

THE FREE SPEECH ARGUMENT AGAINST PORNOGRAPHY¹

*When a diplomat says yes, he means perhaps.
When he says perhaps, he means no.
When he says no, he is not a diplomat.
When a lady says no, she means perhaps.
When she says perhaps, she means yes.
But when she says yes, she is no lady.
Otto von Bismarck.*

Introduction

Pornography may harm women in a variety of ways. But among the harms that pornography has sometimes been alleged to cause is a surprising one: it violates women's right to freedom of speech. Pornography 'silences' women; and laws against pornography are justified (among other reasons) in order to stop pornographers from expressing themselves in a way that prevents women from speaking. Or so claims Catherine Mackinnon.²

Prominent liberal defenders of pornography famously disagree. The claim that pornography violates women's right to freedom of speech is a "dangerous confusion", indeed patently "absurd", says Ronald Dworkin in a discussion of Mackinnon's work on the topic.³ Even those most charitably inclined have thought that the claim cannot be more than merely "metaphorical".⁴

Dworkin and other opponents of the silencing argument have tended to grant Mackinnon the empirical claim that pornography might silence women in various ways, if only for the sake of argument. But, they argue, even if it does, it does not silence them in a way that amounts to a violation of their right to free speech—at least, on the orthodox liberal understanding of what that right involves. Frank Michelman, for example, allows that pornography may "create difficulty for women trying to make themselves credibly and effectively heard in any social or political cause"⁵, and holds that in this sense it may be said to undermine their freedom of speech. But this sense is "somewhat figurative or extended, inasmuch as publication and consumption of pornography obviously do not directly or inevitably prevent women from speaking out".⁶

The chief objection to the silencing argument is not, however, simply the fact that it may presuppose an extension of the orthodox understanding of right to free speech (indeed, Michelman points out that some other widely accepted restrictions on

free speech, such as prior restraint, also depend on extending the orthodox understanding of the nature of the right to free speech in certain ways). Rather, the objection is to the particular way(s) of extending the right to freedom of speech that it has usually been assumed that the silencing argument must presuppose. The silencing argument, says Dworkin, is premised on the "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."⁷ It supposes "that everyone—the bigot and the creationist as well as the social reformer—has a right to whatever respectful attention on the part of others is necessary to encourage him to speak his mind and to guarantee that he will be correctly understood; and that is absurd".⁸ In a similar vein, Leslie Green takes proponents of the silencing argument to be committed to the claim that freedom of expression requires "a receptive audience disposed to hear ...[the speaker]... just as they intend to be heard"; and concludes that "[w]ere we to impose all the duties and disabilities needed to guarantee *that* sort of reciprocity, we would surely sacrifice not only freedom of expression but also other important liberties as well, including freedom of movement, association, opinion, and conscience."⁹ Daniel Jacobsen agrees. The sort of "illocutionary silencing" that some have suggested pornography might produce is "beyond the pale of what even arch-defenders of free speech have tried to protect."¹⁰

These objections assume that any conception of the right to free speech that allowed any of the senses in which it has been claimed that pornography might silence women to amount to a violation of their right to free speech would be a clearly unacceptable one, justifying the imposition of illiberal duties and disabilities on individuals and paving the way to "terrible tyranny".¹¹ The central aim of this paper is to show why this assumption is mistaken. I will argue that *if* consumption of pornography silences women in a certain, quite specific way (by 'scrambling' their speech), then there is a liberally acceptable sense in which consumers may be said to violate women's right to free speech by consuming pornography. And if it turns out that consumption of pornography does in fact silence women in the requisite way, and the costs of legislating against pornography are not excessively great, then liberals should legislate against pornography on free speech grounds. This may come as something of a surprise to liberals, who are more accustomed to invoking the right to free speech as the cornerstone of the towering liberal *defence* of pornography.

It is worth stressing that the central claim I aim to defend is an importantly conditional one. I will not be defending the claim that consumption of pornography does *in fact* silence women in the requisite way, and so in fact violates women's right to free speech. For that is an issue that cannot be decided *a priori* from the philosopher's armchair. (As I will briefly discuss in conclusion, I think the available evidence neither supports nor undermines the truth of the conditional, since social science researchers have on the whole failed to make the more fine-grained distinctions which turn out to be crucial.) Nor will I be taking a firm stand on what form of anti-pornography legislation, if any, is justified on free speech grounds. For, as I discuss in the concluding sections, this turns on some further empirical questions and the outcome of a delicate process of weighing the likely costs and benefits associated with different policies; and there is not space to undertake this process here.¹² Rather, I will be exploring what it would take for the silencing argument to succeed in showing that anti-pornography legislation of any sort could be warranted on free speech grounds; and a defence of even this conditional thesis is likely to be controversial enough.

Establishing the validity of even the conditional claim has some important implications. Most obviously, it vindicates the silencing argument from a common charge that is generally taken to defeat it before it even gets off the ground. If, as many think, the silencing argument is the most dialectically promising of the possible lines of feminist argument against pornography, then the feminist case against pornography emerges with significantly improved prospects.¹³ But there are some broader implications as well.

Many feminists have claimed that liberalism lacks the conceptual resources to adequately address feminist issues and concerns—so much so, that it is now quite frequently said that one cannot be a liberal and a feminist. The orthodox liberal defence of pornography is often held up as a classic illustration of some of the central respects in which liberalism fails feminists; and the liberal conception of free speech, along with the liberal conception of equality, subjectivity and the public/private distinction, has been identified as deeply problematic from a feminist point of view. Just as it has been claimed that the liberal conception of equality makes liberalism blind to many of the substantive inequalities women suffer, so it has been claimed that the liberal conception of free speech, with its traditional focus on governmental

restrictions as the chief or only obstacle to free speech, has rendered liberals unable to recognise the extent to which other, non-governmental actions and circumstances may restrict women's freedom of speech.¹⁴ Securing genuine freedom of speech for women, along with genuine equality, thus requires abandoning liberalism in favour of a political philosophy that is able to recognise and redress these injustices. Or so it is frequently argued. Feminists who have liberal sympathies (along with liberals who have feminist sympathies) have a vested interest in seeing what might be done to rescue liberalism from these charges. The argument of this paper can be seen as contributing to this more general project. If the argument succeeds, then liberals have better conceptual resources—at least when it comes to freedom of speech—than has often been supposed. Finally, I hope to sketch the outlines of a way of understanding the right to free speech that will be of yet more general interest: a conception that is consistent with plausible liberal principles, but which seems to me to be superior to the traditional conception(s).

I will begin in Section I by briefly distinguishing a number of different senses in which it has been claimed that pornography silences women. The importance of making these distinctions will become apparent in section II, where I discuss the central issue of whether women's 'silencing' amounts to a violation of their right to free speech. This depends on exactly what women's 'silencing' involves. The problem with both sides of the argument has tended to be that, by failing to distinguish clearly between importantly different senses of silencing, they fail to distinguish between importantly different conceptions of the right to free speech which the claims about silencing presuppose.¹⁵ I suggest that there are some powerful liberal reasons for thinking that the right to free speech should include a minimal comprehension requirement, according to which one of the senses of silencing distinguished in section I would amount to a violation of women's right to free speech. Section III responds to two objections to the silencing argument. The first is the obvious objection that pornographers cannot be held responsible for the violation of women's right to free speech since pornography is voluntarily consumed and any beliefs it may reproduce or reinforce are mentally-intermediated. This need be no barrier to the silencing argument, I suggest, since the crucial issue turns out to be whether *consumers* should be permitted to act in ways which prevent comprehension of speakers' ideas. The second objection concerns whether the silencing effects of

pornography could rightly be thought to be the result of any agent's actions in the way that the minimal comprehension requirement sketched in section II requires. I outline two ways of responding to this concern. In section IV, I explain why liberals can accept the view that the right to free speech includes a minimal comprehension requirement, without thereby being committed to recognizing or enforcing the sorts of duties and disabilities that have led liberals to reject other, richer understandings that have been proposed (or presupposed). In conclusion, I briefly consider whether some form of legislation against pornography is justified on free speech grounds.

One final preliminary. For the purposes of the argument of this paper, I will be defining 'pornography' in a slightly unorthodox way (though one which I think remains in the spirit of other feminist definitions¹⁶): just as that sexually explicit material, whatever it is, which harms women.¹⁷ This quasi-technical definition may sound trivially circular, but it is not. For, on this way of defining pornography, two substantial questions remain. The first is the empirical question of whether there is any pornography: that is, whether there is any sexually explicit material that harms women. It may turn out, *a posteriori*, that there is no sexually explicit material which harms women, in which case we will have an error theory about pornography—it will turn out there is no pornography, so defined. For the bulk of what follows, however, I will assume that there is some pornography. This is not a particularly bold or controversial assumption—even the most fervent defenders of pornography typically admit that some sexually explicit materials do cause at least some harm to women by, for example, weakening consumers' critical attitudes to crimes of sexual violence against women. What is controversial is whether there is any sexually explicit material that harms women to an extent, or in a way, which may merit anti-pornography legislation on liberal grounds. This is the second substantive question left open by the definition; and whether the silencing argument, properly construed, can shed new light on this question is exactly the issue this paper sets out to explore.

1 Three kinds of silencing

If women are not prevented by force or law from producing words, or from having those words heard by anyone who cares to listen, exactly how might they be silenced by pornography?

One sense in which it has been claimed that pornography silences women is a quite literal one. Pornography may establish a social climate that makes women reluctant to speak at all: they literally do not utter or pen a string of words. This sort of literal silence is a familiar general phenomenon: political dissidents in repressive regimes do not speak for fear of government retribution; students may not speak in class for fear of public embarrassment or ridicule; survivors of childhood sexual abuse may not speak for shame or for fear that they will not be believed; and so on. Pornography may create a social climate where women are similarly reluctant to utter or pen a string of words. In overt cases, cited by Mackinnon, pornographers threaten and intimidate women and children harmed in the making of pornography into literal silence. Less overtly, sexual crimes of rape, incest, domestic violence and sexual harassment are substantially under-reported by women.¹⁸ According to Mackinnon, pornography bears a large responsibility for this literal silence by perpetuating and reinforcing a view of these crimes as a legitimate, arousing and harmless part of normal sexual relations. She writes,

In pornography, there it is, in one place, all of the abuses that women had to struggle so long even to begin to articulate, all the *unspeakable* abuse: the rape, the battery, the sexual harassment, the prostitution, and the sexual abuse of children. Only in the pornography it is called something else: sex, sex, sex, sex, and sex, respectively. Pornography sexualises rape, battery, sexual harassment, prostitution and child sexual abuse; it thereby celebrates, promotes, authorizes, and legitimizes them.¹⁹

In a social context shaped by such pornographic ideas, women who report rape and sexual harassment may be ridiculed, deemed inadequate, disbelieved or told that what happened was not wrong. And so, in such an unsympathetic social climate, many women may not speak about these things at all. They may literally remain silent.

A second sense in which pornography may silence women is by creating or reinforcing a social climate in which, even where women do speak, no one pays attention to what they say or takes what they have to say seriously. Pornography may cause people to ignore, dismiss, ridicule, disbelieve or disagree with what women say, especially when women say things which contradict the picture of women contained in pornography. As Mackinnon writes, pornography

...strips and devastates women of credibility, from our accounts of sexual assault to our everyday reality of sexual subordination. We are stripped of authority and reduced and devalidated and silenced...Even if she can form words, who listens to a woman with a penis in her mouth?²⁰

Thus, for example, women who report rape or incest may sometimes not be believed. They may be told that they imagined it or that they invited it. Women who report sexual harassment may sometimes be ridiculed, dismissed as overly sensitive or 'neurotic', or told that what happened was not wrong or not harassment. Women's protests against pornography may be dismissed or ridiculed on the grounds that the women making them are 'man-hating, sex-hating lesbians who are just bitter because they are unable to get a man'.²¹ Women may sometimes say 'no' to sexual advances, but their refusal may be dismissed or ignored.

A third sense in which it has been claimed that pornography silences women is importantly different from this second sense. Pornography may silence women by causing consumers to systematically fail to comprehend—or to miscomprehend—the idea that women intended to express by uttering the words they did. As Mackinnon writes,

When anyone tries to tell what happened, she is told that..[h]er 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.²²

The difference between the second and third senses of silencing may sometimes be a subtle one. Compare the following three scenarios.²³

Case 1

A woman utters 'no', sincerely intending in so speaking to refuse a man's sexual advances. He hears the word 'no' and understands that by uttering 'no' she means to refuse his sexual advances. But, either excited by the thought of overcoming her resistance or simply indifferent to it, he goes ahead with the sexual advances anyway.

In this case, the man understands that by uttering 'no' the woman means to refuse him; he simply ignores her refusal. This is a case of the second sense of silencing

distinguished above: The woman says 'no' and her refusal, though understood, is dismissed or ignored. So too, is the following, slightly more complex, case.

Case 2

A woman utters 'no', intending in so speaking to refuse a man's sexual advances, as in case 1. He hears the word 'no' and understands that by uttering the word 'no' she intends to refuse his advances. But he thinks that her refusal does not express her real desires. She utters 'no' with the sincere intention of refusing him, but he believes that she is mistaken or self-deceived about what she really wants. So, taking himself to be acting in accordance with her real desires, he goes ahead with his sexual advances.

In this case, the man understands that by uttering 'no' the woman intends to refuse him, but he dismisses her refusal as failing to be revelatory of her true desires.

Contrast cases 1 and 2 with the following:

Case 3

A woman utters 'no', sincerely intending in so doing to refuse the man's sexual advances, as in case 1. The man hears the word 'no'. But he does not understand her utterance of 'no' as constituting a refusal. He does not understand that by uttering 'no' she means to refuse him. Instead, he understands her utterance of 'no' as playful provocation and further invitation. And so he continues with his sexual advances.

In this third case, it is not that the word 'no' uttered by a woman in a sexual context is understood as a refusal, but ignored or dismissed; it is that the word 'no' uttered by a woman in a sexual context fails successfully to communicate the intended idea of refusal at all, being understood, rather, as expressing encouragement. A woman's 'no' in sexual contexts means yes. If women are silenced in this way, then—as Rae Langton notes—men can rape women without even realising it.²⁴

It is worth briefly noting that there are at least two things that might be occurring in this third, 'no-means-yes' sort of case. One possibility (perhaps an unlikely one) is that the sound 'no' is taken by the hearer to have the literal meaning yes, and is understood as being used to express invitation—or, at least, not to prohibit it. (It might be, for example, that hearers believe that the meaning of the word 'no' is

context-sensitive, meaning refusal in most contexts, but encouragement in the mouths of women in sexual contexts; in the same way in which what the word ‘bank’ means is context-sensitive, meaning elevation at the edge of a river when used in some contexts and meaning financial institution when used in others.) A second possibility is that the word ‘no’ is taken by the hearer to literally mean no, but the hearer thinks that that word is being used by a woman in a sexual context to convey invitation to further sexual activity—or, at least, not to prohibit it. The hearer may think that the woman is not actually refusing *him* when she utters ‘no’, but is rather play-acting: pretending to refuse, or refusing a fantasy character in a fictional context, while all the while hoping that he, the real man, plays along with the game and continues his advances.²⁵ Whether either of these possibilities occurs is an empirical question; and, in what follows, I shall not distinguish between them unless anything hinges on it.

How might pornography contribute to this sort of failure of comprehension of women's expression in sexual contexts? The short answer, which has been developed in more depth elsewhere²⁶, is that much pornography contains, either explicitly or implicitly, ideas about what women's words and behaviour in sexual contexts mean. Among the other ideas which pornography contains are ideas about how women's utterances in sexual contexts should be interpreted: ideas such as that when women utter the sound ‘no’ in sexual contexts that sound has the meaning or performative force usually associated with the sound or mark ‘yes’—agreement, encouragement or invitation. Likewise for pornography's representation of the meaning of women's non-verbal behaviour in sexual contexts: women's struggles against unwanted sexual advances signify, not resistance, but provocative invitation. Since pornography contains such ideas about the meaning of women's sounds and gestures in sexual contexts, it may communicate those ideas to consumers, who come to draw on them (consciously or unconsciously) in interpreting the meaning of women's sounds and behaviour in sexual contexts. In this regard, pornography may function like a selectively misleading translation manual: “For ‘no’ see ‘yes’”, the equivalent dictionary entry might read. This may be particularly true of the large genre of pornography which contains what social scientists call “favourable” or “positive” rape depictions: depictions of initially reluctant women who give in to immediate ecstasy upon being raped, for example. The result may be that there are certain

ideas—refusal, disinterest and resistance among them—which women are unable to communicate to consumers of pornography.²⁷

Pornography, then, may silence women in at least three ways: it may create a social climate such that women are reluctant to utter or pen words; it may create a climate where women speak and succeed in communicating their ideas to others, but those ideas are not taken seriously and fail to secure agreement; or it may silence women by ‘scrambling’ their speech in sexual contexts—by establishing or reinforcing conventions or beliefs in consumers which cause women's ideas in sexual contexts to be systematically misunderstood.

II Silencing and the right to freedom of speech

It is controversial whether certain sexually explicit materials do silence women in general in all or any of these ways. But let us suppose that they do, if only for the sake of argument. The question is whether this would merit anti-pornography legislation on free speech grounds.²⁸ If the silencing argument is to get off the ground at all, the first task is to show how at least one of the three senses of silencing distinguished above might properly amount to a violation of women’s right to freedom of speech; and this turns on the more general question of exactly what the right to freedom of speech is.

When liberals want to protect freedom of speech, what they want to protect is speakers’ freedom to communicate opinions and ideas to others. This much should be uncontroversial, although different liberals take the freedom to communicate ideas to be valuable for different reasons.²⁹ But just what does, or should, the ‘freedom to communicate ideas to others’ involve? Does it, for example, merely require that speakers are not physically prevented from producing word-like things in private? Or does freedom to communicate opinions to others require something more than this: for example, that speakers are not prevented by the actions of another agent, say a government censor or a threatening Mafia boss, from producing those word-like things in public? Freedom to communicate opinions to others might require even more still. It might require that wide, public distribution of speaker’s ideas is not simply allowed, but that it is promoted, perhaps even *assured*, through government subsidies to speakers, guarantees of access to public media, speech forums and the like.

It is helpful to think of the different possible degrees of restriction on the distribution of ideas as located at various points along a continuum. At the narrow end, the right to freedom of speech protects speakers' freedom to utter or pen words in private, but it does not protect their freedom to have those words heard by an audience and it does not protect their right to utter those words in the absence of threats or severe penalties for speaking. A government censor would not violate a speaker's right to freedom of speech, on this understanding of the right to freedom of speech, nor yet would a totalitarian regime who rounds up, intimidates or imprisons those who dare to speak dissent. Of course, this extremely narrow notion of the right to freedom of speech falls well short of an account of freedom of speech. But it is crucial to see that freedom of speech is a member of a family of properties which extend along this continuum: at one end of which lies this unacceptably narrow conception, and at the other end of which lies a (no doubt equally unacceptable) very rich conception, according to which the public distribution of ideas is not simply allowed, but guaranteed. Speakers' right to free speech is violated, on this most rich of possible conceptions, wherever their words fail to receive wide public distribution, and for whatever reason. Locked doors at night would violate a speakers' right to free speech, on this conception, as would poverty, illiteracy or fear of public speaking. In between these two extremes, lie a cluster of different conceptions of the intermediate view that the right to free speech requires that public distribution of ideas is permitted, in the sense that there is no agent whose actions prevent the public distribution of ideas.

Given such a continuum of possible understandings of the right to free speech, the question is where on that continuum liberals should draw the line. It is important to note that even the most libertarian of liberals resist drawing the line at the narrow extreme. At the very least, freedom of speech requires that there be no government censor denying speakers' words a public hearing; and it is widely thought that it requires, in addition, that speakers are not 'prevented' from speaking by state threats—cowed into silence for fear that government troops will round them up, for example. But even the most liberal of liberals will stop far short of drawing the line at the assurance of public distribution of ideas—and perhaps for good reason. To say that someone has a right to something, on at least one popular liberal view of the nature of rights, is to say that a person has an interest so important that it warrants holding others duty-bound to attend to it; and also, on some conceptions, that the

interest is of a strength or character which *prima facie* justifies the state acting to protect that interest from interference by others by legislative means, if needs be. A conception of the right to free speech as requiring the assurance of public distribution of ideas would thus impose a burdensome range of duties on individuals: duties on citizens not to lock their doors at night, for example; and perhaps justify laws against such conduct as well. As liberals sometimes prefer to put this point, to adopt this most rich of conceptions would be to conceive of the right to free speech as a ‘positive’, rather than a ‘negative’, liberty: ‘freedom to’—or the capacity to—speak, rather than ‘freedom from’ interference with speech, as the distinction often gets explained.³⁰

So liberals should clearly draw the line somewhere between these two extremes. The aim is to protect individuals’ freedom to communicate their ideas to others, but not at the cost of imposing unacceptably broad and heavy-duty obligations and disabilities on hearers. But exactly where in the middle of the continuum should liberals draw the line? What preventions, and by whom, on the wide distribution of ideas are permitted and which justifiably disallowed?

Liberals agree that preventions of public utterances by government agents (including threats) constitute a violation of the speaker’s right to free speech. And many liberals are happy to admit that actual or threatened interference by powerful *non-governmental* agents may violate a speaker’s right to freedom of speech as well: The stand-over Mafia boss who threatens a potential informer—“say that and you’ll be shot”—violates the informer’s right to freedom of speech, as much as do government troops.³¹ That interference by non-governmental agents, such as the stand-over Mafia boss and his or her ilk, may violate a speaker’s right to freedom of speech seems right; and it is important for the silencing argument that it is right, since neither pornographers nor consumers of pornography are typically government agents.

But, of course, there are other senses in which speakers can be prevented from communicating ideas to others; and not all of these senses have directly to do with questions of how widely a speaker’s utterances are allowed to be distributed in the ways in which I have discussed above. There is a sense, for example, in which a speaker is ‘prevented’ from communicating an idea by an audience that staunchly refuses to listen to what he or she has to say. Speakers can utter as many words as often, loudly and widely as they like, but they will not succeed in getting their ideas

across to an audience that systematically refuses to pay their speech any attention—that blocks its ears, covers its eyes or turns off its television sets, for example. The communication of ideas is a two-sided process, involving a speaker and at least one hearer; and the communication of ideas—or, at any rate, the successful communication of ideas—requires an audience who is at least minimally prepared to listen to what the speaker has to say.

As well as the question of the breadth of *distribution* of speech, then, freedom to communicate an idea to others involves another dimension: the dimension of hearer *reception* or *consideration* of ideas. Hearers may choose to ignore what speakers say, they may choose to hear but dismiss what speakers say, they may choose to hear and agree with what speakers say; and they may do all these things with varying degrees of comprehension, reflection and critical acumen. Here, again, there is a continuum of degrees of reception, ranging from complete inattention to speakers' expressed ideas, at one end, to complete attention combined with Bayesian perfection, at the other. What, if anything, does the right to free speech require in the way of audience reception of ideas?

The orthodox liberal answer is that the right to free speech in itself requires nothing of an audience in the way of reception. Although there is a sense in which an unreceptive audience 'prevents' a speaker from communicating his or her idea, this sort of prevention of communication does not amount to a violation of the speaker's right to free speech. It should not amount to a rights-violation because, as Dworkin and Green point out, to allow it as such would seem to license the imposition of a range of demanding duties on individuals to attend to other speakers' ideas: duties not to turn off one's television set, or avoid demonstrations, or block one's ears, or walk out of movies or public lectures, and the like. A speaker's interest in a receptive audience is insufficiently great even *prima facie* to justify the imposition of such duties; still less could it justify coercive public or state action designed to force others to attend to this interest.

Of course, to say that the right to free speech requires nothing in the way of audience reception is not necessarily to deny that things would go better for free speech if hearers made at least some minimal attempt to attend to ideas in the marketplace, especially where those ideas happen to be true. Even liberalism's most famous defender of free speech, John Stuart Mill, notes that the benefits of free

speech—namely, truth and progress—can only obtain where audiences are appropriately attentive.³² Still, even if individuals (or society as a whole) have at least some interest in an receptive audience, this interest is not sufficiently great to justify imposing demanding duties on individuals to provide such an audience (though it may perhaps justify measures to encourage them to do so: public education campaigns about the importance of paying certain ideas some attention, for example).

If this is right, the upshot for the silencing argument is that the second sense of silencing distinguished in section I—the ignoring, dismissing or ridiculing of women’s ideas—falls well short of a violation of women’s right to freedom of speech. Nor, it seems, would the first sense of silencing—a social climate which discourages women from speaking—amount to a violation of women’s right to free speech. For that would be to think that the right to free speech involves a substantial degree of assurance of wide distribution of ideas; and, however unfortunate it is when lack of resources mean that speakers lack the capacity to speak, liberals will insist for the reasons previously mentioned that such unhappy circumstances do not amount to a violation of the speaker’s right to freedom of speech. And so we may seem to be back where we started, with a vindication of the orthodox conception of the right to free speech. On that conception, insofar as pornographers do not directly intimidate women into literal silence with physical violence or serious threats thereof, they do not violate women’s right to freedom of speech.³³

But is it right to think, as opponents of the silencing argument do, that the third sense of silencing—the systematic misunderstanding of women’s ideas—necessarily falls with the other two? I think it is not. If the right to freedom of speech is to protect what liberals agree is valuable about free speech—speaker’s freedom to communicate *ideas*—then the right to freedom of speech seems to involve the right not to be prevented from distributing *meaningful* words: and since words are meaningful only in virtue of how they are received in a community, the right not to be prevented from distributing meaningful words will impose at least some constraints on the natures of those who hear the words.

What kind of constraints could these be? Certainly, if the words cannot be comprehended then, in at least one important sense of meaning, they are meaningless. What makes a waving of the hand in the air express the idea of farewell, or a vigorous shaking of the head express the idea of refusal or disbelief, is that those who receive

the gestures are able to interpret them as such. In the absence of such abilities, the gestures are meaningless; and in the presence of different abilities in receivers, they may have a different meaning, or communicate a different idea, altogether. Likewise, for the determination of the meaning of other intentional communicative actions. So some constraint involving the 'grasp' or 'understanding' of speakers' words seems to be required if speakers' freedom to distribute ideas is to be protected.

One way of expressing this constraint, without requiring either that speakers must have the ability to speak or that hearers have duties to pay their speech attention, is this: that *were speakers to speak, and were hearers to want to hear the idea the speaker expressed by so speaking, there is no agent whose actions prevent hearers from comprehending that idea*. The comprehension requirement embodied in this counterfactual is a minimal one, which should be distinguished from richer ones which liberals are unlikely to want to accept. The right to free speech is *not*, for example, the 'positive' right to have one's ideas understood just as one intended.³⁴ For this would mean that a speaker's right to free speech is violated wherever an audience fails to speak their language. On this conception, a physicist, or pure mathematician—even a philosopher—would have their right to free speech violated by audiences which fail to learn sufficient physics, mathematics or philosophy to enable them to follow the speaker's ideas; and individuals might have duties, potentially enforceable by law, to become universal polyglots.

But the requirement I have sketched does not have these consequences. The right to free speech does not require that hearers have the capacity to comprehend what speakers say. It requires merely, in the familiar liberal language of negative rights, that comprehension is not prevented by the actions of another agent. Hearers cannot be forced to learn a language or employ a translator, on this conception, but they are not allowed to disable the translator provided. Someone with severe disabilities of speech, for example, does not have a right to vocal cords, but others are not allowed to sever the vocal cords of those who have them. Nor is the right to free speech on the suggested conception the right to express yourself in any way you please. Speakers who utter the sound "brumph" to express refusal, for example, cannot complain that their right to free speech has been violated when others fail to grasp their intended meaning. The right to free speech requires that agents do not act in such a way as to deny speakers any of the conventional ways of communicating

ideas: for example, by uttering words such as 'no', 'stop', 'please don't'; or by non-verbal means, such as struggling.

To see why this minimal comprehension requirement seems to be needed in order to protect the freedom of something that is meaningfully called *speech*, consider the following series of cases.

Imagine that there is a dictator who wishes to silence dissent. He might do so by calling on the services of a government censor. But suppose that, preferring to conceal the true extent of his tyranny, he hits on a more ingenious way of ensuring that dissenters' ideas do not receive public distribution. There is a machine, a voice-scrambler, which can be implanted in the larynxes of political dissidents secretly and in the dead of night. The machine systematically replaces selected words dissidents utter with other words of a different meaning: the political dissident utters the words 'overthrow the dictator' but the voice scrambler does its thing and the audience hears the words 'support the dictator' emanating from the speaker's mouth. Let's suppose that the machine also functions as a writing-cum-action scrambler that does something similar for speakers' attempts at communicating their dissenting opinions through other expressive media. So that, try as they might, the dissidents have no means of communicating their dissenting ideas to others.

Liberals will readily admit that, by implanting the voice-scrambler, the dictator violates the dissidents' right to free speech. He does so quite straightforwardly: by preventing the audience from hearing the particular words the dissidents utter. In this way, he acts just as government censors often do—a paradigmatic case of violation of the right to free speech. (In fact, the imaginary dictator does something worse than merely preventing the dissidents from communicating their ideas—he forces them to communicate quite different ideas from the ideas they intended to communicate by speaking as they did).

Now suppose that the dictator achieves the same end of preventing the wide distribution of ideas, but in a slightly different way: not by fiddling with the sounds that emerge from dissidents' mouths, but by tampering with hearers' minds. The dictator secretly implants a false translation manual, a 'meaning-scrambler', in the heads of hearers. The meaning-scrambler causes hearers to systematically fail to grasp the meaning of what the dissidents say. It tells hearers that words such as 'overthrow' uttered by dissidents in the context of phrases such as 'overthrow the dictator' mean

‘support’. The result of this tampering is that, although dissidents are not prevented from uttering the words ‘overthrow the dictator’, and although hearers are not prevented from hearing them, the scrambler nonetheless prevents the dissidents from successfully expressing certain ideas.

The point of raising these two cases is to illustrate two different stages in the communication process at which prevention of the communication of ideas might occur; and to bolster the intuition that in both cases a violation of the dissidents’ right to freedom of speech has occurred.³⁵ In the first case, the dictator prevents the distribution of speakers’ dissenting ideas by preventing dissemination of the particular sounds the dissidents’ utter; in the second case he does so, not by preventing dissemination of the sounds, but by preventing their comprehension. Orthodox liberal wisdom seems to have it that only in the first case does a violation of the dissidents’ right to free speech occur. But surely that is not right. In both cases there is a violation of the dissident’s right to free speech, since in both cases there is a government agent whose actions prevent speakers from communicating their ideas to others. Under these circumstances, to insist that only in the first case does a violation of the right to free speech occur would be to manifest a puzzling fetish for the distribution of particular noises and scribbles. So something like the comprehension requirement does indeed seem to be required if we are to protect speaker’s freedom to communicate ideas.

Now suppose that pornographers are the evil dictator and pornography their meaning scrambler. Then, by analogy, by producing pornography, pornographers violate women’s right to freedom of speech. They do so, not by preventing the distribution of speakers’ words, but by preventing the distribution of speakers’ ideas by preventing comprehension.

If only the analogy were quite so straightforward! For, of course, there are a number of points of disanalogy between the two cases. Pornographers probably do not prevent the wide distribution of women’s ideas with the same conscious evil intent revealed by the dictator, despite Mackinnon’s occasional rhetoric to the contrary. But the fact that pornographers do not produce pornography with the intent of violating women’s right to freedom of speech does not necessarily mean they do not violate that right or excuse them of responsibility for it. Negligent drink drivers probably do not intend to run over innocent pedestrians, but that does not mean that they do not

violate the pedestrians' rights when they do so, or that they should not be held responsible for it. Secondly, unlike the evil dictator, pornographers are not government agents. But, as many liberals agree, powerful non-governmental agents (say, in the civilian garb of a Mafia boss) can violate a speaker's right to freedom of speech if they prevent speakers from speaking in the right kind of way.

But there are perhaps two more important points of disanalogy between the two cases. First, unlike the evil dictator, it seems that pornographers do not forcibly implant the meaning scrambler without the knowledge or consent of consumers. Not only are consumers free to choose to consume pornography, but it seems that they are free to choose whether or not to agree with pornography's misleading translation manual as well. Insofar as consumers freely choose both to consume pornography and, having freely consumed it, to agree with its ideas about what women's words mean, it seems that *pornographers* cannot be held responsible for violating women's civil right to freedom of speech.³⁶ Second, one might think that in the case of pornography there is no *particular* agent (like the dictator) whose actions are, on their own, sufficient to establish general semantic conventions (such as the no-means-yes convention) that may be thought to be required in order for the scrambling of ideas to occur. No (single) agent makes it the case that there is a general convention that no-uttered-by-a-woman-in-a-sexual-context-means-yes, any more than any one agent makes it the case that 'square' means square. If, as I have suggested, a violation of the right to free speech requires that there be *an agent* whose actions prevent comprehension of speakers' ideas, it may seem that neither consumers nor producers of pornography can properly be said to violate women's right to freedom of speech after all.³⁷ Let me address these issues in turn.

III Do individuals have a right to psychic self-mutilation?

Some reject the claim that consumers of pornography are in fact free to choose to agree with pornography's ideas about women, including presumably its ideas about what women's words mean. If these philosophers are right, then there may be literal truth to the analogy after all: pornography really may 'forcibly' implant its meaning-scrambler in consumers. These authors claim that pornography is not "mentally-intermediated" or "persuasive" speech: pornography does not communicate its ideas in such a way that those ideas can be rationally evaluated or resisted by consumers. Mackinnon, for example, claims that pornography "does not engage the conscious

mind".³⁸ Pornography alters consumers' beliefs and preferences not "because they are persuaded by its ideas...but because they are sexually habituated to its kick; a process that is largely unconscious and works as primitive conditioning, with pictures and words as sexual stimuli".³⁹ In a similar vein, Cass Sunstein suggests that pornography functions like subliminal advertising, communicating its message to consumers in a way of which they are not even aware.⁴⁰ More recently, Danny Scocia has argued that pornography non-rationally affects consumers' mental states via a process of 'operant conditioning'; and concludes that liberals can support a ban on violent pornography because liberal principle protects speech only insofar as it rationally affects hearers' mental states.⁴¹

Unfortunately, however, even if the claim that pornography is not mentally-intermediated were right⁴², it would not save the silencing argument (nor would it constitute a good liberal argument for anti-pornography legislation in its own right). For consumers may not be free to choose whether or not to agree with pornography's ideas upon consuming pornography, but they are free to choose whether or not to consume pornography in the first place. The argument from 'no mental-intermediation' may strengthen the case for informing consumers of the likely unmediated effects of consuming pornography. It may provide the basis of a case for placing warning labels on pieces of pornography: "Warning: consumption of this material will non-rationally influence your beliefs, desires and behavioural dispositions in the following ways:...". But the argument falls short of providing liberally acceptable grounds to ban pornography. If rational adults want to lose weight or give up smoking by availing themselves of the latest techniques in hypnotherapy, then the mere fact that hypnosis is not mentally-intermediated does not seem a good liberal reason for preventing them from doing as they wish.⁴³ Indeed, to prevent rational and informed adults from exercising their freedom of choice in this way seems positively illiberal. And the same seems to apply in the case of pornography.

However, the crucial issue for the silencing argument here need not be whether pornography is mentally-intermediated speech; nor, necessarily, even whether consumers are free to consume it. Let us assume that they are. Rather, the crucial question is whether the right to free speech allows individuals to act in ways which bring it about that they are unable to comprehend other speakers' ideas. Should consumers of pornography be allowed to implant the meaning scrambler in

themselves?⁴⁴ Suppose that a pharmaceutical company invents a pill which has the effect of altering the abilities of those who take it in such a way as to make them unable to comprehend certain ideas, with the result that other speakers are prevented from successfully expressing those ideas. Let's suppose, furthermore, that prospective pill-takers are fully informed that this will be the effect and still desire to take the pill. Should they be allowed to take it?

This question bears some similarity to an older liberal quandary. There are some choices that individuals can make which have the effect of severely constraining what a future self can do in profoundly illiberal ways. Selling oneself into slavery is a more familiar example of such a choice; suicide is sometimes thought to be another. Are these choices which individuals should be allowed to make? A prominent strand of liberalism insists that they are not. The liberal duty of non-interference at a time extends to future person-stages, as well as to other person-stages at a time. Whilst future person-stages may be parts of oneself, they may nonetheless have different interests from one's current self; and, as such, are a proper bearer of rights over one's current self.⁴⁵ We have liberal duties of non-interference towards our future selves in the same way, and for much the same reason, that we have such duties towards other people. These reasons for curtailing the making of illiberal choices in the cases of selling oneself into slavery and the like, apply equally to suggest that a person should not be allowed to act in a way which prevents a future self from comprehending other speakers' ideas—at least, on the assumption that acting in this way is liberally impermissible. Not only should individuals not be allowed to disable someone else's translator; they should not be allowed to disable their own translator either. Since taking the pill should not be allowed, *a fortiori*, producing and selling it should not be allowed either.

IV Must silencing be systematic?

But consumers of pornography will only violate women's right to freedom of speech, on the analysis I have suggested, providing the agency requirement is met: in order for a speaker's right to free speech to be violated there must be an agent whose actions prevent comprehension of the relevant kind. But no individual act of consuming pornography seems sufficient to establish a general social convention such as 'no-uttered-by-a-woman-in-a-sexual-context-means-yes'. Such a convention is at most an

effect of sufficiently many individuals consuming pornography and acquiring certain beliefs, not an individual action.

There are two possible routes of reply. First, one might agree that women are silenced by general semantic conventions of the no-means-yes sort, but deny that this defeats the agency requirement. The fact that no particular agent's actions are on their own sufficient to produce the general scrambling effects does not mean that there is no agency involved, or that particular agents cannot be held responsible for the general harm to which their individual actions contribute. Consider a murder, where a number of different individuals each contribute one stab. Each particular stab, on its own, is not sufficient to kill the victim; but enough individual stabs, collectively, are. Should we say that there is no agency involved, since each individual's stab makes only a very small and insufficient contribution to the overall harm of murder; or that, because each individual's stab is not sufficient, none of the particular individuals involved can be held responsible for the murder? Surely not. For there is individual contributive agency involved.⁴⁶ We can count as part of the cause of a harm, actions that are such that enough of them will collectively produce the harm. And this may be true in the case of pornography: if enough individuals consume pornography and acquire the selectively misleading beliefs about the meaning of women's sounds etc. in sexual contexts, their actions will be collectively sufficient to produce the general scrambling effects that violate women's right to freedom of speech. Especially if individuals are made aware that their individual actions contribute to this general harm, and yet continue so to act nonetheless, it may be appropriate to hold them responsible for it (in the same way in which it is appropriate to hold the individuals above responsible for the murder).

However, this route of reply is bound to be contentious. It spreads agency and responsibility very broadly. Most of us do things every day (e.g. driving cars) which contribute to very great harms (e.g. environmental destruction). Perhaps in at least some sense of 'responsibility' we are responsible for these harms, but there seems to be a difference between this and full-blown agency. Arguably, in driving our cars we are not responsible for environmental destruction in the same way in which the 'last man' who builds and detonates the bomb to destroy it all would be; nor are we responsible for genocide in the same way that the general who orders it is, even if we vote for a government that sells the general the arms to do it.

Fortunately, there is another reply available. We might hold that the scrambling effects need not be systematic in order to violate a speaker's right to free speech. Perhaps it is not general semantic conventions or systemic social practices *per se* that violate women's right to freedom of speech, but certain beliefs (e.g. that 'no' uttered by a woman in a sexual context does not express refusal) that can in principle be held by one individual or by many. Suppose that 999 of the 1000 meaning scramblers that are implanted by the henchmen have a mechanical fault and fail to work. There is now only one individual who is rendered incapable of comprehending dissidents' dissenting ideas. Does this violate the dissidents' right to freedom of speech, or is that right only violated when some critical mass, say 51 per cent, of the population are rendered incapable of understanding their dissenting ideas? Even if only one audience member is so rendered incapable of comprehending certain ideas, there is a case for holding that the right to free speech of those who attempt to express the idea has been violated. After all, liberals will say that the voice-scrambler implanted in only one speaker so as to prevent them from communicating certain ideas to others would count as a violation of the speaker's right to free speech—no matter how many other people are free to communicate the same idea. Liberals do not typically regard it as legitimate to say that it is permissible to prevent one would-be speaker from expressing an opinion on the grounds that there are plenty of other people who are free to express it. The liberal right to free speech does not simply protect ideas, or the communication of ideas by someone or other, it protects each and every speaker's freedom to express token ideas, no matter how many other tokens of the same idea-type are being expressed by others elsewhere in the marketplace. As I have previously argued, it seems arbitrary and unmotivated on free speech grounds for liberals to value individuals' freedom to produce and distribute tokens without caring about the comprehension of tokens. For otherwise what is being protected is token sounds and scrawls, not token *ideas*. So it seems that there should be symmetry here: liberals should say the same thing about the comprehension of tokens as they do about their production and distribution. Thus if only one would-be hearer were rendered incapable of comprehending speakers' token expressions of ideas of a certain type by the actions of an agent, that would count as a violation of speakers' right to communicate those ideas—no matter how many other hearers are in a position to comprehend that idea perfectly well.⁴⁷ Otherwise the liberal commitment to freedom

of speech looks less like a liberal one, and more like a consequentialist commitment to protecting the freedom of enough speakers to communicate enough tokens of enough idea-types to enough people who not prevented from understanding them. So a single individual who consumes pornography, thereby rendering him- or her-self incapable of comprehending certain ideas, may violate the right to freedom of speech of those who would express the ideas after all.

Of course, broader social conventions and practices may enter into the picture in another, indirect and empirical way. It may be, as a matter of fact, that individuals only acquire the beliefs that produce the selective failure of comprehension when certain general conventions or social conditions obtain. (Perhaps, for example, a consumer of pornography will only acquire a fully-fledged belief that a woman's 'no' in sexual contexts expresses encouragement from consuming pornography when that act of consumption occurs in a broader social context that facilitates, legitimates or sustains such an interpretation). If this is the case then, *as a matter of fact*, individual miscomprehension—and so, a violation of the right to free speech—will require such a broader social context. But this is an open empirical question.

IV The Comprehension Requirement and the Right to Free Speech

But does acting to prevent comprehension really amount to an illiberal violation of other speakers' right to free speech? This depends on whether the right to free speech should include the minimal comprehension requirement I sketched earlier. The case for including this requirement is that it protects what liberals take to be valuable about free speech—namely, the communication of ideas. Without this requirement, insofar as such systematic failure of comprehension or 'scrambling' may occur, what is being protected is not *speech* or *ideas*, but the freedom only of sound- and scrawl-making. It is not obvious why the freedom merely to distribute the latter is an important value.

The standard worry about existing statements of the silencing argument is that they presuppose conceptions of the right to free speech that would impose on individuals duties and disabilities that seem both profoundly illiberal and insufficiently motivated by free speech considerations.⁴⁸ The account I have suggested has neither of these consequences. First, it will not be true on my account that consumption of *The Origins of Species* or *A Theory of Justice*, for example, would violate the right to free speech of creationists and bigots by causing consumers to ignore, dismiss or ridicule their ideas, as Dworkin seems to fear. The conception I

have suggested does not justify imposing such duties and disabilities as may be required to guarantee a speaker a receptive, considerate or sympathetic audience. It may, however, license the imposition of some (more limited) duties on individuals that more orthodox conceptions do not: duties not to produce or consume comprehension-scrambling pills or selectively misleading dictionaries; and, if pornography were to cause the scrambling of women's ideas in sexual contexts, duties not to consume pornography. Recall, however, that the comprehension requirement targets a very specific sort of failure of comprehension (recall the subtle difference between cases 2 and 3 in section I); and it is an open question whether anything—including the consumption of pornography—in fact causes this sort of failure of comprehension.

It may seem odd or unintuitive to think that the right to free speech imposes duties of this sort, even conditionally. And if my proposal were not well motivated by considerations about the value of free speech it might be entirely reasonable to reject them. But the suggested extension of the right to free speech is directly motivated by a presupposition central to all the standard liberal justifications for the value of free speech. Those justifications explain why it is that individuals have a very important interest in this thing called 'free speech'; and the important interest presupposed by all these justifications is an interest in being free (in some sense) to *speak*—to produce meaningful words and the like—not simply to produce sounds and scrawls. Of course, it is open to liberals to deny this. They could say that because it seems unjustified to impose on individuals duties not to act in ways that prevent comprehension of the relevant sort, we should say that the important interest is merely the interest in being free (in some sense) to produce sounds and scrawls and the like. One philosopher's *modus ponens* can always be another's *modus tollens*. But then it seems a stretch to say that the interest protected by the right to free speech is an interest in free speech; and, more crucially, it is far from obvious why this interest is at all morally significant in itself.

As well as the worry about the nature and extent of the duties that an extended conception of the right to free speech may impose on individuals, many liberals also worry about the broadening of the parameters for legitimate legislative interference with speech that may go with it. However, it is crucial to see that the sense in which the right to free speech may justify legislation is an importantly conditional one. The

right to free speech tells us what it is justified to legislate against in order to protect free speech, *if we can do so without overwhelming cost*. It does not automatically tell us that we should enact such laws in the actual world, where laws may not be required in order to protect freedom of speech (because freedom of speech is never in fact interfered with in the ways it might be⁴⁹) or where the costs of enacting and enforcing such laws are likely to be very great. The right to free speech tells us that in a world in which there is the relevant interference with free speech, and in which legislating to prevent such interference will not come at overwhelming cost (or where the costs are outweighed by the benefits), then legislation to prevent the interference should be enacted. If, on the other hand, things are such that enacting legislation to protect free speech will come at an exceedingly high price (or where the benefits of legislating are outweighed by the costs), then the legislation should not be enacted. (Of course, the costs and benefits will vary from policy to policy and according to context, so different policies will need to be evaluated on a case by case basis). So a view of the right to free speech as requiring minimal comprehension will not even in principle justify enacting legislation where the costs are likely to be excessively high, or where the costs outweigh the gains to free speech.

Dworkin and Green's concerns should not necessarily be seen as objections to extending the conception of the right to free speech along the lines I have suggested, but perhaps rather as important reminders of some of the costs that might be associated with enforcing duties to protect that right in the actual world. Liberals need not balk at understanding the right to freedom of speech to include the minimal comprehension requirement, even if there is a much wider range of activities that might violate speaker's right to free speech than the few I suggested above. What if it were to turn out, for example, that the consumption of many *non*-sexually explicit materials—romance films and novels, advertisements etc.—also caused systematic failure of comprehension in the relevant sense? One might think that the mere possibility that the right to free speech might serve to justify sweeping bans on romance novels, advertisements etc. is enough to show the dangers of that way of understanding the right to free speech, and an impeccable justification for retreating one step back on the free speech continuum to the relative safety of the orthodox understanding. However, such laws would not be justified on the conception of the right to free speech I have suggested, if it is the case—as the objection assumes—that

the costs of imposing such sweeping laws would be excessively high. That does not go to show that consumption of these things would not violate speaker's right to free speech, rather it shows that this is a case where we should not legislate to protect free speech. The enormity of the costs that legislation against pornography, conventional romance novels, some advertisements etc. seems likely to produce in the actual world may well be the real source of the intuition that such laws are unjustified, not the thought that the consumption of such materials would not violate speakers' right to free speech if they produced the relevant failure of comprehension. Imagine a world (very different from our own) where all these materials function to prevent comprehension, but legislation against them does not have these costs, and it is not so clear that the legislation is unjustified.

Moreover, we can now see how it might be justified to legislate only against pornography—i.e. the subset of sexually explicit materials which violate speaker's right to free speech—even if the consumption of other non-sexually explicit materials were also to violate women's right to free speech in the same way. For suppose we could legislate against the sexually explicit subset of the objectionable class of materials without overwhelming cost, and without incurring the overwhelming costs that would result from legislation against it all. If this were so, we would have a principled reason for legislating only against pornography, even as we recognise that the other materials also violate women's right to free speech. (Of course, this might work the other way around as well: if it turned out that consumption of certain sorts of sexually explicit material did not cause failure of comprehension of the relevant sort, but consumption of certain classes of non-sexually explicit materials did, and we could legislate against the non-sexually explicit materials without overwhelming cost, then we would have a principled reason for legislating only against the non-sexually explicit materials.)

Conclusion

I have argued that the right to free speech requires minimal comprehension, so that *if* consumption of pornography prevents consumers from comprehending certain of women's ideas, then consumers of pornography may legitimately be said to violate women's right to free speech by consuming it. We now know what it would take for pornography to violate women's right to free speech. But this is not yet to show that

any sort of legislation against pornography is justified on free speech grounds. Two further questions remain.

The first is the empirical issue of whether pornography in fact silences women in the requisite way. The second is the question of why, even if it did, free speech considerations favour legislation against pornography. For many forms of anti-pornography legislation would violate pornographers' right to freedom of speech as well: by preventing the wide public distribution of their pictures and words. Given such a conflict between rights to freedom of speech, whose right should win?

Typically, when *different* rights conflict, liberal rights-theorists can appeal to the mechanism of an independent lexical ordering of rights in order to determine which of the conflicting interests should be honoured. The lexical ordering tells us how to resolve conflicts among different rights by telling us which rights take priority over others in cases of conflict. The difficulty in the particular case here, however, is that the usual mechanism of lexical ordering will not help us determine whose right to honour. For we have a conflict between interests of the *same* strength and subject matter: to paraphrase Mackinnon, 'it's the same right, just different people'. In this situation, a natural strategy is to appeal to consequentialist considerations in order to determine which right to honour. Hence, the answer to the second question is likely to turn on the outcome of the process of balancing respective harms. If permitting the consumption of pornography causes more harm overall than would result from anti-pornography legislation of some particular sort, then anti-pornography legislation of that sort will be justified. It falls outside the scope of this paper to undertake such weighing here. My aim has been to show that the silencing argument can take us to a stage where there is a point to engaging in this process of weighing harms. Liberals can no longer maintain that the harm of the violation of pornographers' right to free speech is so great as to leave the outcome of any such weighing a foregone conclusion. For consumption of pornography may violate women's right to freedom of speech too. The way is clear for the weighing of harms to proceed on an even playing field.

What of the first question? It may seem *a priori* extremely unlikely that consumption of pornography prevents consumers from comprehending women's ideas in the required way. But this is an empirical question, which cannot be refuted merely by armchair incredulity. Current evidence strongly indicates that some form of

silencing occurs as a result of the consumption of pornography. Research consistently finds that subjects are much more likely to assent (or to assent much more strongly) to statements such as ‘when a woman says ‘no’ she does not mean it’ after exposure to pornography.⁵⁰ The problem for present purposes, however, is that the existing research fails to make the more fine-grained distinctions that turn out to be crucial. For the available evidence is consistent with either of two importantly different possibilities being the case. The first of these is where the consumer fails to grasp that ‘no’ expresses refusal. The second of these is where the consumer realizes perfectly well that what is meant is no, but believes that this utterance does not properly express the real desires of the woman. Only the first of these is the sort of failure of comprehension that amounts to a violation of the woman's right to free speech. Since we need data which distinguishes between these two senses of silencing in order to know whether consumption of pornography causes the relevant failure of comprehension, the empirical question of whether pornography in fact violates women's right to free speech remains open as yet.

Caroline West
The University of Sydney
Sydney NSW 2006
AUSTRALIA

¹ I have benefited greatly from discussions with philosophers in the Philosophy Program at the Research School of Social Sciences at The Australian National University, from audiences at La Trobe University, The University of Melbourne and at a recent Australasian Association of Philosophy conference, and from comments from an editor and two anonymous referees for the *Canadian Journal of Philosophy*. Special thanks are due to Daniel Nolan and David Braddon-Mitchell for extensive comments on previous versions of this paper.

² See Catherine Mackinnon, “Not a Moral Issue” and “Francis Biddle’s Sister: Pornography, Civil Rights, and Speech”, both in *Feminism Unmodified* (Cambridge, Mass: Harvard University Press, 1987): 146-162, 163-197; and Catherine Mackinnon, “Defamation and Discrimination” in *Only Words* (London: Harper Collins, 1994): 1-28. Mackinnon herself favours civil, rather than criminal, legislation against pornography. The sort of civil legislation she advocates would enable individuals to sue in civil court both to put a future ban on the publication of specified sexually explicit material and to collect damages for the provable harm that its publication had done.

³ For the claim that the silencing argument rests on a “dangerous confusion”, see Ronald Dworkin, “Two Concepts of Liberty” in *Isaiah Berlin: A Celebration*, ed. Edna and Avishai Margalit (London: Hogarth Press, 1991), 103 and 108. Dworkin repeats this claim, along with the additional charge of absurdity, in “Women and Pornography”, *The New York Review of Books* Vol. XL, no. 17 (1993): 36-42, 40.

⁴ Frank I. Michelman, “Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation”, *Tennessee Law Review* 56 (1989): 291-319, 296n.13. However, this does not defeat the silencing argument in Michelman’s view.

⁵ *ibid.*, 295.

⁶ *ibid.*, 296n.13.

⁷ Dworkin, “Women and Pornography”, 38.

⁸ *ibid.*, 40.

⁹ Leslie Green, "Pornographizing, Subordinating and Silencing" in Robert C. Post, ed., *Censorship and Silencing: Practices of Cultural Regulation* (Los Angeles: The Getty Research Institute, 1998): 285-311, 303.

¹⁰ Daniel Jacobsen, 'Freedom of Speech Acts? A Response to Langton', *Philosophy & Public Affairs*, 24 (1), 1995: 64-79, 76.

¹¹ Dworkin, "Two Concepts of Liberty", 101.

¹² It may be, for example, that even if it turns out that consumption of pornography does in fact violate women's right to freedom of speech, some forms of anti-pornography legislation (e.g. wholesale criminal prohibitions on the production or consumption of pornography) are not justified: since the overall costs of legislation of this sort are likely to be too great and the benefits too small or uncertain. Other forms of legislation or state action (such as restrictions on the distribution, sale or display of pornography; or civil legislation of the sort that Mackinnon proposes; or punitive taxes on pornography to discourage its production and consumption; or public education campaigns about pornography's harms) may turn out to be permissible or preferable. Or they may not. These are important further questions, but I will not answer them here.

¹³ The silencing argument cannot be dismissed, as more orthodox harm-based feminist arguments against pornography have been, on the grounds that there is insufficient evidence of a causal connection between the consumption of pornography and crimes of sexual violence against women or that pornographers' right to free speech takes precedence over women's right to equality or autonomy. Pornography could no longer be defended on grounds of the supremacy of the right to free speech alone, if there were a legitimate sense in which pornography deprived women of their freedom of speech.

¹⁴ See, for example, Mackinnon, *Feminism Unmodified*, esp. 155-6.

¹⁵ Two notable exceptions here are Jennifer Hornsby and Rae Langton, both of whom draw on J.L. Austin's speech-act theory to distinguish different senses in which pornography might silence women. See, for example, Jennifer Hornsby "Speech Acts and Pornography", *Women's Philosophy Review* 10 (1993): 38-45, reprinted with a postscript in Susan Dwyer, ed., *The Problem of Pornography* (Belmont, Calif.: Wadsworth, 1995): 220-32; Rae Langton, "Speech Acts and Unspeakable Acts", *Philosophy and Public Affairs* 22 (4) (1993): 293-330; and Jennifer Hornsby and Rae Langton, "Free Speech and Illocution", *Legal Theory* 4 (1998): 21-37. Hornsby and Langton, however, take their distinctions to bear on the question of what free speech requires, rather than on what the *right* to free speech requires; and they concede that liberals will be reluctant to accept that the right to free speech includes "a right to another's grasping what [the speaker] means to say". In their view, however, this just goes to show "the limitations of a libertarian, negative liberty defence of free speech" (Hornsby and Langton, "Free Speech and Illocution", 36). If I am right, liberals need not, and indeed should not, accept the narrow libertarian view of the right to free speech.

¹⁶ For Andrea Dworkin and Mackinnon's definition see Andrea Dworkin and Catherine A. MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Minneapolis, MN: Organizing Against Pornography, 1988), 138-9; and Mackinnon, "Francis Biddle's Sister", 176.

¹⁷ This definition of pornography is, of course, somewhat rough and ready as it stands. There will be some sexually explicit material that harms women that we may not want to count as pornography—false anatomical representations of women in medical textbooks, for example. A complete definition of pornography would thus need to say more. But this rough, working definition will be good enough for present purposes.

¹⁸ See Mackinnon, "Pornography, Civil Rights and Speech", in Catherine Itzin, ed., *Pornography: Women, Violence, and Civil Liberties* (Oxford: Oxford University Press, 1992), 459.

¹⁹ Mackinnon, "Francis Biddle's Sister", 171.

²⁰ Mackinnon, "Pornography, Civil Rights and Speech", 483-484.

²¹ This is an attitude commonly expressed in letters to the editor in pornographic magazines.

²² Mackinnon, *Only Words*, 4, 5 and 10.

²³ I borrow cases 1 and 3, slightly amended, from Langton, "Speech Acts and Unspeakable Acts", 320-321. Langton suggests that there are two ways in which a woman's utterance of 'no' can fail. I think that there is a third, which I outline in case 2.

²⁴ Langton, "Speech Acts and Unspeakable Acts", 325. Of course, sometimes women who utter 'no' may not mean it. In which case, there will be no failure of comprehension here. My focus in this paper is on the possible cases where women who sincerely utter the word 'no' are deprived of the standard means of communicating the intended idea of refusal. But the silencing argument gives us as much reason for concern about women who play the game of invitation through feigned resistance as it will give us reason for concern about pornography which depicts women playing such games. For playing

that game may communicate to men the ideas that violate other women's right to freedom of speech (those who use the word 'no' to express genuine refusal) in just the way that pornography may.

²⁵ There is another possibility: The word 'no' is taken to literally mean no, but the hearer thinks that the word is not being used to express *anything*. It is neither being used to communicate acceptance, nor is it being used to express refusal. The hearer may believe that the woman utters the word 'no' because considerations of modesty, or deniability, or self-acceptance, or self-deception, or the possibility of guilt-free sex, require that she produce this token utterance, though she intends to communicate nothing to him by uttering it. He might, for example, believe that she utters 'no' so she can say to others (or herself) after the event that she said 'no'. This third possibility is perhaps not well described as a case where 'no' means yes. Nonetheless, it is a situation in which a woman's sincere utterance of 'no' in a sexual context fails to communicate the idea of refusal. It would therefore count as a case of 'scrambling' in my sense.

²⁶ See, for example, Rae Langton and Caroline West, 'Scorekeeping in a Pornographic Language Game', *Australasian Journal of Philosophy* 77(3), September, 1999: 309-319; Rae Langton, "Speech Acts and Unspeakable Acts"; and Jennifer Hornsby, "Speech Acts and Pornography". The three senses of silencing distinguished in this section correspond roughly to Langton's 'locutionary silence', 'perlocutionary frustration' and 'illocutionary disablement' respectively.

²⁷ It is crucial, of course, that consumers do not merely take the translations to apply to the utterances of fictional women in pornography, but draw on it in translating the utterances of actual women in the real world. The empirical evidence strongly suggests that consumers do acquire a range of beliefs about real women from pornography. The question of whether this amounts to evidence of the phenomenon of misunderstanding (or 'scrambling' as I will later call it) will be discussed in conclusion.

²⁸ In the discussion that follows, I will be granting liberals that a broadly deontological approach to free speech is correct. On this approach, freedom of speech is a value that should be honoured; and interfering with the free speech of individuals is a serious wrong in itself, even in order to promote a greater degree of freedom of speech overall. It is perhaps worth noting that the silencing argument might have an easier time of it on a consequentialist approach to the value of free speech, where interfering with the free speech of some (e.g. pornographers) might be justified on the grounds that it will promote more free speech overall (e.g. for women). Deontologists resist attempts to trade-off losses of free speech to some against greater gains for free speech overall. For a more general discussion of the difference between deontological and consequentialist approaches to values such as freedom of speech see Philip Pettit, "Consequentialism" in Peter Singer ed., *A Companion to Ethics* (Oxford: Blackwell, 1991): 230-240. For a more detailed exploration of a consequentialist approach to freedom of speech see Braddon-Mitchell and West, "What is Free Speech?", manuscript.

²⁹ The most common of these liberal justifications appeals to a free marketplace of ideas. The crux of the justification is that truth is most likely to emerge from a situation in which all competing ideas, however unpopular or ostensibly false, are freely expressed and debated by rational people. Through a process of unfettered debate, weight of evidence and force of argument will lead rational agents to choose to agree with the true ideas in the marketplace, while belief in the false ones will die out. Liberals have also defended the right to free speech on the grounds that uninhibited information flow and unfettered public discourse are crucial to individual autonomy and constitutive of a well-functioning democracy; that to prevent some individuals from expressing their opinions is an affront to their dignity and undermines the dictum that all persons should be treated with equal respect; and that the values of tolerance, moral independence, trust, progress, and diversity require allowing all individuals freedom to express and communicate their differing opinions to others. But, as Frederick Schauer notes, on all of these justifications what is important about free speech is the freedom to communicate ideas to others. See Schauer, *Free speech: a philosophical enquiry* (Cambridge: Cambridge University Press, 1982).

³⁰ Ronald Dworkin, for example, frames the question of the nature of the right to free speech in these terms. See Dworkin, "Two Concepts", 100-109. The "dangerous confusion" on which he takes the silencing argument to rest is the confusion of positive with negative liberty.

³¹ Schauer denies that non-governmental agents can ever violate freedom of speech. According to Schauer, the right to freedom of speech is the "liberty to communicate, unencumbered by government control but not necessarily unencumbered by other forms of control and not necessarily entailing the *de facto* ability to communicate". (*Free Speech*, 129.) For a persuasive argument to the contrary, see Michelman, "Conceptions of Democracy", 291-319.

³² "[T]ruth has no chance but in proportion as every side of it, every opinion which embodies even a fraction of the truth, not only finds advocates, but is so advanced as to be listened to", says Mill in *On*

Liberty. The quotation appears on page 180 of *On Liberty* in M. Warnock ed., *Utilitarianism* (London: Collins, 1962).

³³ Liberals such as Schauer will think that even in this case no violation of the right to free speech has occurred, since that right is only violated when such intervention is performed by a *government* agent.

³⁴ As, for example, Hornsby seems sometimes to suggest. Free speech requires "reciprocity"; and this obtains "when people are such as to recognize one another's speech as it is meant to be taken, and thus to ensure the success of attempts to perform speech acts" (Hornsby, "Speech Acts and Pornography", 224). As an account of what the right to free speech requires, this will be far too broad for most liberal tastes. For a critical discussion of this, see Green's "Pornographizing, Subordinating and Silencing".

³⁵ Of course, in the second case, the dictator also violates the rights of hearers.

³⁶ For those interested in some of the legal implications of this in the American context, Judge Easterbrook appeals to the mental-intermediation of pornography's message in upholding the decision earlier made by the District Court: that the Indianapolis anti-pornography ordinance (drafted by Andrea Dworkin and Mackinnon) was unconstitutional on the ground that it violated pornographers' First Amendment right to freedom of speech. See Hudnut, 771 F.2d 323 (7th Cir. 1985), 329-330.

³⁷ I am grateful to an anonymous referee for the *Canadian Journal of Philosophy* for bringing this point to my attention.

³⁸ Mackinnon, *Only Words*, 11.

³⁹ *ibid*, 11.

⁴⁰ Cass Sunstein, "Pornography and the First Amendment," *Duke Law Journal* (September 1986): 589-627.

⁴¹ Danny Scoccia, "Can Liberals Support a Ban on Violent Pornography?," *Ethics* 106 (1996): 776-799.

⁴² In fact, I suspect this line of argument is not right. Pornography is mentally-intermediated in the relevant sense. Or, at any rate, to the extent that pornography is not mentally-intermediated speech, it is not mentally-intermediated in the same sort of way as much political rhetoric and advertising; and, although liberals are suspicious of rhetoric and advertising for exactly this reason, they do not think they should be banned on these grounds.

⁴³ For a more detailed argument to this effect see Daniel Nolan and Caroline West, 'Liberalism and Mental Mediation', *The Journal of Value Inquiry*, forthcoming.

⁴⁴ In terms of the previous example: should the henchmen be allowed to implant the meaning scrambler in themselves?

⁴⁵ This is a four-dimensionalist way of putting the point. The issue deserves a fuller discussion than I have space to give it here.

⁴⁶ See chapter 3 of Part I of Derek Parfit's, *Reasons and Persons* (Oxford: Clarendon, 1984) for a similar discussion of contributive agency.

⁴⁷ Of course, how many speakers are prevented from communicating an idea—whether it be as a result of interference with production, distribution or comprehension of sounds, scrawls or gestures—may be relevant to the question of what policy response is justified. For example, if interference with communication of ideas is occurring in only a very small and limited domain then, even though such interference constitutes a violation of the speaker's right to free speech, heavy-handed legislative solutions may not be justified: for one might think that the costs of legislation will vastly outweigh the benefits in such a case. I take up this issue in the next section.

⁴⁸ Dworkin (in "Two Concepts of Liberty" and "Women and Pornography") has this worry about Mackinnon's statement of the argument, while Green (in "Pornographizing, Subordinating and Silencing") takes similar concerns to undermine the version of the argument that Hornsby recommends.

⁴⁹ This may not be enough. Those with republican sympathies will think that if there is a significant risk of interference with free speech, then protection may be necessary even if no interference is actually occurring. Not all liberals have these republican sympathies, but those who do will want to ensure that free speech not only obtains, but obtains in nearby worlds too.

⁵⁰ For a succinct summary of many of these research findings and methods see Edna F. Einsiedel, "The Experimental Research Evidence: Effects of Pornography on the 'Average Individual'" in Catherine Itzin, ed., *Pornography: Women, Violence, and Civil Liberties*, 248-283.