is rather that *there is a right to free expression* . . . and weighty considerations in terms of harm have to be advanced by those who seek to curtail it'.⁵⁵

Dworkin proceeds to show how it is possible to mount an argument of principle against a prohibitive policy. Suppose, he says, that the policy

⁵³ Home Office, *Report of the Committee on Obscenity and Film Censorship*. Cmnd. 7772 (London: Her Majesty's Stationery Office, 1979) (hereafter Williams Report). The Williams Report recommended, in brief, that some kinds of pornography (including live sex shows and child pornography) be banned, and that other kinds of pornography be permitted on a restricted basis. Dworkin's chief, but by no means exclusive, concern is with its permissive aspect.

⁵⁴ Dworkin, 'Right to Pornography?', 338.

⁵⁵ Williams Report, 56; italics mine.

of prohibiting pornography would satisfy the preferences of the majority,⁵⁶ and that the opportunities of the consumers of pornography would be curtailed as a result. Our next step, if we are interested in finding out whether pornographers might have rights against this policy, is to consider the character of the preferences upon which the policy relies, since the right to equality demands that certain preferences be disregarded. Does the prohibitive policy rely on any external preferences? Remember that external preferences can be of two broad types: one can prefer that another person receive fewer goods and opportunities because one thinks that that person is worth less concern, or, alternatively, because one thinks that that person's conception of the good life deserves less respect. The external preferences involved in the Sweatt argument were of the former variety; in the case of pornography I take it that Dworkin thinks they are of the latter. People want pornography to be prohibited chiefly because they think that it is ignoble or wrong, and that a conception of the good life that holds otherwise deserves less respect. 'Moralistic' preferences of this kind must, says Dworkin, be defeated by a corresponding 'right to moral independence', which he describes as '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'.⁵⁷ Insofar as the utilitarian argument hinges on moralistic preferences, the consumers of pornography have rights that trump the prohibitive policy, and our policy should be permissive.⁵⁸

It is crucial to note that pornographers are said to have rights not because there is something special about speech per se, and pornography is speech; nor because there is something special about the private domain in which pornography is often consumed; but simply because they are vulnerable to the effects of the external preferences of others, and equality demands that such preferences be ignored. This essay provides a good

⁵⁶ Dworkin, 'Right to Pornography?', 335, 360.

⁵⁷ Ibid., 353.

⁵⁸ Insofar as this permissive policy would in turn constrain the ability of other people to lead the lives of their choice, we have an argument for restriction of some form. So what Dworkin ends up with, balancing these conflicting considerations, is an endorsement of the compromise solution offered by the Williams Report, i.e., that most pornography should be permitted but restricted through measures such as zoning (ibid., 358).

illustration of Dworkin's strategy of deriving traditional liberties from the principle of equality alone. It is also worth pointing out that Dworkin claims that his own strategy, as illustrated here, does justice to deeply held liberal convictions about the value of free speech in a way that competing theoretical strategies cannot hope to do.⁵⁹

4. Pornography and Civil Rights: A Feminist Response

The purpose of this section is to review briefly a certain feminist civil rights argument about pornography, in the hope of showing how the question is transformed once it is placed in a civil rights context. Some, but by no means all, aspects of this argument will be relevant to the later argument in Section 5 of this paper, and at the beginning of that section I will outline the aspects that are. The reader should be aware that the argument reviewed in this section is one of a variety of feminist responses, many of which disagree with both the analysis and the course of action advocated by this one.⁶⁰

In contrast to the argument discussed in Dworkin's paper on the topic, this feminist argument against pornography sets aside questions about 'morality' and focuses instead on the civil status of women. The argument has been put very forcefully by Catharine MacKinnon,⁶¹ who has written widely on the subject, and who was involved in the drafting of the Indianapolis ordinance. In that ordinance pornography is defined as a civil

⁵⁹ Ibid., 352.

⁶⁰ For a range of views other than MacKinnon's, see, e.g., Gail Chester and Julianne Dickey, eds., *Feminism and Censorship: The Current Debate* (Bridport: Prism Press, 1988); Nan D. Hunter and Sylvia A. Law, 'Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al.', in *American Booksellers, Inc. v. Hudnut*, 771 F.2d 323 (1985); Andrea Dworkin, *Pornography: Men Possessing Women* (London: The Women's Press, 1981); Varda Burstyn, ed., *Women Against Censorship* (Vancouver: Douglas and MacIntyre, 1985); and Edward Donnerstein, Daniel Linz, and Steven Penrod, *The Question of Pornography: Research Findings and Policy Implications* (New York: Free Press; London: Collier Macmillan, 1987), chs. 7, 8.

⁶¹ See MacKinnon, *Feminism Unmodified*, esp. 'Francis Biddle's Sister'. There are many important aspects of MacKinnon's argument that I do not take time to consider in any detail here—for example, the claim that pornography constitutes a form of subordination (which has been considered by Melinda Vadas in 'A First Look at the Pornography/Civil Rights Ordinance: Could Pornography be the Subordination of Women?', *Journal of Philosophy* [1987], 487–511), and the claim (in answer to the champions of free speech) that pornography silences women, preventing women's exercise of free speech. These claims are addressed in 'Speech Acts and Unspeakable Acts', this volume.

rights violation.⁶² We define pornography as the graphic sexually explicit subordination of women through pictures or words that also includes women dehumanized as sexual objects, things, or commodities; enjoying pain or humiliation or rape; being tied up, cut up, mutilated, bruised, or physically hurt; in postures of sexual submission or servility or display; reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture; shown as filthy or inferior; bleeding, bruised or hurt in a context which makes these conditions sexual.⁶³ The ordinance distinguished pornography from erotica, taking erotica to be sexually explicit material other than that covered by the above definition. It should be emphasized that according to this argument, and in contrast to 'moralistic' arguments, there is nothing wrong whatsoever with materials that are simply sexually arousing and explicit; the focus of concern lies elsewhere.⁶⁴ Insofar as the ordinance is not concerned with explicit material per se, it departs of course from a more traditional or popular conception that simply equates pornography with the sexually explicit, a conception I take Dworkin to have been using. Pornography as defined above is a subset, though, of pornography as it is popularly conceived, and

⁶² It should be noted that the ordinance made pornography civilly actionable, rather than a criminal offense. The definition used here is one that raises many difficult legal and philosophical questions in its own right, but I am afraid that such questions, while admittedly important, lie beyond the scope of this essay. A further question related to the definitional problems is that of the 'slippery slope', a question that rightly concerned Dworkin (and the Williams Committee) and again deserves more attention than I give it here. While the 'slippery slope' problem raises many difficulties, one should not, I take it, assume that it is insoluble; I proceed on the assumption that the problem is not so daunting that it rules out the possibility of discussion.

⁶³ MacKinnon, 'Francis Biddle's Sister', 176.

⁶⁴ To give the reader some idea of the kind of pornography that might be covered by the above definition, I offer the following description of a relatively soft-core example, which appeared on the cover of an issue of *Hustler*: 'The photograph is captioned "Beaver Hunters". Two white men, dressed as hunters, sit in a black Jeep. The Jeep occupies almost the whole frame of the picture. The two men carry rifles. The rifles extend above the frame of the photograph into the white space surrounding it. The men and the Jeep face into the camera. Tied onto the hood of the black Jeep is a white woman. She is tied with thick rope. She is spread-eagle. Her pubic hair and crotch are the dead center of the car hood and the photograph. Her head is turned to one side, tied down by rope that is pulled taut across her neck, extended to and wrapped several times around her wrists, tied around the rearview mirrors of the Jeep, brought back across her arms, crisscrossed under her breasts and over her thighs, drawn down and wrapped around the bumper of the Jeep, tied around her ankles. . . . The text under the photograph reads: "Western sportsmen report beaver hunting was particularly good throughout the Rocky Mountain Region during the past season. These two hunters easily bagged their limit in the high country. They told HUSTLER that they stuffed and mounted their trophy as soon as they got her home". (Description given in Andrea Dworkin, *Pornography: Men Possessing Women*, 25-6.)

Dworkin's remarks about the relevance of his own argument to the 'radical feminist' case⁶⁵ indicate that he views pornographers as having a right to this kind of pornography as well.

The distinctive feature of the MacKinnon argument is that it views pornography—as defined in the ordinance—as having implications for sexual equality: pornography is seen as a practice that contributes to the subordinate status of women, just as certain other practices (segregation among them) contribute to the subordinate status of blacks. The argument seeks to establish at least two things: one is that women do not, as a matter of fact, currently have equal status; and the other is that pornography does, as a matter of fact, contribute significantly to the continuing subordinate position of women.

The first claim is, I think, not very controversial, and a cursory glance at sociological facts about the distribution of income and power should be enough to confirm it. One dimension to the inequality is the economic; women earn substantially less than men, and a disproportionate number of women live in poverty.⁶⁶ A further dimension to the inequality is to be found in the scale of the sexual abuse, including but not confined to rape, that women suffer and that men, as a rule, do not.⁶⁷ The advent of feminism has brought with it a new and more acute awareness of the conditions of women, says MacKinnon. I will let her continue:

Rape, battery, sexual harassment, forced prostitution, and the sexual abuse of children emerge as common and systematic. . . . Sexual harassment of women by men is common in workplaces and educational institutions. Based on reports in one study of the federal workplace, up to 85 percent of women will experience it, many in physical forms. Between a quarter and a third of women are battered in their homes by men. Thirty-eight percent of little girls are sexually molested inside or outside the family. . . . We find that rape happens to women in all contexts,

⁶⁵ Dworkin, *A Matter of Principle*, 1.

⁶⁶ 'What women do is seen as not worth much, or what is not worth much is seen as something for women to do', comments MacKinnon about women's pay, which at the time of her writing was 59 cents to the man's dollar ('Francis Biddle's Sister', 171). According to more recent figures, women in the United States who work full time now earn 66 cents to the man's dollar and constitute more than 60 percent of adults living below the federal poverty line (Claudia Wallis, 'Onward Women!', *Time*, 4 December 1989, 85).

⁶⁷ This is not, of course, to say that it is only women who suffer sexual abuse, or to underrate the extent of the sexual violence suffered by children of both sexes, or by men in prisons. It is only to say that, as a pervasive phenomenon, sexual violence seems to be directed mainly against women.

from the family, including rape of girls and babies, to students and women in the workplace, on the streets, at home, in their own bedrooms, by men they do not know and by men they do know, by men they are married to, men they have had a social conversation with, and, least often, men they have never seen before. Overwhelmingly, rape is something that men do or attempt to do to women (44 percent of American women according to a recent study) at some point in our lives.⁶⁸

What is different about MacKinnon's approach to facts like these is that she sees sexual violence not simply as 'crime' (as Dworkin seemed apt to do), but rather as a dimension to the inequality of the sexes, and one that calls for an explanation. These things are done to women; they are not, by and large, done to men. To call such violence simply 'crime', says MacKinnon, without remarking upon the interesting fact that the perpetrators are nearly always members of one class of citizens, and the victims members of another, would be to disguise its systematically discriminatory nature.

Turning now to the second claim, the feminist argument can be seen as offering a hypothesis about the explanation for this pattern of sexual abuse: part of the explanation lies in the fact that certain kinds of pornography help to form and propagate certain views about women and sexuality. Such pornography is said to work as a kind of propaganda, which both expresses a certain view about women and sexuality and perpetuates that view; it 'sexualizes rape, battery, sexual harassment, prostitution, and child sexual abuse; it thereby celebrates, promotes, authorizes and legitimizes them'⁶⁹

To back up this claim, a substantial amount of empirical evidence was cited by those supporting the ordinance (in the form of both social science studies and testimony of people whose lives had been directly affected by pornography) which pointed to the conclusion that pornography influences behavior and attitudes, and does so in ways that undermine both the

⁶⁸ MacKinnon, 'Francis Biddle's Sister', 169. (I have taken some liberties with the order of these passages.) MacKinnon cites a formidable array of studies in support of these claims; the constraints of space dictate that I cannot reproduce all of her sources here, so I refer the reader to the notes in her work (*Feminism Unmodified*, 277-9). Joel Feinberg cites 1980 FBI Uniform Crime statistics, according to which 'a twelve-year-old girl in the United States has one chance in three of being raped in her lifetime' (*Offense to Others* [New York: Oxford University Press, 1985], 149).

⁶⁹ MacKinnon, 'Francis Biddle's Sister', 171-2.

well-being of women and sexual equality.⁷⁰ In the light of evidence of this kind, the Indianapolis City Council issued the following findings:

Pornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and maintaining sex as a basis for discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, access to and use of public accommodations, and acquisition of real property; promote rape, battery, child abuse, kidnapping and prostitution and inhibit just enforcement of laws against such acts; and contribute significantly to restricting women in particular from full exercise of citizenship and participation in public life.⁷¹

The case was viewed by the district court as presenting a conflict between First Amendment guarantees of free speech and the Fourteenth Amendment right to be free from sex-based discrimination.⁷² The ordinance would survive constitutional scrutiny only if the state's interest in sex-based equality were 'so compelling as to be fundamental', for 'only then can it be deemed to outweigh interest of free speech'.⁷³ And the court concluded,

⁷⁰ The question of what is involved in making a causal claim of this kind is an important one. No one is claiming, of course, that there is a simple link; one can agree with Feinberg that 'pornography does not cause normal decent chaps, through a single exposure, to metamorphose into rapists' (*Offense to Others*, 153). For an interesting discussion of the notions of causality that bear on questions of this kind, see Frederick Schauer, 'Causation Theory and the Causes of Sexual Violence', *American Bar Foundation Research Journal* 4 (1987), 737-70. Questions about the empirical evidence are also important, and deserve more attention than I can give them here, but in brief: the social science studies seem to suggest that pornography, especially some kinds of violent pornography, can increase aggression against women in certain circumstances, and that it can change attitudes in the following ways. Subjects who are exposed to it can become more likely to view women as inferior, more disposed to accept 'rape myths' (e.g., that women enjoy rape), more callous about sexual violence, more likely to view rape victims as deserving of their treatment, and more likely to say that they would themselves rape if they could get away with it. The personal testimony cited at the original Minneapolis Public Hearings (with reference to an ordinance nearly identical to that passed at Indianapolis, which did not, however, become law) included, among other things, testimony of women who had been victims of 'copycat' rapes inspired by pornography. See the transcript of the 1983 Minneapolis Public Hearings, published as *Pornography and Sexual Violence: Evidence of the Links* (London: Everywoman, 1988); see also Eva Feder Kittay, 'The Greater Danger—Pornography, Social Science and Women's Rights: Reply to Brannigan and Goldenberg', *Social Epistemology* 2 (1988): 117-33; for a more comprehensive discussion of the social science evidence, see Donnerstein et al., *The Question of Pornography*.

⁷¹ Hudnut 1320.

⁷² Hudnut 1327.

⁷³ Hudnut 1316. The case also raised constitutional problems in connection with the 'due process' requirements of the Fifth and Fourteenth Amendments. The ordinance was judged to be vague and to

as a matter of law, that the state's interest in sex-based equality was not so compelling.⁷⁴

It is worth noting that the empirical findings were not disputed; in fact, when the case went to the court of appeals, Judge Frank Easterbrook went so far as to say, 'We accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets'. His conclusion, however, is that 'this simply demonstrates the power of pornography as speech'.⁷⁵

5. A New Start

What I want to do now is take certain elements from the feminist case that was presented briefly in the preceding section and put them in the context of Dworkinian political theory. The result will be two arguments that are Dworkinian in spirit and that see the pornography issue as analogous to the issue of race discussed by Dworkin in 'Reverse Discrimination'. Both are civil rights issues; and the broad approach that Dworkin exploits in 'Reverse Discrimination' is apparently just as applicable to pornography.

In presenting these arguments I will be relying on a number of claims that Dworkin does not consider, which I draw largely from Section 4. Briefly, these are the claims: that women do not have equal status in this society; that widespread prejudice against women exists; that certain practices in this society express that prejudice and probably perpetuate that inequality, and thereby disadvantage women; and that the consumption of a certain kind of pornography is one such practice.

1. Prohibiting Pornography: An Argument of Principle

Let us begin by reminding ourselves of the general Dworkinian recipe for a good argument of principle. We saw this general recipe at work in both 'Reverse Discrimination' and 'Do We Have a Right to Pornography?': (a) Begin with what looks like a good utilitarian argument for a particular

establish prior restraint of speech, and would therefore have been unconstitutional on those grounds alone.

⁷⁴ Hudnut 1326.

⁷⁵ 771 F.2d 329 (7th Cir. 1985).

policy; (b) look at the individuals who appear to suffer as a result of the policy, and ask whether the policy violates the rights of those individuals; (c) inspect the preferences upon which the utilitarian argument is based, and show that they are external preferences; (d) conclude that the individuals concerned do have rights that are trumps against the policy in question. This is precisely the recipe I now propose to follow, bearing in mind that this is a civil rights argument which works on an analogy with Sweatt, and that the assumptions about burdens of proof that applied in Sweatt apply in this context as well.

a. *The Utilitarian Argument.* In the two essays mentioned above, Dworkin's starting point was an apparent utilitarian argument in favor of a position that most liberals would eschew. In the case of Sweatt, the balance of preferences apparently comes out in favor of segregation; in the case of pornography, the balance of preferences apparently comes out in favor of prohibition.

Could there be a utilitarian argument for *permitting* pornography? Such an idea sounds odd, since we are accustomed to casting the debate in the language of fundamental liberties, rather than utility. But I suggest that there might be at least a germ of a utilitarian argument in the background: people want pornography, so let them have it. If one were to take up this idea and add some other speculative premises, one might construct a simple utilitarian argument in favor of permitting pornography: most people would prefer that pornography be permitted, and so our policy should be to permit pornography.

To suppose this would be to question one of Dworkin's assumptions. In 'Do We Have a Right to Pornography?' Dworkin assumed that unanalyzed preferences about pornography would come out in favor of prohibition. I am not so sure. The power of the pornography industry in sheer monetary terms⁷⁶ bears eloquent witness to the popularity of its product; and although it is difficult to gauge how much of this would count as pornography by MacKinnon's definition, it seems that pornography of the

⁷⁶ According to Itzin, the pornography industry in the United States currently has a \$10-billion-a-year turnover, although this total almost certainly includes material that would count as erotica by the ordinance definition ('Sex and Censorship: The Political Implications', in *Feminism and Censorship*, ed., Chester and Dickey, 45). See Gordon Hawkins and Franklin E. Zimring, *Pornography in a Free Society* (Cambridge and New York: Cambridge University Press, 1988) ch. 3, for a survey of attempts to estimate the size of the general pornography market.

latter kind is a fairly widespread phenomenon, appearing in some guise on the shelves of most newsagents and video stores.⁷⁷ Given these facts, and given a general ignorance about or indifference to pornography's influence, can we be sure, as Dworkin seems to be, that a utilitarian argument would support a prohibitive policy? I do not know. I think it is at least possible that overall preferences would come out in favor of a permissive policy.

Suppose I am wrong about this empirical question. No matter. For, strange as it may sound, Dworkin himself has supplied us with a certain kind of utilitarian argument for the permission of pornography, and I would be perfectly willing to use this as a starting point. Recall that Dworkin concluded, having argued that the rights of pornographers must trump the preferences of the moralists, that pornography should be permitted; and, granted that Dworkin views his argument as relevant to the feminist case,⁷⁸ his conclusion is presumably that pornography—including violent and degrading pornography—should be permitted. What exactly was the justification for this policy of permitting pornography? It rested partly, of course, on the failure of the opposing moralistic argument, as we have seen; but it also rested on the important fact that the remaining preferences were *in favor of* the policy. Majority preferences—leaving aside those of the moralists—are in favor of permitting pornography. The justification for the permissive policy advocated by Dworkin can be seen, in other words, as resting ultimately on a utilitarian argument that has been laundered of moralistic antipornography preferences, the rights of the pornographers

⁷⁷ Even if one leaves aside, for the sake of avoiding needless controversy, that clause of the definition which counts subordinating depictions of women in postures of 'display' as pornography, it seems that some of the more straightforwardly 'violent and degrading' material may have found a niche in magazines that have wide circulation (see Feinberg, *Offense to Others*, 151, for some *Penthouse* examples, and note 64 above for one from *Hustler*). Accurate figures for pornography generally, let alone violent pornography, are hard to find. It seems that the pornography that concerns MacKinnon is prevalent, although it is almost certainly not 'the most prevalent [form] of pornography', as is claimed in the *Report of the Attorney General's Commission on Pornography* ([Washington, D.C.: United States Government Printing Office, 1986], 323; italics mine), even if one does include 'threatened violence' (p. 323). Certainly there has been a widespread perception that violent pornography is very much on the increase (Donnerstein et al., *The Question of Pornography*, 88). Donnerstein suggests that 'we may be more aware of the sexually violent forms of pornography because all forms of pornography are more prevalent than they once were' (ibid., 91). Feinberg cites studies according to which some time ago (before 1980) the number of violent scenes in hard-core pornography was 'as high as 20%', and in leading pornographic magazines such material constituted 'as much as 10% of the total' number of cartoons and pictorials (*Offense to Others*, 149).

⁷⁸ Dworkin, *A Matter of Principle*, 1.

serving to effect this laundering.⁷⁹ To interpret Dworkin's result this way is only to suggest that there is a sense in which an argument of principle against an unreconstructed utilitarian argument just *is* a reconstructed utilitarian argument. (I will suggest later that this particular argument is not in fact fully reconstructed.)

In short, there is, I suggest, an apparent utilitarian argument in favor of permitting pornography. Whether one takes the argument to be apparent at first sight, as I am inclined to do, or evident only after a careful weeding out of moralistic preferences, as Dworkin does, is immaterial for my purposes. Most people (or: most people, excluding the moralists) would prefer that pornography be permitted, so our policy should be to permit pornography.

b. The Individuals Who Suffer. Women appear to suffer as a result of this policy. In what ways? We should be careful not to misconstrue this question. We are not asking, at this point, whether women suffer in any respect that would be sufficient to justify changing the policy, but only whether they suffer at all. The purpose of this step in the argument is only to establish a certain *prima facie* cause for complaint; the question of whether such complaint is justified is addressed only at a later stage of the argument. Sweatt and DeFunis both had cause for complaint in this sense: each might have felt deeply insulted by the admissions policy that excluded him; each was apparently disadvantaged by the policy; each was, arguably, denied opportunities that would not otherwise have been available to him. This was true despite the fact that the University of Washington's treatment of DeFunis was not ultimately unjust. And it would have been true even if it had been difficult to prove that the Texas admissions policy harmed Sweatt, as it might well have been had the case arisen in the context of a worked-out 'separate-but-equal' social policy. Keeping in mind, then, the modest scope of the question we are asking, we can return to it once more: In what ways does the permissive policy harm women?

⁷⁹ I do not know whether Dworkin would resist this description of his argument of principle as a 'laundered' argument of policy. (As will become evident later, it is in my view only partially 'laundered'; there is an important set of external preferences that it has failed to eliminate.) But surely one natural way to see Dworkin's general strategy is to interpret him as advocating that we launder utilitarian arguments (assuming that they are the relevant arguments) of external preferences by means of rights, since it is too difficult, pragmatically speaking, to launder such arguments by any other means at the disposal of democratic governments.

Beginning with what we have clearest evidence for, it is certainly the case that some women feel deeply distressed about and insulted by pornography. Dworkin would, I take it, agree that this counts as harm, since part of his argument against Williams relies on the claim that distress at the mere thought that pornography exists is indeed a kind of harm, and one that governments have a *prima facie* obligation to take into account.⁸⁰ Of course, the fact that a policy causes some insult and distress is not sufficient reason for thinking that there is something wrong with the policy, when that policy is otherwise justified. 'Everything depends', as Dworkin so clearly puts it in the Sweatt context, 'upon whether the feeling of insult is produced by some more objective feature that would disqualify the policy even if the insult were not felt.' If no such feature can be found, then the felt insult 'must be based on a misperception'.⁸¹ Whether the permissive policy has an 'objective feature' of this kind is a question I will turn to in the next step of the argument.

However, to leave the harm at the level of 'insult and distress' would be to seriously misrepresent the feminist argument I am attempting to interpret. The central point of that argument is that some pornography can work as a kind of propaganda, which constitutes a threat to women's well-being, and, more generally, a threat to women's equality. If this were true, then the harm might be in the first instance something like 'harm to reputation',⁸² although almost certainly not of a kind that would count as libel under current law. It would surely be a kind of harm nonetheless. One does not have to accept all the findings of the Indianapolis City Council to agree that some pornography might work in this way. Some liberal theorists seem to come close to concurring with the view that pornography of certain kinds can be like propaganda. Violent pornographic depictions of certain kinds 'reenforce macho ideology', writes Joel Feinberg, and this ideology is one that has done 'manifest harm' to women.⁸³ To avoid needless controversy, let me confine the discussion of harm to some aspects about which there seems to be a greater likelihood of achieving

⁸⁰ Dworkin, 'Right to Pornography?', 345.

⁸¹ Dworkin, 'Reverse Discrimination', 231.

⁸² Susan Brison has written convincingly on this subject in 'The Autonomy Defense of Free Speech', *Ethics* 108 (1998), 312-39.

⁸³ Feinberg, *Offense to Others*, 150-1. Feinberg, it should be noted, does not think that violent pornography is like libel; he thinks the macho ideology has done manifest harm to men as well; and although he thinks violent pornography 'reenforces' that ideology, he does not think it is a major cause of it (p. 153).

agreement. It is probably the case that violent and degrading pornography 'reenforces macho ideology', as Feinberg puts it, and thereby perpetuates the subordinate status of women; the resulting 'manifest harm' to women probably includes, but is not confined to, sexual abuse of various kinds (including sexual harassment and rape), harm to reputation, and loss of credibility.

It will be seen that what I have described above is something other than the conclusive evidence of crimes of violence that Dworkin appeared to demand of an antipornography argument. I have spoken of 'probable' harm, and of harm other than violence. This talk of 'probable' harm raises, of course, difficult questions about burdens of proof. Recall that we attributed to Dworkin a certain implicit principle about burdens of proof, a principle that was relevant in some important contexts, such as the civil rights context of *Sweatt*. One could accept that Sweatt had *prima facie* cause for complaint, even if he were bringing his case in the context of a broader 'separate-but-equal' social policy; even if, that is, it were impossible to establish conclusively that Sweatt was disadvantaged by the segregatory policy (since it would, *ex hypothesi*, have been possible for him to gain admission to a black law school that was 'in a material sense' the equal of the white school). As we saw earlier, to take such an approach would be reasonable, and would amount to a certain presumption in Sweatt's favor. Given the social circumstances, there would be a presumption that he probably is harmed by the policy, a presumption that is not yet sufficient to justify changing the policy, but rather prompts us to ask the further question about whether there is real injustice. I assume a similar burden of proof here: we are entitled to say that women are probably harmed by the permissive policy, and that although this harm is not (as far as this argument is concerned) sufficient to warrant changing the policy, it prompts us to move on to the question of whether there is real injustice.

Before we move on to consider that question, it may be worth pointing out that this assumption is not novel, and not confined to feminist arguments about pornography: the Williams Committee, although noted for its liberal recommendations, appears to have taken a similar approach, at least with respect to certain kinds of pornography. While the committee explicitly endorsed a principle that discourages the conclusion that there is a link between pornography and harm, requiring 'that the causation of harm

should lie "beyond reasonable doubt"⁸⁴ it apparently saw little need in practice to apply this strong principle in justifying some of its prohibitive recommendations. It recommended, for example, 'that films, even those shown to adults only, should continue to be censored',⁸⁵ especially those films that 'reinforce or sell the idea that it can be highly pleasurable to inflict injury, pain or humiliation (often in a sexual context) on others'.⁸⁶ It is interesting to see how the shift in burden of proof relevant to such material was expressed: 'It *may* be that this very graphically presented sadistic material serves only as a vivid object of fantasy, and does no harm at all. There is certainly no conclusive evidence to the contrary. But there is no conclusive evidence in favor of that belief either, and in this connection it seems entirely sensible to be cautious'.⁸⁷ Many would agree that caution in the face of uncertain evidence for serious risks is sensible,⁸⁸ and that in some contexts it is appropriate to use a burden of proof that is more modest than the 'beyond reasonable doubt' principle. In sum, given that a more modest burden of proof appears to have some independent plausibility for cases of the kind we are considering, and given also that there are grounds for thinking that Dworkin would endorse it in the relevantly similar context of Sweatt, I see no reason not to adopt it here—especially in view of the fact that our purpose, unlike that of the Williams Committee, is not to establish whether there is harm sufficient to justify prohibition, but only to establish whether there is some *prima facie* cause for complaint sufficient to motivate further inquiry.

Women apparently suffer as a result of the policy of permitting violent and degrading pornography. We can now ask: Does that policy violate women's rights?

c. *Preferences.* At this point we must look more closely at the preferences upon which the utilitarian policy might be based. There are all kinds of reasons that people might have for wanting pornography to be permitted. Many people like pornography (including violent pornography), and want to be able to consume it without restriction; some people do not like it

⁸⁴ Williams Report, 59. ⁸⁵ Ibid., 146. ⁸⁶ Ibid., 145.

⁸⁷ Ibid. I am indebted to the discussion in Hawkins and Zimring, *Pornography in a Free Society* (pp. 128–30) for drawing this aspect of the Williams Report to my attention.

⁸⁸ One might wonder, though, why it is only *films* of such a kind that concern the committee. The members of the Williams Committee do think that film is a 'uniquely powerful instrument', deserving of special attention; see Williams Report, 145.

themselves, but are happy enough for others to enjoy it; some people are afraid of the 'slippery slope', and worry that allowing the state to prohibit pornography would raise the likelihood of government abuse of power. It seems likely that the preferences upon which the argument hinges will be of the very first kind, namely, the preferences of the consumers of pornography for pornography itself.

What kind of preferences are these? On the face of it, they all seem to be personal. How could a preference for what one reads or watches behind closed doors fail to be anything other than personal? But we must not stop here, if we are to be true to the Dworkin of 'Reverse Discrimination': there is more to the notion of an external preference than an explicit reference to the allocation of resources to another citizen. Dworkin has already endorsed a version of the view that the personal is sometimes political, or, more precisely, that apparently personal preferences can have implications for political questions about rights. We need to refer back at this point to the extended notion of an external preference discussed in Section 2. Is the situation we are considering one in which prejudice against the disadvantaged group is strong and pervasive in society? Surely that much at least is uncontroversial.

But if so, there are further questions to be asked. If the prejudice against women did not exist, would the preferences for this kind of pornography exist? This is a complicated hypothetical question, but at least one eminent liberal theorist has offered a fairly confident answer to it. This kind of violent pornography 'does not appeal at all', says Feinberg, to a male who is 'not in the grip of the macho cult.' In fact these pictures, stories, and films have no other function but to express and reenforce the macho ideology. "Get your sexual kicks", they seem to say, "but make sure you get them by humiliating the woman, and showing her who's boss".⁸⁹ Feinberg thinks that the possession of 'macho' values is a necessary condition for the appeal of violent pornography; he also thinks that macho values embody a view about the worth of women.⁹⁰ If one were to accept his suggestion, one

⁸⁹ Feinberg, *Offense to Others*, 151.

⁹⁰ According to macho values, says Feinberg, men ought to be 'utterly dominant' over women, treating them as little more than 'trophies' (ibid., 150). In an earlier note I mentioned that while Feinberg thinks that violent pornography may 'reenforce macho ideology', he thinks that it is not a major cause of either the macho ideology or the violence (the latter being an effect not of the pornography but of the macho cult). Feinberg seems to think that the considerations raised here—that having 'macho values' is a prerequisite for the appeal of violent pornography—constitute evidence

would be accepting that a preference for pornography of this kind depends upon a view about the worth of women, and hence that such preferences are, by Dworkinian standards, external preferences.

What Feinberg is suggesting here sounds interestingly similar to Dworkin's description of the associational preference of a white law student. Recall that Dworkin described such a preference as 'parasitic upon external preferences... a white student prefers the company of other whites because he has racist social and political convictions, or because he has contempt for blacks as a group'.⁹¹ If Feinberg is right, then what we have in the case of violent and degrading pornography is just the same kind of thing. To paraphrase Dworkin's words, an apparently personal preference for such pornography is really 'parasitic upon external preferences... the consumer prefers pornography of this kind because he has macho social and political convictions, or because he has contempt for women as a group'.

Feinberg's suggestion surely has some plausibility. One could, however, be somewhat more cautious. One could suppose that, while a great many such preferences depended on the possession of certain antecedent values, people were sometimes drawn to violent pornography through other motives, such as curiosity, or simple peer pressure. Such preferences might

against the feminist claim that pornography is one of the causes of the pattern of sexual abuse suffered by women. Although his concessions (i.e., that pornography of this kind 'reenforces' macho culture, which in turn manifests itself in abuse, and that it may in addition have some small but direct 'spillover' effects into real-world violence) would be sufficient for my argument to go through, I think it would be a mistake to infer as Feinberg has done. Tracing causal connections of this kind is undoubtedly a difficult task, but it would surely be wrong to argue with respect to, for example, racist propaganda, that it made no difference, on the grounds that readers of such material would already be racist and hence that the material would be 'merely' reinforcing existing attitudes. Such an argument would perhaps betray a rather simple view about how tastes and attitudes are formed. There is no contradiction involved in thinking that propaganda can sometimes appeal to people because they already have certain beliefs and values, or are disposed to have them; and that it can sometimes influence beliefs and values, reinforcing them in some cases, and pushing them in certain directions in others. I presume that it is precisely because expression does have this central role in forming beliefs and values that liberals think it so important. It is one thing to believe that pornography of this kind should be protected because it is expression, and expression must be protected at all costs; it is quite another to believe that it should be left alone because it is more or less causally inert, as Feinberg seems to be suggesting. Easterbrook recognized that expression is far from impotent when he concluded that the existence of pornography's pervasive effects was precisely what demonstrated 'the power of pornography as speech' (771 F.2d 329 [7th Cir. 1985]).

One could accept that not every case of apparently violent and degrading pornography embodies a view about the worth of others, while acknowledging that a significant number do have this feature (see, e.g., Feinberg, *Offense to Others*, 144-6). It might be argued that some lesbian and homosexual pornography offers an example of apparently violent and degrading material that does not embody such a view.

⁹¹ Dworkin, 'Reverse Discrimination', 236.

simply be personal. While there is some likelihood that many of the relevant preferences are affected by prejudice, it is possible that what one has here is a complicated situation of the kind Dworkin describes elsewhere, in which 'personal and external preferences are so inextricably tied together, and so mutually dependent, that no practical test for measuring preferences will be able to discriminate the personal and external elements in any individual's overall preferences'.⁹² Suppose that this is the case. Suppose it is difficult to disentangle personal preferences about pornography of this kind from external preferences, difficult to answer the hypothetical question about the dependence of the desire on the prejudice. What should we conclude in such circumstances? We should still, if we are following the third of Dworkin's conditions (listed in Section 2), count the preferences in question as external.

In sum, if we are to be faithful to the Dworkin of 'Reverse Discrimination', we ought, it seems, to conclude that the preferences of men for pornography of this kind are external preferences.

d. Conclusion. Women as a group have rights against the consumers of pornography, and thereby have rights that are trumps against the policy of permitting pornography. The permissive policy has a certain 'objective feature', to use Dworkin's phrase; it relies on external preferences, that is, preferences that are dependent on views about the worth of other people. This is enough to establish that the permissive policy is in conflict with the principle of equal concern and respect, and that women accordingly have rights against it.⁹³

⁹² Ibid.

⁹³ One possible response to this argument that I do not address here is that the argument, if correct, shows that pornography of this kind presents an apparent conflict of rights, the rights of pornographers against moralists and the rights of women against pornographers. How one goes about resolving such conflicts is not clear, but one way might be to think about what a fully reconstructed utilitarian argument might look like, that is, one that laundered out external preferences of both varieties. On this subject one must, perforce, be somewhat speculative; but if we were to talk of preferences at all, we might begin by considering the following three varieties: (i) preferences of some women that some pornography not be permitted because they view it as deeply insulting; preferences of women for an environment in which they can pursue their goals and life plans without the threat of the discrimination and sexual abuse that pornography of this kind arguably engenders; (ii) moralistic preferences of disapprovers, who want pornography prohibited because they view it as immoral; and (iii) preferences of pornographers that pornography be permitted. There may be others, but these would surely be among the most important. Dworkin considers chiefly the second and third varieties. By Dworkin's argument, the second set count as external; I accept this for the purposes of this essay. I have argued that the preferences of the third variety are also external. This would leave the laundered utilitarian

It should be clear that this argument is rather different in kind to arguments against pornography that are based on a simple harm principle. Recall that Dworkin appeared to think that a successful antipornography argument would have to produce conclusive evidence of some grave harm, for example, evidence that pornography causes violent crime. This, I hope I have shown, is a mistake. The argument above does not need to claim that grave harm results from having a permissive policy, nor does it need to have conclusive evidence for the harm it cites. The argument focuses chiefly on the *preferences* underlying the permissive policy. To make this clear, let me sum up the argument once more, this time in the conditional mode. If there were a utilitarian argument for the policy of permitting violent and degrading pornography, women would have rights against it. Women are apparently disadvantaged by the permissive policy, and therefore have *prima facie* cause for complaint. Some women feel deeply distressed and insulted by it; and it is probable that the existence of such pornography reinforces and perpetuates attitudes and beliefs that undermine the well-being of women and undermine sexual equality; it probably contributes, for example, to an environment in which sexual abuse is more likely to occur. Given that women have cause to be concerned about the permissive policy, one can ask whether it violates their rights. Since it is likely that a utilitarian permissive policy would rely on the preferences of consumers for pornography of this kind, and since such preferences are external preferences, by the criteria used by Dworkin in 'Reverse Discrimination', women have rights against the permissive policy.

One possible reply to what I have attempted to do here is that it rather misconceives the role that rights are supposed to play in a Dworkinian framework. As a general rule, it might be said, we invoke rights to protect individuals from the consequences of public institutional policies of one kind or another, policies that are justified by arguments that are apparently legitimate, but in fact rest on external preferences. We do not, on this view, invoke rights in the context of individual private actions motivated by prejudice. There are certain personal situations in which the state simply should not interfere to protect those who are disadvantaged, unless the

calculus with only the first to consider. I take it that preferences of the first variety are personal, and while pornographers may have rights against the second variety, they would have no rights against the first. So a fully reconstructed utilitarian argument would, it seems, yield a restrictive conclusion.

harm suffered is very acute. The state should not, for example, intervene in a situation in which it is merely a child's self-esteem rather than her safety that is being systematically undermined by a cruel and sexist father.

There are two distinct thoughts behind a response like this, and one way of making them clear is to compare the pornography case with the one that I suggested was analogous. Remember that the above argument against pornography was modeled on Dworkin's argument regarding Sweatt; and it might be objected that while I stressed the similarities between the issues, I missed two important differences.

The first may already be evident. An important difference between the policy of institutional racial segregation like that of the University of Texas and the policy of permitting pornography is that law schools are in the *public* sphere whereas the reading of violent pornography is not. Regulating educational institutions is one thing, regulating private consumption of sexual literature quite another. A second difference might be the following. Arguments of principle are always directed against a *policy*. Institutional racial segregation clearly is a policy, and therefore offers an appropriate context in which to raise questions about rights of individuals threatened by the policy. But is 'permitting pornography' really a policy? The thought here rests on something like an acts/omissions distinction. It would perhaps be odd to say, for example, that the state had a 'policy' of permitting people to have cornflakes for breakfast, unless there had been careful deliberation, perhaps some suitable legislation, and so on. In short, the objection runs, we begin to consider rights only when individuals are suffering as a result of a genuine public policy. The practice of institutional segregation counts as a public policy; the practice of 'permitting pornography' simply does not.

What are we to make of these responses? The first objection, which invokes a public/private distinction, is one that many liberals might want to make. However, whatever its merits, it is not at all clear that Dworkin is in a position to make it. For Dworkin seems to have disavowed any public/private distinction other than that which can be derived from the equality principle. His strategy in 'Do We Have a Right to Pornography?' offered a good illustration of his method: pornographers could be defended, not because they had a fundamental right to privacy, *simpliciter*, but because they had a right to moral independence, derivable from their right to equal concern and respect. While such a right may protect pornographers

from moralistic arguments of policy, it is hard to see how it could protect them from an argument of principle of the kind I have constructed. What of the second objection? We say quite naturally of certain countries or governments that they have 'permissive policies' about various activities, about drugs or public nudity, for example. Is this simply a figure of speech? Is there an important conceptual distinction between active public policies on the one hand and 'pseudo-policies' that merely permit an activity on the other—a distinction that renders arguments of principle inapplicable when we are dealing with the latter? Whatever the answer to this interesting question, my response for the purposes of this article is to leave it to one side, pausing only to express a suspicion, yet again, that Dworkin is not in a position to provide a basis for the necessary conceptual distinction.⁹⁴

It is possible, though, to construct a second Dworkinian argument for prohibiting pornography which is immune to any such objection, for it is not a rights-based argument at all. Since I think there is nothing obviously wrong with the first argument, I take this second, independent, argument to be simply bolstering the former.

2. *Prohibiting Pornography: An Argument of Policy*

In constructing a Dworkinian argument of principle in favor of prohibiting pornography, I took as my model Dworkin's argument regarding Sweatt.

⁹⁴ This is a large issue, and one that deserves more attention than I have scope to give it here. It seems that Dworkin's 'principle of victimization', which is introduced in his more recent writings (e.g., in 'What Is Equality', 48) does in effect draw a significant distinction between acts and omissions as far as government policy is concerned. The principle 'denies that equality can be improved when someone is victimized'; someone is victimized when the community imposes a 'liberty deficit', that is, 'a loss of power, in virtue of legal constraint, to do or achieve something one would have had the power to do or achieve following a defensible distribution' (ibid.). One apparent consequence of this principle is that there is an important difference between *allowing* someone to continue in a state in which they have less power than they would in the ideal situation following a 'defensible distribution', and *forcing* such a state on someone. I lack space here to discuss this topic in more depth, but some brief comments are in order. First, the victimization principle does not seem to be derivable from the equality principle, even in the new context of equality of resources. Second, it does not seem very plausible: surely equality *can* be improved when someone is 'victimized' in Dworkin's technical sense. Suppose you have a community in which a large group of people have almost no power to do or achieve anything, and a small group have a great deal; and suppose the only possible way of increasing the power of the large group is by temporarily reducing the power of the smaller group to a level very slightly below that which they would have in the ideal situation. If it were indeed the only means possible, then surely to reject it, on the grounds that it was in conflict with the victimization principle, would be to take a course that would itself conflict, rather than harmonize, with a principle of equal concern and respect.

In constructing an argument of policy for the same conclusion, I again take my lessons from Dworkin's approach in 'Reverse Discrimination', this time looking not at Sweatt but at DeFunis.

We were presented in the analysis of DeFunis with the following powerful argumentative strategy: (a) There was an *ideal* argument of policy, with equality as its goal: the practice of affirmative action was taken to be one that would lead to a more equal, and therefore more just, society (regardless of the preferences of its citizens); and (b) there was also, crucially, an *absence* of any countervailing argument of principle. DeFunis was found to have no right against the policy in question, and given that there were no further objections, that particular affirmative action policy was held to be in harmony with the principle of equal concern and respect. In order to apply this approach to the pornography question, an argument that has both of the above features will be needed.

a. *The Ideal Argument.* We begin, then, by offering an ideal argument of policy. We consider the policy of prohibiting violent pornography, and form the hypothesis that this policy would help us make progress toward an important goal, namely, a more equal, and therefore more just, society. Given that there is some evidence that pornography of this kind plays a role in perpetuating the subordinate status of women, in reinforcing 'macho ideology', it is not altogether unreasonable to suppose that to prohibit pornography would be to remove one of the many impediments to women's equal civil status.

This empirical hypothesis is of course vulnerable. Although it cannot be said to be implausible, it may be controversial. Perhaps the policy will not work in the way we hope. Perhaps it will turn out to have some bad effects, although if Dworkin were right the consequences of the policy would not be too dire; in Dworkin's view, it 'seems implausible that any important human interests are damaged by denying dirty books or films',⁹⁵ and if it seems implausible for pornography generally, it will presumably seem even more so for the subset of pornography we are considering here. It is possible, though, that the policy will backfire, and promote, say, misogyny rather than equality. However, the fact that the hypothesis is controversial should not in itself be a bar to the policy's constitutionality, if Dworkin is

⁹⁵ Dworkin, 'Right to Pornography?', 369–70.

right. For it is not, says Dworkin, 'the business of judges . . . to overthrow decisions of other officials because the judges disagree about the efficiency of social policies'.⁹⁶ If one is to condemn the policy as unjust, it must be for reasons other than its possible inefficiency. Let us move on to consider whether there are such reasons.

b. Absence of Any Countervailing Argument of Principle. We must ask at this point whether there is any countervailing argument of principle that would defeat the proposed policy. Do people have a *right* to pornography? Dworkin is, as we have seen, a champion of the rights of pornographers against those who seek censorship. Can his argument provide a means of trumping this argument of policy? It seems not. First of all, Dworkin's rights-based argument was directed against a utilitarian, rather than an ideal, argument of policy. Pornography was to be prohibited, not because such a policy would promote the equality of its citizens, but because most citizens were thought to *prefer* that pornography be prohibited. Given the utilitarian starting point of Dworkin's analysis in 'Do We Have a Right to Pornography?' his approach there has little to say in response to an ideal argument of the kind being proposed here, an argument that does not consider the preferences of citizens at all. Pornographers may well have a 'right to moral independence' of the kind Dworkin describes, namely, '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'.⁹⁷ But such a right, however admirably it may protect the liberty of pornographers from moralistic arguments, will do them no good here. This prohibitive argument of policy is no more moralistic than the argument invoked in DeFunis. The policy will, admittedly, somewhat restrict the liberty of the pornographer; but this does not have to be interpreted as a denial of his treatment as an equal. Policies that constrain the liberty of the pornographer conflict with the equality principle 'only when the constraint is justified in some way that depends on the fact that others condemn his convictions or values'.⁹⁸ The policy

⁹⁶ Dworkin, 'Reverse Discrimination', 224.

⁹⁸ *Ibid.*, 366.

⁹⁷ Dworkin, 'Right to Pornography?', 353.

we are considering here depends on no such fact. It relies rather 'on the independent argument that a more equal society is a better society even if its citizens prefer inequality'.⁹⁹

Although it seems that Dworkin has provided no answer to the ideal argument proposed here, it would perhaps be unfair to stop at this point. All arguments of policy, whether utilitarian or ideal, are vulnerable, according to Dworkin, to arguments of principle. While Dworkin's failure to supply a defense of a right to pornography against the feminist argument outlined above suggests that his remarks about the relevance of his argument to 'recent history' were a little hasty, it should not be taken as implying that no such defense is possible. How might one go about trying to construct a rights-based argument against an ideal, rather than a utilitarian, argument?

Ideal arguments of policy can sometimes conflict with the principle of equal concern and respect. An example mentioned by Dworkin that we noted earlier is that of an argument of policy that supports the goal of achieving a culturally sophisticated community, in a situation in which no one wants such sophistication. A goal of this kind is in conflict with the 'neutrality' aspect of the equality principle: a government that is committed to treating competing accounts of the good life with equal respect cannot act on the grounds that 'cultural sophistication' is inherently more valuable than some other conception of the good life.¹⁰⁰

But in the context of pornography, as in the context of affirmative action, we are dealing with a goal of a rather different kind: namely, equality itself. While one can see how a goal like cultural sophistication might be vulnerable in the way that Dworkin suggests, it is harder to see how equality itself could come into conflict with the equality principle. There is, of course, an important distinction to be aware of here. As Dworkin comments, 'part of the importance of DeFunis's case [is] that it forces us to acknowledge the distinction between equality as a policy and equality as a right, a distinction that political theory has virtually ignored'.¹⁰¹ Even policies that have equality as their goal can conflict with the principle of equal concern and respect, and in such cases it will be possible to raise

⁹⁹ Dworkin, 'Reverse Discrimination', 239.

¹⁰⁰ Dworkin, 'What Rights Do We Have?', 274.

¹⁰¹ Dworkin, 'Reverse Discrimination', 226.

an argument of principle against the policy. Dworkin has an imaginary example:

Suppose a law school were to charge a few middle class students, selected by lot, double tuition in order to increase the scholarship fund for poor students. It would be serving a desirable policy—equality of opportunity—by means that violated the right of the students selected by lot to be treated equally with other students who could also afford the increased fees.¹⁰²

But the policy of prohibiting pornography that we are considering here does not seem to be inequitable in this procedural way; and in the absence of any further clues as to how we are to go about identifying rights in the context of ideal arguments, we need pursue this path no further. Given that the ideal argument does not depend on the fact that others condemn the pornographer's convictions and values, and given that it is not otherwise in conflict with the equality principle, we can conclude that a prohibitive policy is permissible. Ideal arguments of this kind, whether for affirmative action or for the prohibition of some kinds of pornography, apparently work hand in hand with the principle of equal concern and respect, relying as they do 'on the independent argument that a more equal society is a better society even if its citizens prefer inequality. That argument does not deny anyone's right to be treated as an equal himself'.¹⁰³

6. Concluding Remarks

In the preceding section I advanced two 'Dworkinian' arguments in favor of prohibiting a certain kind of pornography. The first was an argument of principle that relied on the idea of equality as a right, and took the following form: To permit such pornography is to have a policy that relies crucially on external preferences; so such pornography should not be permitted. The second was an argument of policy that relied on the idea of equality as a goal, and took the following form: Prohibiting pornography of this kind would help achieve a desirable social goal, namely, equality; given that there is no countervailing rights-based argument, such pornography should be prohibited.

¹⁰² Dworkin, 'Reverse Discrimination', 226.

¹⁰³ *Ibid.*, 239.

Notice that pornography is to be prohibited, according to these two arguments, not because there is conclusive evidence that it causes violent crime, but rather because it is in conflict with equality. Conclusive evidence of a causal link to violence is not demanded, as it might be demanded by an argument that relied on a simple harm principle. It should be clear that these Dworkinian strategies have significantly altered the burden of proof, with regard to both the argument of principle and the argument of policy. With respect to the argument of principle, demanding conclusive evidence that pornography causes violent crime would be like requiring of Sweatt (in a hypothetical 'separate-but-equal' social context) that he produce conclusive evidence that the 'separate-but-equal' strategy harmed him. With respect to the argument of policy, demanding such evidence would be like requiring the University of Washington Law School to supply proof that *failure* to have an affirmative action policy brought about some grave harm, rather than simply expecting the administrators to have a reasonable empirical hypothesis about the probable social benefits of affirmative action, and to ensure that the policy violates no one's right to be treated as an equal. In sum, if Dworkin were demanding that a case against pornography produce conclusive evidence about violence, then he is requiring both a kind of harm and a degree of evidence that he would not demand in civil rights contexts like that of Sweatt and DeFunis. Now, if there is something special about the pornography case that requires us to apply standards of proof that are quite different to apparently similar civil rights cases, then it is surely up to Dworkin to explain what that is.

It is time now to return to the question I posed at the beginning of the essay. What are we to make of all this? What, exactly, has been achieved by demonstrating an apparent harmony between Dworkin's theory and the feminist view he opposes? Two responses are possible.

The first response is that what we have here is an interesting conclusion about pornography and liberalism. A prohibitive policy about violent and degrading pornography is not only consistent with, but apparently demanded by, liberal theory. Well, so much the worse for pornography. What has been shown is the depth of liberalism's commitment to equality; liberalism will approve whatever steps are necessary to protect the right to equality, and to achieve equality as a social goal, even when those steps seem restrictive, provided that no one's right to be treated as an equal is violated. Perhaps such a conclusion will prompt some reevaluation of the

liberal agenda, that loose package of causes described by Dworkin in his article 'Liberalism'.¹⁰⁴ Liberals, he says, traditionally 'support racial equality and approve government intervention to secure it, through constraints on both public and private discrimination'.¹⁰⁵ However, he continues, 'they oppose other forms of collective regulation of individual decision: they oppose regulation of the content of political speech...and they oppose regulation of sexual literature and conduct'.¹⁰⁶ Perhaps the last of those causes is due for revision, in the light of an awareness that 'sexual literature' at any rate might sometimes have implications for equality.¹⁰⁷ If liberalism cares just as deeply about sexual equality as it cares about racial equality, it might be led to approve whatever measures are necessary to secure it.¹⁰⁸

A second and alternative response is that what we have here is not an interesting conclusion about pornography and liberalism, but rather a conclusion about Dworkin. What I have shown is that a prohibitive policy is in harmony with *Dworkinian* liberal theory. Well, so much the worse for Dworkin. Since the conclusion about pornography is unacceptable (so this response runs), there must be something wrong with the *Dworkinian* premises. What has become evident here is not so much the compatibility of liberalism with restrictive policies on pornography as the weakness of Dworkin's own approach to civil liberties.

Those who are tempted to make this latter response might feel that their suspicions were confirmed if it appeared that these *Dworkinian* strategies could be used to undermine other liberties. Suppose we explore this possibility, confining ourselves for simplicity's sake to the right of free speech. Might these strategies be applicable to other forms of expression? Pornography is not, of course, the only form of expression that manifests a view about the worth of women; and one might ask whether the above strategies could be extended to other representations in the media that are not sexually explicit, but arguably manifest a certain view of women and promote that view. Would such speech be vulnerable in the ways I

¹⁰⁴ Dworkin, 'Liberalism', in *A Matter of Principle*, 181-204.

¹⁰⁵ *Ibid.*, 187.

¹⁰⁶ *Ibid.*

¹⁰⁷ The 'content of political speech' might also have implications for equality; this is an issue I address briefly later in this essay, considering the example of incitement to racial hatred.

¹⁰⁸ Suppose, contrary to what I have said above, that some theoretical defense for the consumers of pornography can be found. A more modest variant of the above conclusion might still be plausible: namely, that the elimination of pornography is a liberal goal, to be pursued in whatever ways are legitimate, for example, through public education campaigns in the media.

have described? This is an interesting and important question, but rather than pursue it here, let me consider instead a rather different kind of speech, which is not sexually explicit, which is apparently constitutionally protected, and which does nonetheless seem to be vulnerable to the above strategies.

We are granting for the sake of the arguments in this article that Dworkin has *some* resources to defend a right to free speech. Such a defense might be a relatively simple matter where 'free speech' is spelled out as the 'freedom to speak unpopular or wicked thoughts'.¹⁰⁹ A restrictive policy based on an argument that 'most people want wicked thoughts not to be expressed' might well be a moralistic argument, based on external preferences, and therefore defeasible by a 'right to moral independence' of the kind derived in 'Do We Have a Right to Pornography?' Consider, however, the right that would be required to permit 'incitement to racial hatred', the example with which Dworkin began his discussion of pornography. Would Dworkin be able to defend a right of this kind? As a matter of fact, Dworkin takes incitement to racial hatred to be a special case of speaking 'unpopular or wicked thoughts',¹¹⁰ speech which can easily be defended by *Dworkinian* strategies. But can a right to racist speech be so easily defended?

I suspect it cannot. I suspect moreover that an application of the principle of equal concern and respect will yield an 'illiberal' result about such speech. To see whether this is so, I invite the reader to consider the following imaginary story. The place is, once again, the University of Texas Law School; the story is set some time after Sweatt's successful suit; and the topic this time is not segregation but speech. The school has had a certain policy about the editorial content of student-run magazines and journals: it has given its students a completely free rein with regard to such content. We can suppose that the administrators have organized a referendum on the question, and have discovered that this is in fact what the majority of students prefer. The student population at this time consists of a small number of blacks, and a large number of whites, many of whom are racist and deeply resent the 'intrusion' of nonwhites into their traditional and elite school. The white editors of the student journals have been exploiting the permissive editorial policy to publish a constant (and popular) flow of hate literature, some of it crude, some of it subtle,

¹⁰⁹ Dworkin, 'Right to Pornography?', 335.

¹¹⁰ *Ibid.*

but all of it directed against the black minority. The lives of the black students have been profoundly affected as a result. Can they mount an argument of principle against the school's permissive policy, and demand that it be changed? It all depends, of course, on the character of the preferences used by the policy: some student preferences for the policy may well be based on a distrust of any university interference; some may be based on a desire for a student voice that is independent of the administration in every way and at all costs; and some may be based on the knowledge that the policy would give a free rein to the racist editors, who would exploit the opportunity to attack, and perhaps in the long run drive away, students who were members of the despised minority. If racist preferences of the latter kind tipped the balance, then the answer is surely that the black students would indeed be able to mount an argument of principle against the permissive policy. This hypothetical example seems very similar in all the relevant details to the Sweatt case. What we have is a utilitarian policy, which disadvantages a certain group, and which relies on racist preferences—preferences that are, by the criteria described in the discussion of Sweatt, external preferences. This means that the black students would have rights against the policy.

The whites could claim no 'right to moral independence' in defense of their speech, since the restriction on their expression would be motivated by an argument of principle, not a moralistic majoritarian argument. The relevant fact about incitement to racial hatred is not that it is 'wicked' or 'unpopular' but that it embodies a view about the worth of people. This fact has implications for the question of whether those hurt by the speech have rights against it—rights, that is, of the kind Dworkinian theory identifies.¹¹¹

The school could also offer an independent argument in support of a decision to restrict speech, modeled, as was the second of my arguments above, on the DeFunis case. Since the school (newly enlightened!) is interested in promoting the goal of equality on its campus, and has the not unreasonable empirical hypothesis that the old permissive policy

¹¹¹ I am not addressing here the question of whether a restrictive policy would be the best for all concerned in terms of other interests and goals; university administrators might decide that it would be better in the circumstances to invest resources in an alternative student magazine, in the hope that empowering the voice of the minority would enable speech to be answered with more speech. My point is simply that members of the minority would be *entitled* to bring an argument of principle in the way I have suggested.

was a barrier to the achievement of that goal; and since implementing a more restrictive policy would not obviously require violating any student's right to be treated as an equal, a more restrictive policy is permissible.

In order to bring out the analogy with the cases discussed in 'Reverse Discrimination', my imaginary story focused on a university situation. However, it is not implausible to think that governments might use similar arguments to support similar restrictions. Dworkin remarks in the opening paragraph of 'Do We Have a Right to Pornography?' that the United Kingdom Race Relations law 'makes it a crime to advocate racial prejudice'.¹¹² He appears to believe that in doing so, the law—which he says would be found unconstitutional in the United States—conflicts with a principle of equal concern and respect.¹¹³ But the United Kingdom legislators might surely justify their policy by appeal to arguments of the very kind described above. To permit incitement to racial hatred would be to give weight to racist preferences of a kind that egalitarian governments have a duty to ignore, so such speech should not be permitted. Or: to prohibit such speech would be to make progress toward an important social goal, namely, equality, so such speech should be prohibited. If this were the case, then the United Kingdom policy would not conflict with a principle of equal concern and respect. It would, on the contrary, be in harmony with it.

What the Indianapolis ordinance and the United Kingdom Race Relations law appear to have in common is a concern for equality that runs very deep—so deep that the silencing of some speech is not regarded as too high a price to pay for it.¹¹⁴ The Dworkinian commitment to equality appears to run equally deep. Recall that Dworkin said that there could be no real conflict between liberty and equality, since it is the right to equality that provides the wellspring for the rights to liberty. He also said that if we value liberty at all, then we have an interest in establishing a harmony between

¹¹² Dworkin, 'Right to Pornography?', 335.

¹¹³ In 'Right to Pornography?', 335, Dworkin takes freedom to advocate racial prejudice as a case of freedom to speak 'unpopular or wicked thoughts', a liberty that he clearly supports (p. 352) and apparently thinks would be defended along lines similar to a defense of a right to pornography.

¹¹⁴ As a matter of fact, members of the feminist antipornography movement in Britain have proposed (at the 1987 annual general meeting of the National Council of Civil Liberties) that 'the Race Relations Act 1976 be used as a model for legislating against pornography: making it unlawful to publish or distribute material likely to stir up sexual as well as racial hatred' (Itzin, 'Sex and Censorship', 46).

liberty and equality, since if there *were* any genuine conflict between the two, it would be a contest that liberty must lose.¹¹⁵ It seems that Dworkin's prognosis about such a contest was correct. Where liberty and equality conflict in the ways I have described, it is indeed liberty that loses, assuming that one regards the conflict through the lens of Dworkinian liberal theory. That theory seems unable, in such circumstances, to supply a defense of free expression, even when that expression is of a kind to which the First Amendment extends its protection. Those of us who share the concern for equality expressed in the ordinance and the Race Relations law may welcome these results, happy to find in Dworkin an unexpected ally. Those of us who find the results unwelcome may conclude that Dworkin has not taken civil liberties seriously enough, and that rights to such liberties as free expression may need to be theoretically fundamental if they are to be successfully defended. Perhaps Dworkin has been hasty in dismissing as illusory all apparent conflict between liberty and equality. Perhaps, on the other hand, the apparent conflicts I have described are only that: apparent. I leave such questions to the reader's judgment.

¹¹⁵ Dworkin, 'What Is Equality?', 9.

7

Equality and Moralism: Response to Ronald Dworkin

When traditional wars about pornography, waged between liberals and moralists, began to recede, Ronald Dworkin defended the on-going relevance of his classic defense of free speech as a significant weapon against a new and sinister feminist threat. His talk of 'old wars' and 'new armies' was surprisingly bellicose, given that the 'new armies' might easily have been on his own side, motivated as they were, and are, by principles of equality at the heart of his own philosophy. His optimism about the relevance of his earlier argument was ill-founded. It failed to justify the liberal, permissive conclusion he wanted, and helped to vindicate the feminist, restrictive conclusion he did not want, as I showed in 'Whose Right?'. More recently Dworkin has paid direct attention to feminist argument about pornography, in 'Liberty and Pornography' and 'Women and Pornography'. He considers, and rejects, two arguments developed by Catharine MacKinnon and others: the 'egalitarian' argument that pornography conflicts with a commitment to women's equality; and a 'silencing' argument, that pornography conflicts with a commitment to women's freedom of speech. (I address his response to the 'silencing' argument in 'Dangerous Confusion? Response to Dworkin'.) Here I shall look at his response to the argument about equality, and show how the feminist egalitarian argument can still succeed—by Dworkin's own lights.¹

¹ This response to Ronald Dworkin is a revised extract from Langton, 'Pornography: A Liberal's Unfinished Business', *Canadian Journal of Law and Jurisprudence* 12 (1999), 109–33. Dworkin's remark is in *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1977), 1. His classic defence is 'Do We Have a Right to Pornography?', *Oxford Journal of Legal Studies* 1 (1981), 177–212, reprinted in *A Matter of Principle*. But Dworkin's principles vindicate MacKinnon: see 'Whose Right?', this volume. His attention to feminist argument is in 'Liberty and Pornography', *The New York Review of Books*, 15 August 1991, 12–15 (page citations are to this version), published as 'Two Concepts of Liberty'

An argument that pornography threatens women's equality deserves careful attention from a philosopher who takes equality to be the starting point of liberal political philosophy, or so one might imagine. When MacKinnon said 'the law of equality and the law of freedom of speech are on a collision course in this country',² she found that some liberals agree with her: Bernard Williams, for example, said that this claim is no exaggeration.³ How exactly is the feminist 'egalitarian' argument to be understood? In his broader philosophical work, Dworkin distinguishes two distinct roles that equality can play: equality can be invoked as a *right*; and it can be invoked as a *goal*. The feminist argument about equality could thus be construed in the two ways I have shown: first, as an argument of principle, claiming that pornography violates women's *right* to equality; second, as an argument of policy, claiming that pornography causally works to undermine women's equality, and that a government aiming to promote equality as a *goal* is justified in prohibiting pornography.

The stronger of these two argument forms would be the first, for Dworkin. If rights are trumps, the first gives women a trumping argument against pornography. If rights are trumps, the second argument, of policy, is potentially vulnerable to a trumping counter-argument of principle. Now Dworkin neither here, nor elsewhere, to my knowledge, considers a feminist *rights*-based argument against pornography, even when explicitly considering feminist 'egalitarian' argument. This is surprising, if only because the courts were obliged to consider precisely the question of whether pornography violates women's *right to equality* under the Fourteenth Amendment of the US Constitution. For a philosopher who sets such store by the right to equality, it seems a striking omission. If he has not considered a rights-based argument against pornography, he has not considered the feminist argument which, by his lights, should be the strongest. The feminist rights-based equality argument thus remains, for Dworkin, a major piece of unfinished business.

in *Isaiah Berlin: A Celebration*, eds., Edna and Avishai Margalit (Chicago: University of Chicago Press, 1991), 100–9. Dworkin's review of MacKinnon's *Only Words* appeared as 'Women and Pornography', in *The New York Review of Books*, 21 October 1993, 36, 37, 40–2.

² Catharine MacKinnon, *Only Words* (Cambridge, Mass.: Harvard University Press, 1993), 71.

³ Bernard Williams, 'Drawing Lines' (review of MacKinnon's *Only Words*), *London Review of Books*, 16, no. 9, 12 May 1994, 9–10.

He interprets the equality argument in the weaker of the two ways just described. He construes the feminist egalitarian argument in general causal terms, and appears to accept its causal premise, at least for the sake of argument. The feminist egalitarian argument claims that 'pornography is in part responsible [for a] general and endemic subordination', and this is 'a matter of causal connection'.⁴ Pornography works insidiously 'to damage the standing and power of women within the community', and

If pornography contributes to the general subordination of women....then eliminating pornography can...be defended as serving equality.⁵

He construes the feminist equality argument as a goal-based argument, based on an empirical hypothesis about what promotes equality.

Thus construed, it is the starting point of what could be a Dworkinian argument of policy of the kind I developed in 'Whose Right?': it is clearly analogous to the equality-promoting argument discussed and endorsed by Dworkin in 'Reverse Discrimination'.⁶ A first step in considering it should therefore be to address the feminist 'egalitarian' argument as he addressed the reverse discrimination argument: ask whether the policy of prohibiting pornography, despite its apparent motivation in the goal of equality, may nonetheless violate some right to equality. Instead, there is a false start, and Dworkin initially does something remarkable. In both articles he says: if pornography does pose a conflict between liberty and equality, as feminists allege, then that is *a conflict that liberty must win*. If there were a conflict between liberty and equality, it could be 'resolved simply on the ground that liberty must be sovereign'.⁷

If we must make the choice between liberty and equality that MacKinnon envisages—if the two constitutional values really are on a collision course—we should have to choose liberty.⁸

⁴ 'Liberty and Pornography', 14.

⁵ 'Women and Pornography', 40.

⁶ See Ronald Dworkin, 'Reverse Discrimination', in *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), 223–39, for the distinction between rights-based and goal-based arguments of equality. Dworkin defends a goal-based strategy for justifying reverse discrimination policy. The general distinction between goal-based and rights-based arguments, and the relation of the latter to equality, is discussed in much of Dworkin's work, but see especially 'What Rights Do We Have?', in *Taking Rights Seriously*, 266–78.

⁷ 'Liberty and Pornography', 14.

⁸ 'Women and Pornography', 41.

This pronouncement would not be remarkable coming from the Court, which saw the issue in precisely those terms when it trumped women's equality by pornographers' liberty. It would not be remarkable coming from those liberals who take civil liberties such as free speech to be fundamental and absolute. But it is a remarkable pronouncement, coming from Dworkin: from a philosopher who has long taught that if there is ever a conflict between liberty and equality, that is a conflict which liberty must lose.⁹ There is an inconsistency here, and 'Liberty and Pornography' leaves the reader with no better answer than this.

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

First Amendment liberty is not equality's enemy, but the other side of equality's coin.¹⁰

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

Leaving aside the new question of why this does not simply pose a conflict between women's equality and pornographer's equality, it should be clear that Dworkin has failed to confront the feminist argument he is considering. Suppose we grant that there is an equality-based right to moral independence of the kind Dworkin describes, and suppose that everyone, including pornographers, has such a right. This right has no purchase on the feminist goal-based equality argument against pornography. Recall that we have here no absolute right to free speech: the right here is a right not to be prevented from influencing the moral environment, 'on the grounds

that one's tastes and opinions disgust others'. And although Dworkin famously claims to be taking rights seriously, the rights he identifies are sensitive to context and background conditions, and hence vulnerable. Any rights claims must be identified against the backdrop of the countervailing argument that threatens them. One never has a right *simpliciter*, but always a right with respect to a particular kind of political argument. In arguing for the pornographer's 'right to moral independence', Dworkin imagined a background utilitarian argument for censorship, based on moralistic preferences of people who have contempt for pornographers and their way of life. Such preferences are external, so pornographers have rights against a utilitarian policy of censorship. This sensitivity of rights to context is what makes it so important for Dworkin to be precise about what the feminist argument is.

As described, it is an argument of policy whose goal is social equality: pornography contributes to a climate of inequality, so prohibiting pornography will probably help to make society more equal. Crucially, this argument does not say pornography should be prohibited *because it disgusts people*. Instead it is based on a causal empirical hypothesis: an admittedly fallible hypothesis about what is likely to happen if pornography is prohibited. On that hypothesis, society will become more equal if pornography is prohibited. The argument is not based on a claim that pornography disgusts and offends. Facts about current attitudes or preferences of people are not part of its justifying reason. One might object to this equality argument by saying that the empirical hypothesis is implausible. One might object by saying that a government should not be in the business of actively pursuing ideals like that of social equality. But one cannot object as Dworkin objects. One cannot object by saying there is a right which protects a group from moralistic preferences. Dworkin's 'right to moral independence' is, despite its generic-sounding label, a specialist tool, a weapon which can be used only against a moralistic threat. It is irrelevant to the goal-based feminist equality argument, and therefore gives us no reason to reject it. And since the feminist goal-based equality argument is structurally identical to the argument for reverse discrimination which Dworkin himself endorses, I conclude that Dworkin has every reason to positively endorse it.¹¹ If he

⁹ Dworkin, 'What is Equality? Part 3: The Place of Liberty', *Iowa Law Review* 73 (1987), 9.

¹⁰ 'Women and Pornography', 42.

¹¹ In 'Reverse Discrimination'. Dworkin has not, to my knowledge, changed his mind about the conclusion of that paper.

thinks otherwise, he needs to say why. The feminist goal-based equality argument thus remains for him as more unfinished business.

There is a possible diagnosis for the trouble here. Dworkin may think the 'right to moral independence' is relevant after all to feminist argument, because he just assimilates the feminist argument with the old moralistic argument about offense and disgust. This assimilation appears in 'Women and Pornography', where an argument about equality simply *slides* into an argument about disgust and offense. Watch.

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

If pornography contributes to the general *subordination* of women . . . then eliminating pornography can . . . be defended as serving *equality*.¹²

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

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

government could . . . forbid the graphic or *visceral* or *emotionally charged* expression of any opinion or conviction that might *reasonably offend* a *disadvantaged* group . . . Courts would have to balance the value of such expression . . . against the damage it might cause to the *standing or sensibilities* of its targets.¹³

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

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

no-one may be prevented from influencing the shared moral environment, through his own private choices, tastes, opinions and example, just because these tastes or opinions *disgust* . . . [The argument] allows a majority to define some people as *too corrupt or offensive* . . . to join in the informal moral life of the nation.¹⁴

¹² 'Women and Pornography', 40 (emphasis added).

¹⁴ Ibid., 41 (emphasis added).

¹³ Ibid.

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

Such equivocation, in the work of a leading liberal philosopher, is bewildering; and it disguises two things. It disguises Dworkin's continued failure to confront the feminist arguments of equality. With the disguise gone, we see that Dworkin is not, after all, a foe to feminists, but potentially a friend. His principle of equality does not undermine MacKinnon's conclusion, but can vindicate it, as I have shown. Second, the equivocation disguises the weakness, for more traditional liberals, of Dworkin's defense of free speech: if liberals want resources to combat the perceived perils of 'political correctness', they will not find them here. For all he has shown, the right to free speech works only when confronted with moralism, and offers no reply to restrictions on speech motivated by equality, even by equality as a goal. With the disguise gone, we see that Dworkin is not, after all, a friend to those liberals, but a foe.

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