Public Affairs Quarterly
Volume 23, Number 4, October 2009

PORNOGRAPHY, HATE SPEECH, AND THEIR CHALLENGE TO DWORKIN'S EGALITARIAN LIBERALISM

Abigail Levin

Contemporary egalitarian liberals—unlike their classical counterparts—have lived through many contentious events where the right to freedom of expression has been tested to its limits—the Skokie, Illinois, skinhead marches, hate speech incidents on college campuses, Internet pornography and hate speech sites, Holocaust deniers, and cross-burners, to name just a few. Despite this contemporary tumult, freedom of expression has been nearly unanimously affirmed in both the U.S. jurisprudence and philosophical discourse. In what follows, I will examine Ronald Dworkin's influential contemporary justification for freedom of expression, which claims that a thoroughgoing right to freedom of expression is justified by the fact that it guarantees and preserves liberalism's commitment to equality by offering everyone an opportunity to speak, whereas any other policy, such as state regulation, would fail to offer this equal opportunity. This justification has been challenged by feminists and critical race theorists, who find the cases of pornography and hate speech to be sufficient threats to the freedom of expression and equality of their targets—women and minorities—to warrant limiting freedom of expression in these cases. I will argue that if Dworkin is to take equality as seriously as he claims to, then, by his own lights, he must back away from an unrestricted freedom of expression, in light of these distinctly contemporary challenges of the harms of systemic racism and sexism, which underlie hate speech and pornography.

I. Dworkin on Freedom of Expression

Dworkin argues that freedom of expression is absolutely crucial to moral agency, and that moral agency is the cornerstone of democratic culture. As moral agents, we should all have an equal opportunity to influence the moral environment of our shared culture. Therefore, to do anything but endorse a bare negative right to freedom of expression for every subject is to violate the state's core commitment

to equality. Key to understanding Dworkin's view of the nature of the right to freedom of expression is the distinction he makes between instrumental justifications for freedom of speech, such as Mill's—which famously holds that protecting freedom of expression maximizes utility—and justifications, including his own, which view freedom of speech as a constitutive element of democratic fairness. Dworkin holds that the latter view is in fact the correct view, though he canvasses the history of American jurisprudence and admits that most of the leading decisions have made much greater use of the former.[1] Since the instrumental view is vulnerable to the charge that there is in fact a disutility to its exercise, Dworkin feels that his approach is inherently stronger.

Dworkin does not claim that instrumental justifications for freedom of expression are false, but rather that they fail to capture what really, fundamentally, underlies the right to freedom of expression. The instrumental and constitutive justifications, then, are not mutually exclusive, but the constitutive view is seen by Dworkin to hold even if the instrumental view is proven to be false.

What exactly does Dworkin mean by the constitutive justification for freedom of expression? The constitutive view

> supposes that freedom of speech is valuable, not just in virtue of the consequences it has, but because it is an essential and "constitutive" feature of a just political society that government treat all its adult members, except those who are incompetent, as responsible moral agents.[2]

Thus, Dworkin claims that each individual's having a sphere of independent decision-making around moral issues is a precondition of democracy itself, and that freedom of expression is closely tied to facilitating that sphere.[3] The claim is best understood as twofold: for a sustainable democratic culture, it is necessary both that individuals be in fact independent moral agents (or at least have the inherent potential to develop into them), and that government treat them as such. Dworkin goes back and forth between each claim, but it is best to think of them each as separate necessary conditions for democracy.

For Dworkin, as a liberal within the egalitarian tradition, the aim of democracy is not merely to facilitate majoritarianism, but rather to facilitate equality. To this end of promoting equality, certain background conditions are required as prerequisites to the effective functioning of democracy, one of which is independent moral agency:

> A genuine political community must therefore be a community of independent moral agents. It must not dictate what its citizens think about matters of political or moral or ethical judgment, but must, on the contrary, provide circumstances that encourage them to arrive at beliefs on these matters through their own reflective and finally individual conviction.[4]

It is uncontroversial to hold that moral independence is a requirement of a democratic culture—at the most simplistic level, simply because freedom of thought

seems fundamental to such elementary democratic processes as voting. Further, it is uncontroversial to suppose that freedom of expression is instrumental in facilitating that goal of moral agency.

However, Dworkin means to say something stronger than that—that freedom of expression is not merely instrumental to the goal of moral independence, but indeed constitutive of it. It seems that much more argument and elaboration is needed to make sense of this idea. Certainly it cannot be the case that mere citizenship in a society which protects freedom of expression is sufficient to make every person an independent moral agent. If not, then this raises the question of how much participation in such a culture is necessary to secure moral agency. It seems that it is up to the individual how, if at all, and to what degree, she engages with the ideas presented in a society which protects freedom of expression, and hence, on Dworkin's scheme, up to her how much of a moral agent she in fact is. It is even difficult to think of the relationship between moral agency and freedom of expression as anything but instrumental, although, of course, it is importantly instrumental.

The second aspect of Dworkin's moral agency necessary conditions, though, requires that government treat its citizens as moral agents, regardless of how or whether the citizenry in fact exercise that agency. Dworkin claims that this treatment amounts, at least in part, to refraining from censorship, particularly in controversial matters of moral or political concern:

> First, morally responsible people insist on making up their own minds about what is good or bad in life or in politics, or what is true and false in matters of justice or faith. Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions. We retain our dignity, as individuals, only by insisting that no one—no official and no majority—has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.[5]

So the first requirement of democracy is a certain autonomy of the citizenry in moral decisions—the presumption that citizens are in fact moral agents—and what is necessary in order to meaningfully exercise that autonomy is exposure to different, morally relevant, ideas. It would be vacuous to subscribe to an idea of moral autonomy without also subscribing to the societal conditions, such as exposure to a diversity of ideas, which give such autonomy substance. Hence, it is government's role to facilitate this diversity by protecting speech, thus fulfilling the second part of Dworkin's requirement that government treat citizens as moral agents. This formulation thus closely links freedom of expression with moral agency, both of which, for Dworkin, are necessary conditions of democracy.

Dworkin's second requirement of democratic culture, that government treat its citizens as moral agents, ties freedom of expression in at the level not only

of hearing, but also of speaking about, different morally relevant ideas. There are, then, two aspects of freedom of expression—hearing the opinions of others, and disseminating one's own opinions to others—and both are intimately tied to moral agency, which is a prerequisite of democracy. Thus, for Dworkin, freedom of expression is itself effectively a precondition of democracy. Once Dworkin ties treatment as a moral agent to freedom of expression, then a curtailment of freedom of expression becomes an infringement on moral agency, and thus on democracy itself, and consequently cannot be tolerated.

II. The Silencing and Subordination Arguments

While this seems a strong argument for allowing free speech in all cases, Dworkin's position is nonetheless vulnerable to criticism by those who find unregulated hate speech and pornography problematic for the moral agency of the minorities and women that such speech targets. Two such arguments, advanced by Catharine MacKinnon in *Only Words* as well as in other writings and then elaborated upon by Rae Langton and Jennifer Hornsby, as well as several critical race theorists, are known as the silencing and subordination arguments. In what follows I will outline these arguments, and maintain that though they leave some room for debate, they nevertheless are suggestive and persuasive enough that Dworkin needs to address them more seriously than he does.

The subordination argument holds that state tolerance of freedom of expression in cases of hate speech and pornography compromises the equality interest of those targeted by racist and sexist speech in favor of protecting the liberty interest of the speakers. In other words, put in terms of the U.S. jurisprudence that Dworkin is primarily addressing, the charge is that the hate speech and pornography decisions privilege the First Amendment rights to freedom of expression of the speakers over the Fourteenth Amendment right to equal protection of the laws of the minorities and women addressed by this speech. The claim is, further, that such a privileging is illegitimate and grounded only in the racist and sexist relations of power operative in our culture, rather than grounded in any legitimate doctrinal reason to privilege the First Amendment over the Fourteenth. As critical race theorist Charles Lawrence III puts the problem,

> we are balancing our concern for the free flow of ideas and the democratic process with our desire for equality. . . . When we see the potential danger of incursions on the First Amendment but do not see existing incursions on the Fourteenth Amendment, our perceptions have been influenced by an entire belief system that makes us less sensitive to the injury experienced by nonwhites. Unaware, we have adopted a worldview that takes for granted Black sacrifice.[6]

Similarly, MacKinnon argues that

> The law of equality and the law of freedom of speech are on a collision course in this country. Until this moment, the constitutional doctrine of free speech has developed without taking equality seriously—either the problem of social inequality or the mandate of substantive legal equality. . . . The First Amendment has grown as if a commitment to speech were no part of a commitment to equality and as if a commitment to equality had no implications for the law of speech. . . . Understanding that there is a relationship between these two issues—the less speech you have, the more the speech of those who have it keeps you unequal; the more the speech of the dominant is protected, the more dominant they become and the less the subordinated are heard from—is virtually nonexistent.[7]

The idea behind both of these charges is that hate speech and pornography violate equality because the views that they put forward give rise to unequal opportunities for the minorities and women who are addressed by this speech—if women are treated as sex objects in pornography and the content of hate speech is about the inferiority of whatever minority group is being targeted, then women and minorities go out into a world where those views are prevalent, and their opportunities for advancement are thus hindered accordingly.

For MacKinnon, even more strongly, pornography is itself an act of subordination as well as causing further subordination as a result. She writes that pornography "institutionalizes the sexuality of male supremacy . . . Men treat women as who they see women as being. Pornography constructs who that is."[8] When pornography "constructs who that is," it is itself an act of subordination, and when women's status is consequently lowered as a result of that construction—in that women are seen either as sex objects, as subservient to men, or as enjoying rape—pornography causes further subordination down the road. The claim of the subordination argument, then, is that women's status, agency, and positive liberties in the community are effectively lowered by the very utterance of speech which enacts their subordinate status, and that subordinate status is then furthered by a community which offers women and minorities fewer positive life choices due to the beliefs spread and accepted by pornography and hate speech.

The claim that pornography and hate speech, at the moment of its very utterance, enacts subordination is certainly a strong one. MacKinnon writes that pornography "sexualizes rape, battery, sexual harassment, prostitution, and child sexual abuse; it thereby celebrates, promotes, authorizes, and legitimizes them."[9] But how can she support this claim? It is here that the work of Rae Langton and Jennifer Hornsby is apposite.[10] In trying to explicate and render plausible MacKinnon's claim that pornography itself enacts the subordination of women, Langton and Hornsby apply the apparatus of speech act theory developed by J. L. Austin and argue that pornography may best be thought of as an illocutionary speech act, on Austin's terminology—a speech act that changes the state of affairs in the world at the moment of its very utterance, such as saying "I do" when participating in

a legally binding marriage ceremony. While a full explication of these ideas is beyond the scope of this paper, I believe that Langton and Hornsby's work offers a compelling theoretical framework to buttress MacKinnon's claim.

The subordination argument holds, then, that if pornography is protected by the First Amendment, it violates another competing constitutional value—the Fourteenth Amendment, which guarantees equal protection of the laws for all citizens. If so, the argument continues, then the state's task is to balance the two constitutional values, and since pornography contributes nothing of any importance to political debate, and commitment to equality is a central concern of liberals, the debate should be resolved in favor of equality. Thus, like other instances where speech is regulated due to other compelling and competing interests, such as in the cases of libel and slander, pornographic and hate speech may be justifiably regulated in order to promote equality for women and minorities.

The subordination argument is particularly salient against Dworkin's formulation of the right to freedom of expression, because he views freedom of expression as itself protective of equality, rather than in competition with it. Not only is freedom of expression protective of equality, but further and more profoundly, democracy itself is understood as protective of equality. The whole thrust of Dworkin's conditions of moral membership in a democratic community, which include the right to freedom of expression, is that such conditions are equality preserving.[11]

Thus, the charges of the subordination argument are damaging to Dworkin's justification for freedom of expression because they suggest that freedom of expression cannot in all cases be tied to equality, and that in some cases, equality is impeded by the protection of the right to freedom of expression. Hate speech and pornography are inimical to equality, since they subordinate minorities and women and thus offer them unequal opportunities in society—economically, politically, and interpersonally.

The second argument against unregulated freedom of expression—the silencing argument—maintains that the choice to privilege the speaker's dignity and moral agency over the recipients' same interests, by consistently protecting the speech interests of the white, male, majority over the speech interests of oppressed groups, as the U.S. jurisprudence on the topic has repeatedly done, violates the First Amendment rights of women and minorities in favor of those of pornographers and hate speakers. If this argument is correct, it establishes the idea that the protection of some speech compromises the speech interests of others. This argument claims that sexist or racist speech in a sexist and racist culture "silences" the subsequent speech of women and minorities—either because the chilling effect of the racist or sexist speech is so powerful as to entail that women and minorities will not bother even attempting to rebut it—whether out of fear, disenfranchisement, cynicism, or some combination of these responses—or that their attempted rebuttals will be wholly ignored, not even heard, or profoundly misunderstood by the dominant culture.

Here again, the work of Langton and Hornsby is illuminating: if women are "silenced" by pornography, one way to make sense of that claim in spite of the fact that women are, of course, literally as free to speak as anyone else, is to think of their speech acts under the social conditions of silencing, in Austin's terms again, as infelicitious. Attempted illocutionary speech acts can be said to "misfire" when the circumstances of their utterance render them not conducive to their being efficacious. One persuasive example that Langton and MacKinnon give here is the situation of date rape: when a woman says "no" to sex, but the man, for whatever reason, hears that as a "yes." In such a situation, though the woman has, of course, spoken, she has been thoroughly misunderstood or ignored—in other words, silenced. Again, while a thorough examination of feminist speech act theory is beyond the scope of this paper, I believe that this theoretical framework adds the needed back story behind MacKinnon's claims.

Thus, while, of course, women and minorities are still technically as free as anyone else to speak, the silencing argument holds that the background conditions for their speech, having been established by the preceding racist or sexist speech, are such that any subsequent speech is discounted in advance by the privileged recipients, or not spoken at all by the oppressed speakers. According to these arguments, the speech of the dominant culture so effectively dictates opinions about oppressed groups as to create the oppression of those groups, as the subordination argument has it, and, once created, furthers that oppression, as the silencing argument has it. The oppressed—and thus unequal—subjects enacted by such speech will then have their speech discounted as a result of the inferior subject position created by the injurious speech. MacKinnon claims:

> In the context of social inequality, so-called speech can be an exercise of power which constructs the social reality in which people live, from objectification to genocide. . . . Together with all its material supports, authoritatively *saying* that someone is inferior is largely how structures of status and differential treatment are demarcated and actualized. Words and images are how people are placed in hierarchies, how social stratification is made to seem inevitable and right, how feelings of inferiority and superiority are engendered, and how indifference to violence against those on the bottom is rationalized and normalized. Social supremacy is made, inside and between people, through making meanings. To unmake it, these meanings and their technologies have to be unmade.[12]

This argument, like the arguments of feminists and critical race theorists generally, begins with the premise that power relations between privileged and subordinated groups are key to understanding the actual workings of social and political interaction, and it is this insight that, I will argue, Dworkin fails to contemplate throughout his writings on freedom of expression.

Once the subordinated culture has been oppressed by the speech of the dominant culture, the first step in silencing has been achieved, and the dominant culture is

alleviated from the burden of listening to that culture. Once this has happened, we see more clearly the workings of silencing. Pornography in particular, as opposed to other types of sexist speech, according to MacKinnon, silences women by causing its consumers to miscomprehend the ideas that women intended to express by uttering words in a sexual context: "When anyone tries to tell what happened, she is told that her no meant yes. . . . You learn that language does not belong to you, that you cannot use it to say what you know. . . . Society is made up of words, whose meanings the powerful control, or try to."[13] Women are stripped of the ability to have their meaning properly heard; though they speak, they are effectively silenced, since they are taken to have said the opposite of what they did, in fact, say.[14]

Seen in this light, the silencing argument can be understood as a charge that the Dworkinian free speech program, enacted in a racist and sexist culture, in effect protects the right to freedom of expression of the dominant culture at the expense of the protection of that same right towards the oppressed cultures. Put in Dworkin's own terms, the silencing argument denies that unregulated freedom of expression allows individuals equal opportunity to speak, and by speaking, influence their culture.

These two arguments—from silencing and from subordination—are independent of each other, and feminists and critical race theorists can and do offer them either as alternatives or in combination. While these arguments are by no means completely above criticism, I believe that they raise an important objection to Dworkin's views about free speech, especially with the theoretical boost offered by Langton and Hornsby. Both of these arguments are, of course, in stark contrast to Dworkin's view that freedom of expression is necessarily linked to equality, because each points out a particular way that pornography enacts and furthers inequality—the subordination argument by showing how women's status in society is lowered through representations that are degrading to women, and the silencing argument by showing how men's speech is worth more than women's, since women's voices are effectively silenced, especially with respect to speech acts about consent or refusal to sexual intercourse. We need to further examine Dworkin's views about these claims in order to see whether he can meet their charges. He has several different arguments against these charges, all of which, I will argue, are inadequate responses to the idea that pornography and hate speech vitiate equality.

Before turning to those arguments, though, let us conclude by noting that the silencing and subordination arguments effect their criticism by granting Dworkin's conception of the link between freedom of expression, moral agency, and democracy itself, and then showing that lack of regulation, too, denies moral agency and is thus deleterious to democracy. The force of the silencing argument is to grant that freedom of expression is indeed tied to moral agency and then to democracy itself, but to show that given that, the fact that some speech leads to the

denial of other speech must itself entail that moral agency and hence democracy are violated by lack of regulation as well. The most mild reading of the silencing argument has it that the conclusion is at least a dilemma—essential conditions of democracy are violated both in cases of state regulation of some speech and in some cases of free speech—and a stronger reading has it that democracy is more importantly violated in allowing hate speech than in prohibiting it, because views of the unequal moral worth of citizens are more of an affront to democratic society than is regulation that prohibits such views. Either reading of the silencing argument, however, grants Dworkin's formulation of the relationship between democracy, moral agency, and freedom of expression and reads it against itself by showing that the relationship is violated by allowing unregulated speech, in the cases of hate speech and pornography.

Dworkin's argument for freedom of expression certainly has persuasive rhetorical value—he is all but demanding that we ought to be morally outraged at the very idea of any kind of regulation of speech. It denies our "dignity," it claims that we "cannot be trusted," it is a "wrong," it "frustrates moral personality," and it is an "insult."[15] All of these terms are, of course, emotionally loaded, and Dworkin seems to rely heavily on that. That said, if indeed there is such a relationship between moral agency, freedom of expression, and democracy, as Dworkin posits, then his argument for freedom of expression is indeed a strong one. However, I want to suggest that it is a strong argument only in less controversial cases of freedom of expression, where harms to oppressed groups from hate speech and pornography do not raise issues about the effects on the freedom of expression and moral agency of the targets arising from the content of the speech in question.

Cases where freedom of expression expresses and furthers views about the unequal moral worth of certain classes of people—women and minorities—such as hate speech and pornography, demonstrate that there cannot be such an easy relationship between freedom of expression and ideas of human dignity and agency. If the content of such speech is doing little or nothing else than disputing the moral agency of women, according to such feminists as MacKinnon, and nothing other than assaulting the dignity of visible minorities, as many critical race theorists hold, then how can there be a necessary connection between freedom of expression, on the one hand, and dignity and moral agency on the other?

In other words, it seems that freedom of expression cannot be *constitutively* tied to dignity and moral agency if in some cases the exercise of freedom of expression denies the dignity and moral agency of its targets. This objection, which owes its inspiration to the arguments of feminists and critical race theorists, seems sufficient to show that there is no reason, without providing further argument against this objection, to believe that there is a constitutive link between freedom of expression and dignity and agency, although there may very well be an instrumental link between these ideas in cases where cultural oppression

against women and minorities is not implicated. It seems that Dworkin has not convincingly made his case that there is a constitutive link between freedom of expression and democracy, and the importance of this link being constitutive is hard to overestimate for Dworkin's theory, since he needs to argue constitutively if he is to successfully sidestep any arguments from the disutility of freedom of expression.[16]

III. Dworkin's Response to the Subordination and Silencing Arguments

A. The Overall Challenge to Dworkin

In discussing Catharine MacKinnon's arguments against constitutional protection of pornography, Dworkin notes that they are instrumental arguments, and that only by arguing constitutively can they be defeated.[17] Much, then, seems to turn on the question of whether the constitutive argument can get off the ground, and, as I have argued, it cannot, for at least two reasons: (1) Dworkin has not established that there is anything other than a strong instrumental link between moral agency and freedom of expression; and (2) the arguments from pornography and hate speech, if correct, show that there cannot be a constitutive relationship between freedom of expression and moral agency and dignity if some instances of freedom of expression operate to vitiate both agency and dignity.

Dworkin, then, needs to show that these arguments that pornography and hate speech vitiate dignity and agency ought not to be accepted as they stand, but he makes several statements that show that he fails to appreciate the point of their charges. With reference to racist speech, he writes:

> It is very important that the Supreme Court confirm that the First Amendment protects even such [racist] speech; that it protects, as Holmes said, even speech we loathe. That is crucial for the reason that the constitutive justification of free speech emphasizes: because we are a liberal society committed to individual moral responsibility, and *any* censorship on grounds of content is inconsistent with that commitment.[18]

This just restates the problem. The charge from critical race theorists is that dignity, which Dworkin was happy to equate with moral responsibility when it suited his rhetorical purposes, is impaired by the very operation of freedom of expression.

In the case of pornography, Dworkin discusses and disagrees with Supreme Court of Canada's *Butler*[19] decision that would regulate some pornography containing degrading and dehumanizing depictions of women, because the Court found that such speech constitutes harm not acceptable to a free and democratic society. He writes of *Butler*:

> In a recent decision, the Supreme Court of Canada accepted a different instrumental argument for upholding a statute censoring certain forms of pornography. . . . The Canadian Court conceded that the effect of its ruling was to narrow that constitutional protection, but said that "the proliferation of materials which seriously offend the values fundamental to our society is a substantial concern which justifies restricting the otherwise full exercise of the freedom of expression." That is an amazing statement. It is the central, defining, premise of freedom of speech that the offensiveness of ideas, or the challenge they offer to traditional ideas, cannot be a valid reason for censorship; once that premise is abandoned it is difficult to see what free speech means. The Court added that some sexually explicit material harms women because "materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on the individual's sense of self-worth and acceptance." But that kind of harm is so close to mere offensiveness that it cannot count, by itself, as a valid reason for censorship either. Every powerful and controversial idea has a potential negative impact on someone's self-esteem. . . . It is obviously inconsistent with respecting citizens as responsible moral agents to dictate what they can read on the basis of some official judgment about what will improve or destroy their characters, or what would cause them to have incorrect views about social matters.[20]

The *Butler* decision stands for the proposition that some pornography may impair the fundamental interests of a democratic society and is thus subject to state regulation on that basis, so it is no defense against that decision to simply reiterate the importance of society treating its citizens as responsible moral agents. At the very least, Dworkin must acknowledge that there is a standoff between the dignity and moral agency of the speakers and that of the recipients, and then make a compelling further argument for why the agency of the speakers matters more than that of the recipients.

B. Dworkin's Response to the Subordination Argument

Dworkin has three responses to MacKinnon's subordination argument—that pornography subordinates women and thus limits their ability to have equal access to opportunities—and her conclusion that pornography ought to be regulated. First, Dworkin claims that there is a prohibitively slippery slope in entertaining this kind of approach:

> Government could then forbid the graphic or visceral or emotionally charged expression of any opinion or conviction that might reasonably offend a disadvantaged group. It could outlaw performances of *The Merchant of Venice*, or films about professional women who neglect their children, or caricatures or parodies of homosexuals in nightclub routines. Courts would have to balance the value of such expression as a contribution to public debate or learning against the damage it might cause to the standing or sensibilities of its targets.[21]

This, again, simply restates MacKinnon's problem—she *wants* the courts to "balance the value of such expression against the damage it might cause to the standing of its targets." One can at least imagine as plausible the possibility that in such a balancing by thoughtful people with clear criteria for decision-making, *The Merchant of Venice* will pass, and certain kinds of pornography may fail. This is not to suggest that the process of balancing will be at all easy, and it indeed may prove to be prohibitively difficult as a practical matter, but this kind of conclusion needs to be arrived at after considered and sincere attempts and debate, rather than at the outset. MacKinnon's point, though, which Dworkin seems above to dismiss, is that taking the conflict between the First and Fourteenth Amendments at all seriously would necessarily require some kind of balancing of these interests, and Dworkin's refusal to engage in that balancing calls his commitment to equality into question.

He admits as much when he writes that "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 because the alternative would be the despotism of thought-police."[22] This seems a substantial leap—if there were in fact despotic thought-police, this would, of course, be a problem for a liberal society,[23] but Dworkin needs to show that a careful judiciary—or other body—committed to the equality of women and minorities is in fact a despotic thought-police in disguise, as it is not obvious that such a careful judiciary, in aiming to uphold democracy's central values of equality, moral agency, and dignity, would necessarily violate those very principles. He has not even come close to establishing that, unless he means to suggest that the very idea of advancing minority equality rights is itself despotic and thought-controlling. If so, then in what sense is he committed to equality, moral agency, or democracy at all?

So these arguments against MacKinnon's position seem weak at best. Dworkin's second, and more powerful, response to the subordination argument is that the First and Fourteenth Amendments aren't really opposed at all, and thus that the concerns of feminists and critical race theorists are misguided. Dworkin claims that political equality is preserved through the operation of the First Amendment itself, because

> citizens play a continuing part in politics between elections because informal public debate and argument influences what responsible officials will do. So the First Amendment contributes a great deal to political equality: it insists that just as no one may be excluded from the vote because his opinions are despicable, so no one may be denied the right to speak or write or broadcast because what he will say is too offensive to be heard. . . . Equality demands that everyone, no matter how eccentric or despicable, have a chance to influence policies as well as elections. Of course it does not follow that government will in the end respect everyone's opinion equally, or that official decisions will be

> equally congenial to all groups. Equality demands that everyone's opinion be given a chance for influence, not that anyone's opinion will triumph or even be represented in what government actually does.[24]

The claim here is that an unrestricted First Amendment leads to protection of the Fourteenth Amendment because an unrestricted First Amendment allows each person an *equal* chance to influence the political sphere. This response seems inadequate to the charges of the subordination argument, but before I address that inadequacy, I will present Dworkin's third and final attempted rebuttal to the subordination argument.

According to Dworkin, because pornography has little political merit, it seems immune to his argument above. He thus needs to modify his position slightly in order to claim that the First Amendment, even in cases of pornography, is equality preserving. He claims that not only should every citizen have an equal chance to influence the political process, but so, too, should every citizen have an equal chance to influence the moral environment:

> Exactly because the moral environment in which we all live is in good part created by others, however, the question of who shall have the power to help shape that environment, and how, is of fundamental importance, though it is often neglected in political theory. Only one answer is consistent with the ideals of political equality: 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 those who have the power to shut him up or lock him up. . . . But we cannot count, among the kinds of interests that may be protected in this way, a right not to be insulted or damaged just by the fact that others have hostile or uncongenial tastes. . . . Recognizing that right would mean denying that some people—those whose tastes these are—have any right to participate in forming the moral environment at all. . . . In a genuinely egalitarian society, however, those views cannot be locked out, in advance, by criminal or civil law; they must instead be discredited by the disgust, outrage, and ridicule of other people.[25]

So Dworkin claims that the only way to preserve our right to *equal* participation in influencing our shared moral environment is through an unregulated First Amendment. To regulate in any way would necessarily give some groups an unequal opportunity to speak. However, this seems to straightforwardly beg the question when viewed in light of the charges of the silencing argument. MacKinnon's point in the silencing argument is that who is participating in that debate is exactly what is at stake here—her claim is that some speech takes other speech effectively out of the debate, because it is systematically misinterpreted, and in so doing violates the right of all persons to have an equal chance to speak. So, Dworkin is right that equality demands that each person have an equal chance to speak, but the claim of the silencing argument can easily be put as follows: hate speech and pornography effectively deny every person an equal chance to

influence government or morality, because those kinds of speech, due to their content, ensure that its target's subsequent speech will be misunderstood and misinterpreted, thus denying the victim the right to speak. If we accept the silencing argument, then Dworkin's idea that the lack of regulation leads to equality fails to be persuasive.

C. Dworkin's Response to the Silencing Argument

Dworkin, however, does not accept the silencing argument. He argues that, according to the silencing argument,

> it is women, not pornographers, who need First Amendment protection, because pornography humiliates or frightens them into silence and conditions men to misunderstand what they say. . . . Because this argument cites the First Amendment as a reason for banning, not for protecting, pornography, it has the appeal of paradox. But it is premised on an unacceptable proposition: that the right to free speech includes a right to circumstances that encourage one to speak, and a right that others grasp and respect what one means to say. These are obviously not rights that any society can recognize or enforce. Creationists, flat-earthers, and bigots, for example, are ridiculed in many parts of America now; that ridicule undoubtedly dampens the enthusiasm many of them have for speaking out and limits the attention others pay to what they say. Many political and constitutional theorists, it is true, insist that if freedom of speech is to have any value, it must include some right to the opportunity to speak; they say that a society in which only the rich enjoy access to the newspapers, television, or other public media does not accord a genuine right to free speech. But it goes far beyond that to insist that freedom of speech include not only the opportunity to speak to the public but a guarantee of a sympathetic or even competent understanding of what one says.[26]

Dworkin's objection here derives much of its rhetorical force from its occlusion of the issue of social power that is so central to the silencing argument—and indeed to all of the arguments against the refusal to regulate hate speech and pornography. Though Dworkin is certainly not oblivious to the notion of social power elsewhere in his writing, he does not address it in his remarks here. Creationists, flat-earthers, and bigots are minority groups precisely *because* the views they espouse have already been tested, debated, investigated, and empirically rejected through fair democratic discussion process. In other words, their views are ridiculed for *legitimate* reasons, according to the Millian account of free speech as a search for truth.

This is crucially not the case, however, for the views of minorities and women, and the reason that their views are ridiculed and dismissed has everything to do with the illegitimate power that dominant groups are able to exercise upon historically disadvantaged groups, discounting their views for reasons that have absolutely nothing to do with their merit as ideas. Interestingly and inexplicably,

Dworkin seems to understand that power is important in discussing the scope of freedom of expression, because he grants, above, that it is a defensible position to maintain that access to the press is importantly impeded by economic concerns. Why would this concern be any different in principle than the concern that other people's views are discounted, or not given airtime, not because of economic factors, but rather because of racist or sexist prejudice?

The issue underlying both of these important impediments to the exercise of free speech is that of social power, and that issue seems to be all but denied outright by most liberal accounts of freedom of expression, including, notably, Dworkin's. As Dworkin maintains above, free speech includes nothing else but the bare negative liberty for any subject to speak without direct impediment by the state. It is this bare-bones account of free speech that all of the feminist and critical race theory arguments object to in one way or another, claiming alternatively that the marketplace of ideas is not a neutral space, as Dworkin and Mill would have it, but is instead corrupted by racism and sexism, which serve to deny the ideas of minorities and women in advance. Only through an analysis of the concept of social power, which is beyond the scope of this paper, can we redress these shortcomings of the marketplace. Without it, we are led to views as inadequate as those offered above by Dworkin.

The charge of the silencing and subordination arguments, as we have seen, is that free speech cannot be constitutively tied to morality—in the case of the subordination argument, because the speech enacts the unequal moral worth of its subjects, and in the case of the silencing argument, because the effective deprivation of the speech of women and minorities must give them lower moral status by Dworkin's own lights. Dworkin's response to these charges—in the case of the subordination argument, that unregulated freedom of expression itself ensures equality—does not beg the question directly, since he is claiming, effectively, that there is no need for the subordination argument. However, his response still crucially misses the point of these arguments. Dworkin is saying that there is no conflict between the First and Fourteenth Amendments, because an unrestricted First Amendment leads unproblematically to the upholding of the Fourteenth Amendment's equal protection clause. However, the charge of the subordination argument is exactly the opposite—untrammeled freedom of expression applied systematically in favor of the hate speaker and the pornographer denies minorities and women the equal protection of the laws. In other words, protecting pornography gives rise to the silencing argument—privileging the freedom of expression interests of the speaker over the freedom of expression interests of the minority is an immoral and unjustified reification of the status quo of the powerful at the expense of the relatively powerless. Dworkin's point above is only persuasive if it is convincing that pornographers are the minorities whose interests are genuinely in need of protection. However, such a response occludes the feminist and critical race theorists' point that pornography and hate speech are the voice of majority

hegemonic power, and thus the privileging of their interests over the interests of minorities is yet another instance of these operations of power working to oppress, rather than vindicate, minority interests.

We have seen, then, that Dworkin's attempts to justify freedom of expression as constitutive of moral agency, and as protective of equality, do not effectively meet the charges offered against these justifications by feminists and critical race theorists. The silencing and subordination arguments from feminists and critical race theorists—which call into question whether unregulated freedom of expression in fact promotes liberty and equality—have raised important challenges to Dworkin's scheme, suggesting that there is room to criticize orthodox liberal justifications of free speech. Thus it seems that the problem of the harm to minorities and women from hate speech and pornography remains unaddressed by Dworkin's attempt to dismiss it. If the arguments I have been presenting are persuasive, then these concerns, implicating as they do crucial liberties and equalities, are the kinds of concerns that Dworkin's theory needs to genuinely come to terms with.

NOTES

1. Ronald Dworkin, *Freedom's Law* (Oxford: Oxford University Press, 1996), pp. 197–198.

2. Ibid., p. 200.

3. Ibid., pp. 25–26.

4. Ibid., p. 26.

5. Ibid., pp. 200–201.

6. Charles Lawrence III, "If He Hollers, Let Him Go," in *Words That Wound*, eds. Mari Matsuda et al. (Boulder, CO: Westview Press, 1993), pp. 72, 82.

7. Catharine MacKinnon, *Only Words* (Cambridge, MA: Harvard University Press, 1996), pp. 71–73.

8. Catharine MacKinnon, "Francis Biddle's Sister: Pornography, Civil Rights, and Speech," in *Feminism Unmodified* (Cambridge, MA: Harvard University Press, 1987), p. 172.

9. Ibid., pp. 171–172.

10. See Rae Langton's "Speech Acts and Unspeakable Acts," *Philosophy and Public Affairs*, vol. 22, no. 4 (Autumn 1993), pp. 293–330; and Rae Langton and Jennifer Hornsby, "Free Speech and Illocution," *Legal Theory*, vol. 4, no. 1 (1998), pp. 21–37.

11. Dworkin, *Freedom's Law*, pp. 25–26.

12. MacKinnon, *Only Words*, pp. 30–31. Italics in original.

13. Ibid., pp. 4, 5, 10.

14. The question arises at this point that even if we grant that some speech causes the effects of silencing and subordination, why think that pornography and hate speech are the particular culprits? Dworkin takes this line (in "Women and Pornography," *New York Review of Books*, XL/17, [1993], pp. 35–42), and though a thorough discussion of this objection is beyond the scope of this paper, the short answer is that there is enough empirical evidence to suggest that pornography in particular is efficacious in producing harmful views about women's sexuality. See especially the July 1986 report of the U.S. Attorney General's Commission on Pornography (http://www.porn-report.com/contents.htm). However, there are other studies that find otherwise. But in any event, an honest response to the data has to be that the empirical evidence is not sufficient to settle the matter on one side or the other, but that in the absence of sufficient evidence, acting to regulate a potential harm or not acting both have political consequences, and that is precisely what the silencing and subordination arguments are attempting to demonstrate: that maintaining the status quo legal framework *is to privilege the pornographers' and hate speakers' interests*.

15. Dworkin, *Freedom's Law*, pp. 200–201.

16. It should be noted that while MacKinnon and her allies do believe that there is a close relationship between freedom of expression, moral agency, and democracy, they still depart from Dworkin in that they do not hold that such a relationship is constitutive, but rather strongly instrumental.

17. Dworkin, *Freedom's Law*, p. 205.

18. Ibid., p. 205.

19. *Regina v. Butler*, 1 S.C.R. 452 (Sup. Ct. of Canada 1992).

20. Dworkin, *Freedom's Law*, pp. 206–208.

21. Dworkin, *Freedom's Law,* p. 236.

22. Ibid., p. 236.

23. MacKinnon has repeatedly insisted that her arguments are for regulation of speech, and not outright censorship. She has maintained that her 1983 anti-pornography ordinance, drafted with Andrea Dworkin, and adopted by the city of Indianapolis before it was ruled unconstitutional by the Supreme Court, did not advocate state censorship because it did not place a prior restraint on pornographic materials.

24. Ibid., pp. 236–237.

25. Ibid., pp. 237–238.

26. Ibid., p. 232.