

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.