

ORIGINAL ARTICLE

Discursive democracy and the limits of free speech

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1 | INTRODUCTION

One of the most contested issues in modern democracies is the regulation of speech and expression. The U.S.A., Canada and European countries (to take a few examples) adopt different approaches to the problem. European countries legislate and enforce hate speech codes, whereas the U.S.A. does not. Consistent with the European Convention of Human Rights, many European countries outlaw certain forms of pornography. On the other hand, a narrowly drawn pornography statute, regulating only sexually explicit material that constituted subordination, was struck down by an American appeals court. The difference in legal approach tracks differences between academics. Liberals and feminists fall out over pornography legislation, and liberals and critical race theorists over hate speech codes. But feminists also divide over pornography regulation, and liberal scholars disagree over hate speech codes.

This essay approaches the controversy from an unexplored perspective: that of discursive, or deliberative, democracy. Within the framework originally formulated by Jürgen Habermas, and then explored further by Seyla Benhabib and Nancy Fraser, among others, it aims to locate the place of free speech, and limitations upon free speech, in a discursive democracy. It does so by specifically analyzing the controversy surrounding the regulation of pornography.

Through this analysis the essay aims to accomplish three goals: first, to provide fresh insight into free speech and constitutional law, by examining the issues within a different analytical model (that of discursive democracy); second, by applying the framework of discursive democracy to a specific constitutional controversy, to analyze how its abstract principles play out in concrete circumstances; and third, by examining how discursive democracy could deal with social inequalities and hierarchies, to respond to scholars such as Ian Shapiro and Chantal Mouffe, among others, who argue that its inability to incorporate differences of power renders it both theoretically incomplete, and practically undesirable.

The essay is divided into six sections. The following section discusses Habermas's abstract conception of discourse ethics. Section 3 examines how Habermas, and some of his interlocutors, instantiate discourse ethics through the structuring institutions of a constitutional democracy, with a specific focus on free speech. Subsequently, section 4 changes tack and analyses one type of feminist argument against the practice of pornography. Section 5 brings together the two strands of the article to answer the basic question: how ought discursive democracy deal with pornography? It concludes that there are good reasons to regulate certain forms of pornography. Section 6 examines four possible objections to the argument, three of which are internal arguments from within discursive democracy, while the fourth (the power-based objection) is an external critique.

2 | DISCOURSE ETHICS

Habermas's discourse principle (D) conditions the validity of action norms upon agreement by all possibly affected persons, as participants in rational discourse (Habermas, 1990, p. 66). Habermas understands a rational discourse as one in which "participants genuinely want to convince one another, [making] the pragmatic assumption ... that they allow their "yes" and "no" responses to be influenced solely by the force of the better argument" (Habermas, 1994, p. 31). For this, two basic conditions must exist, which I shall label the principles of inclusion and equality. The inclusion principle stipulates that "every subject with the competence to speak and act is allowed to [participate]" (Habermas, 1990, p. 89). Moreover, everyone may introduce any argument, question any assertion, and express any attitudes, desires or needs that she might have. The equality principle requires that "no speaker may be prevented, by internal or external coercion, from exercising his rights as laid down above" (Habermas, 1990, p. 89). It is only when the two principles are satisfied—that is, when everyone can both freely enter and participate in the discourse, and do so on an equal, non-coercive footing, that the results of the discourse enjoy a presumption of validity. The basic purpose is to achieve a "rationally motivated consensus" based on reasons acceptable to all (Finlayson, 2005, p. 44).

Importantly, action norms must emerge out of an actual discourse. Unlike Rawls, whose theory (or so Habermas claims) is monologic—that is, constructed from the vantage point of the individual, reflecting theorist—Habermas insists that the "intersubjective recognition of validity claims" requires "all affected to adopt the perspectives of all others in the balancing of interests" (Habermas, 1990, p. 65). This flows from Habermas's important insight that participants do not enter the discourse with their interests and preferences already formed. Rather, preferences and interests are constituted through and in discourse, as participants adopt each others' perspectives. This makes the inclusivity and equality principles all the more important, since the manner in which the discourse will affect, modify, and ultimately constitute preferences (and thus impact outcomes) will depend upon how it is structured and constrained. The challenge—in the real world—is to "actualize the ideal content of the presuppositions of argumentation under empirical conditions" such as finite time (Habermas, 1990, p. 92).

3 | INSTITUTIONALIZING D

Habermas institutionalizes D in the form of the democracy principle, which replaces norms of action with legislation. The legitimacy of statutes and laws in a modern state depends upon whether they can "meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted" (Habermas, 1998, p. 110). This is achieved through a familiar mechanism—a system of rights. A system of rights must "institutionalize the communicative framework for a rational political will-formation" (Habermas, 1998, p. 111). Rights guarantee each person equal participation in the process of legislation—that is, the process of generating those norms of action that are supposed to bind all the members of society.

Habermas views discourse as a bridging principle between two opposed conceptions of democracy: one based on human rights and the other on popular sovereignty. The former understands systems of rights as being designed to secure the private autonomy of the individual. Popular sovereignty, on the other hand, prioritizes public autonomy, that is, the "self-conscious realization of the ethical substance of a concrete community" (Habermas, 1998, p. 104). Opposed to both these, the discourse principle views public and private autonomy to be co-original.

This means that discourse is instantiated through a legal form, which establishes the framework "conditions for a discursive exercise of political autonomy." (Habermas, 1998, p. 122) But in order for discourse to take place (as we discussed), its "subjects [must] reciprocally recognize each other in their role of addressees of laws" (Habermas, 1998, p. 121). Thus, the legal form presupposes an abstract equality among participants. This abstract equality is guaranteed by a set of (also abstractly framed) basic rights resulting "from the politically autonomous elaboration of the right to the greatest possible measure of equal individual liberties" (Habermas, 1998, p. 121). At this stage, these rights have not yet acquired their familiar form as rights against the State: they are "unsaturated placeholders" (Maus, 2002, p. 95), but

simply guarantee an abstract private autonomy. They create the framework for the reciprocal recognition discussed above, within which discourse can take place.

By then applying discourse—that is, the equal participation in opinion-and-will-formation just described above—to the legal form, “private autonomy that was at first abstractly posited can retroactively assume an elaborated legal shape” (Habermas, 1998, p. 122). This is the circular process by which public and private autonomy are co-originally constituted: the structural framework within which discursive communication takes place is determined by basic rights framed at an abstract level, which, in turn, are concretely constituted by being subjected to discourse. The process is “self-referential ... insofar as it enables citizens to change and expand their various rights and duties or material legal status” (Habermas, 1998, p. 123).

The function of basic rights, therefore, is to institutionalize the procedural conditions under which discourse can take place, which ought to approximate as closely as possible to the abstract (equality and inclusivity) conditions of D. In Habermas’s model, however, these procedural conditions are restricted to the institutionalized public sphere—that is, parliamentary and legislative bodies, the Courts and so on. Beyond this lies the informal public sphere that is meant to be the site of informal processes of opinion formation (Habermas, 1998, p. 307). In a well-working system the formal public sphere is responsive to the opinion-and-will formation that goes on within the informal sphere via “a far-flung network of sensors that react to the pressure of society-wide problems and stimulate influential opinions” (Habermas, 1998, p. 300). While the task of the informal public sphere is “identifying and interpreting social problems” (Baynes, 2002, p. 18), ultimately, it is the formal public sphere, organized in accordance with the principles of discourse ethics, that can act through the making of policy or the passing of legislation.

Seyla Benhabib, and other thinkers such as Nancy Fraser, take this further by complicating the two-track model. They argue for not just one informal public sphere but a multiplicity of them. Benhabib’s vision is of an informal public sphere as a set of “loosely associated, multiple foci of opinion-formation and dissemination which impact each other in free and spontaneous processes of communication” (Benhabib, 1996, p. 74). Notice that each of these mutually overlapping networks is a network of “deliberation, contestation and argumentation” (Benhabib, 1994, p. 35), whose association with each other and ultimately, the formal public sphere, is what finally generates legitimate norms of action. Therefore, the way that these multiple networks are structured—that is, whether they, too, approach the ideal of discourse ethics by incorporating the conditions of inclusivity and equality, will directly affect the quality of the overall discourse and the outcome in terms of the final norms of action. The closer these networks approach the ideal, the closer we are to a thriving deliberative democracy.

4 | THE PROBLEM OF PORNOGRAPHY

Pornography is a contested term among both lawyers and philosophers. It is sometimes taken to mean sexually explicit material, which in turn, might be violent or non-violent, coercive or non-coercive. Alternatively, it has been defined as material that primarily aims at sexual arousal (or, in judicial language, the “prurient interest”). It has also been linked to the equally difficult concept of obscenity, with a focus on its tendency to deprave or corrupt its viewers (Rea, 2001).

For the purposes of this article, however, I take pornography to be “verbal or pictorial material which represents or describes sexual behaviour that is degrading or abusive to one or more of the participants in such a way so as to endorse the degradation” (Longino, 1980, p. 43; MacKinnon, 1985). Pornography so defined is to be distinguished from erotica, which is sexually explicit material premised upon the equality of participants (MacKinnon, 1985, p. 22). I choose this definition—and restrict my arguments to dealing with pornography so defined—because of the central place that it accords to the concept of equality (some constitutional courts have also understood it in this way) (see *Case v Minister*, 1996; *R v Butler* 1992). As I proceed to argue, elements of discourse that both reflect and endorse inequality create a unique problem for the legitimacy of discursive democratic theory.

One more preliminary point: while the debate over regulating pornography has primarily been conducted on the terrain of free speech and its limitations, some scholars argue that pornography presents no free speech problems at all, since it does not seek to win reasoned agreement for its message, but rather, bypasses the reasoning facilities

altogether; being oriented, as it is, to merely titillate or to incite against women (Koppelman, 2008). Our chosen definition of pornography, however, includes a broader set of practices than simply those aimed at sexual arousal. In any event, however, if this argument (with its contested psychological bases) is correct, then pornography, as a speech act, would fail the basic Habermasian test of being part of a discourse that aims to ensure the victory of the “unforced force of the better argument” (Habermas, 1998, p. 306). For the purposes of this article, therefore, I bracket this argument and proceed on the assumption that pornographic speech acts do indeed constitute part of the discourse, as understood in a Habermasian sense.

In the ongoing debate many liberal scholars defend pornography on free speech grounds (R. Dworkin, 1981; Green, 1998). Opponents point to the deterioration of social values, the impact of pornography on public culture, the potential direct harms that it may cause in terms of violence against women, and the danger of coercion in the production of pornography, and yet others defend the right of the majority to write its moral convictions into law (Devlin, 1965). Ultimately, the question turns upon balancing the freedom of expression against a number of countervailing values, with proponents and opponents agreed upon the costs and benefits—but quantifying them differently.

There is, however, another argument against pornography, itself based upon the freedom of speech. Simply put, pornography subordinates and silences women, and denies them their right to speak and have their voices heard in society. It is this argument that we shall evaluate in this section.

We can start by getting a simplistic version out of the way. Free speech opponents of pornography are sometimes taken to be making the following claim: by inundating the public culture with a certain portrayal of women, painting them as perpetually subordinate, pornography ensures that when women do try to speak in the public sphere, their voices will be ignored or ridiculed. This argument, as critics have pointed out, proves too much. It is based upon the unsustainable premise that the right to freedom of speech includes the right to have others listen to your arguments respectfully, and the right to have your arguments taken seriously. However, if that were the case, then—as Ronald Dworkin points out—we would have to extend the same consideration to flat-earthers, creationists and other such groups, and ban speech (such as scientific research) that would lead people to ignore or otherwise ridicule their opinions (Dworkin, 1993). That conclusion is untenable.

The mere fact that pornography causes women’s voices to be undervalued or ignored cannot, therefore, sustain a free speech argument for regulation. There must be something about the *manner* in which it does so. And an argument of precisely this sort—grounded in linguistic theory—is made by Rae Langton, Jennifer Hornsby, and Caroline West, among others (Hornsby, 1995; Hornsby & Langton, 1998; Langton, 1993; Langton & West, 1999). Let us examine it.

Following J. L. Austin, Langton and Hornsby divide speech acts into three kinds: locutionary, illocutionary and perlocutionary (Austin, 1975). Take the example of the statement: “shoot her.” The locutionary act refers to the meaning, or content of the words—that is, “shoot” means “shoot with a gun,” and “her” refers to the woman standing nearby. The perlocutionary act is that which is done by saying the words (for example, A *persuaded* B to shoot her). The illocutionary act, on the other hand, is the performance of an act in saying the words (A *commanded* B to shoot her). The difference between perlocutionary and illocutionary acts—the difference between the “by” and the “in”—is that perlocutionary acts “introduce the idea of extra-linguistic or incidental consequences of speaking—of, as it were, further things that are done for which the conventions attaching to forms of speech do not by themselves provide” (Hornsby & Langton, 1998, p. 24). Illocutionary acts, on the other hand, take place within the linguistic domain.

We can see immediately that our rejected free speech argument fails because it does not distinguish between perlocutionary and illocutionary effects. Any argument based exclusively on perlocutionary effects seeks to provide the speaker control over what Hornsby and Langton call the extra-linguistic or incidental consequences of her speech, and run into the Dworkinian objections—as well as the others—that we outlined above.

Hornsby and Langton, however, base their argument on illocutionary effect. Again, going back to Austin, a speech act can “misfire” when some of the conditions required for its felicitous completion are not met (for example, a woman’s pronouncing of the *triple talaq* to her husband misfires because she is not a man, which is an authority condition necessary to perform *talaq*). One important condition for the success of illocutionary acts is the condition of reciprocity: that

is, sharing a communicative background that allows us to recognize when our conversational partner is undertaking a locutionary or illocutionary act. "This minimal receptiveness," Hornsby and Langton argue

does not mean that a hearer will agree, or is even capable of agreeing, with what a speaker is saying; but it does mean that a hearer has a capacity to grasp what communicative act a speaker might be intending to perform.
(Hornsby & Langton, 1998, p. 25)

Pornography, they argue, causes the illocutionary disablement of women by affecting this condition of reciprocity. And that is a problem because "whether or not another will grasp what one means to say bears on one's freedom as a speaker" (Hornsby & Langton, 1998, p. 36).

Illocutionary disablement, in turn, is of two types: ineffability (not being able to say what one means) and inaudibility (not being heard). Ineffability occurs when, "given existing social arrangements, prevailing beliefs, and distributions of power" (Hornsby, 1995, p. 127), the use of certain concept-words entails committing oneself to consequences that one does not wish to endorse (Hornsby takes the example of the word "quota" in the U.S.A. and how its appropriation by the right has made it synonymous with something unfair or undesirable—but that the practice itself cannot be described in any other way apart from engaging in circumlocution).

Specific to pornography, however, let us focus on inaudibility (which often merges with ineffability, in specific cases). A familiar example of inaudibility is the case of a refusal of sex. A climate of pornography creates what Hornsby calls "the presumption of insincerity" when a woman says no to sex (it is important to distinguish this from a situation in which pornography conditions men to simply disregard a woman's "no," while understanding it fully). And "where a presumption of a speaker's lack of sincerity is in place," Hornsby argues:

it is impossible for a speaker, with however much sincerity she actually utters "No," to be taken as refusing ... ensure[ing] a breakdown in the kind of communication constituted by successful illocutionary acts for which reciprocity ordinarily provides. (Hornsby, 1995, p. 127)

It is in this sense that we must understand the proposition, "pornography silences and distorts the voice of women."

The influence of pornography upon women's speech arguably extends further than sexual refusal. Portraying women as incapable—or always unwilling—to say no to sex is part of a broader story that pornography tells about women's lack of personal and political agency (A. Dworkin, 1981; MacKinnon, 1993). This has the effect of silencing and distorting women's voices across the board. One particularly relevant effect of this is something that we are familiar with from our daily experience and from sociological studies: in a corporate, political, or otherwise public setting, the same suggestion (or proposal, or argument) is treated differently, depending upon whether the person making it is a man or a woman. For instance, a proposal made by a woman rather than a man is treated less seriously and is more liable to be dismissed, simply by virtue of the fact that it was made by a woman (Tannen, 1994). Based on the above analysis, we are now in a position to theorize this widespread phenomenon as another case of illocutionary failure. Denied public or political agency, women's proposals or suggestions, while they are in no substantive way different from men's, are considered to be outbursts of emotion or that of unthinking irrationality. In other words, the illocutionary act of making a rational argument in the public sphere is a move in the language game that is denied to women. Instead, they are either silenced (they cannot perform certain kinds of illocutionary acts at all) or their voices are distorted (they are taken to be performing another kind of illocutionary act altogether).

Again, it is important to distinguish this situation from the kind of speech-act failure that Dworkin and others invoke in their flat-earthers example. Sticking with the illocutionary/perlocutionary distinction for the moment, the flat-earthers' failure remains a failure to persuade—a perlocutionary failure. Their audience has no trouble in understanding their claims. Thus, the case of the woman-in-the-public-sphere involves questions of the equality of participants in a manner that the flat-earthier's case does not. The flat-earthier's case demonstrates that not all arguments are treated equally, or listened to with the same respect. The woman's case demonstrates that not all participants are treated equally, or listened to with the same respect.

The problem should now be obvious. We had noted two abstract principles that constitute D: inclusivity and equality. We can now see that in concrete situations, the two principles may be in tension with each other.

Complete inclusivity—including pornography—can diminish the equality of participation. And, on the other hand, ensuring the equality of participation might require us to exclude certain forms of expression, such as pornography (it might, of course, be objected that excluding pornography is only to exclude a certain speech act, whereas the inclusion principle is concerned with persons. However, as both Habermas and Benhabib make clear, the right to participation includes the right to introduce any kind of idea or argument—in the words of Benhabib, there can be no *prima facie* rules “limiting the agenda of the conversation” (Benhabib, 1996, p. 70). This would therefore concomitantly include the right to choose the manner in which to express it). In the next section, we examine this claim in further detail.

5 | DISCURSIVE DEMOCRACY AND THE LIMITS OF FREE SPEECH

The argument of illocutionary disablement—as Hornsby concedes—would not be accepted by scholars who view the freedom of speech as a negative liberty (such as Dworkin, who argues that there is no [free speech] right that anyone else grasps what one is saying). For such scholars, as long as one is able to complete the locutionary act—that is, free of “literal obstacles like gagging, drowning out, or arrest by the police” (Hornsby, 1995, p. 140), the freedom of speech is satisfied.

While I think the objection is misplaced, this is not a debate that we need to settle in the abstract. Whether or not illocutionary disablement ought to raise free speech concerns in general, it certainly ought to leave a discursive democrat concerned. Recall that individuals do not enter the discourse to advocate preformed interests and preferences. Rather, preferences and interests are constantly being revised, modified, shaped, and constituted by the discourse, through the intersubjective adoption of different roles. This would be impossible if all that was happening was locution, and if there was a breakdown in communication that caused the systematic illocutionary disablement of one set of participants. The point is put in clear perspective by Ishani Maitra, in making the distinction (in response to Dworkin and others) between recognition and persuasion: “we value freedom of speech in part because we want the minority and the powerless to be able to successfully communicate their ideas, regardless of whether those ideas prove to be persuasive” (Maitra, 2009, p. 323). This dimension, that Michelman calls “hearer reception” (Michelman, 1989, p. 291), is as important a part of free speech (forming, as it does, the basis of a discursive democracy) as unhindered locution itself, and “requires that agents not act in a way that so as to deny speakers any of the conventional ways of communicating ideas” (West, 2003, p. 409).

This permits us to add a third principle to Habermas’s preconditions of abstract discourse. In addition to equality and inclusivity, deliberative discourse must also be premised upon effective illocutionary communication. This principle flows from the idea that it is through discourse that preferences and interests are constituted and shaped. A central function of the discourse is to allow individuals both to “express and formulate their preferences in public” (Benhabib, 1994, p. 30) If the outcomes of the discourse are to enjoy the presumptions of validity or legitimacy then, the discourse must be sensitive to impediments—external or internal—that come in the way of either expression or formulation.

It might be argued here that there is no need for a separate third principle, since Habermas’s idea of internal coercion, as a feature of the equality condition, can do the job of effective illocutionary communication. While it is true that our discussion of subordination and silencing is, ultimately, an argument about (structural) inequality, I think that there are two reasons why we nonetheless need a third principle. First, coercion itself is a contested concept and it is too unfocused for the very specific problem of illocutionary disablement that we have identified. And second, even if we were to understand illocutionary disablement as an aspect of the equality principle, we would still need a further reason why, in the case of a stalemate, equality ought to prevail over inclusivity. Considering illocutionary disablement as a separate principle in its own right (and as we have seen, there are good reasons within discursive democracy for doing so) allows us to break the stalemate in situations where inclusivity and equality are in tension with each other.

The importance of the third principle becomes evident when we probe the basis of the inclusivity principle as well. According to Williams, inclusivity is conceptually connected to impartiality and the absence of bias (Williams, 2000,

p. 126). In order for action norms to be impartial in the interests of all concerned, we must have complete information that is brought to bear upon the discourse by everyone concerned. Dryzek, therefore, advocates an “educative mechanism” that would promote the participation of persons with “material interests ... who might otherwise be left out” (Dryzek, 1990, p. 43). And as Habermas himself makes clear, “nothing better prevents others from perspectively distorting one’s own interests than actual participation” (Habermas, 1990, p. 67). But the feminist arguments against pornography challenge this very presumption: sometimes, more participation doesn’t prevent distortion, it actually promotes it. This is why mere inclusivity is incomplete and we need a separate principle that qualifies the normative role that we want inclusivity to play. I suggest that the principle of effective illocutionary communication can do that job. Consequently, while effective illocutionary communication contains elements of both the equality and the inclusivity principles, it is reducible to neither, and plays a valuable role if we treat it as a separate constitutive element of the discourse in its own right.

To sum up: mere locution in the classically liberal conception of free speech, cannot do the job of preference-and-interest formation that is at the heart of discursive democracy. Indeed, the argument goes one step further. Scholars in the discursive democracy tradition treat discourse as not only about formulating interests but about formulating identities. The contribution of dialogic moral practices towards the “intersubjective constitution of the self” (Benhabib, 2007, p. 51) is an idea that unites Honneth, Benjamin, and Benhabib, and is articulated with particular force by Fraser. “Participation,” she argues:

is not simply a matter of being able to state propositional content that is neutral with respect to form of expression. Rather ... participation means being able to speak “in one’s own voice,” thereby simultaneously constructing and expressing one’s cultural identity through idiom and style. (Fraser, 1990, pp. 68–69)

And if it is true that the self exists only within “webs of interlocation” (Taylor, 1990, p. 39), then—as Benhabib argues—“the task of the state [should] be to preserve in general those social practices and instantiations that aid in the most equitable and integral development of the human person.” (Benhabib, 2007, p. 56)

6 | FOUR OBJECTIONS CONSIDERED

6.1 | The two-track model

Recall that in Habermas’s model, conditions of discourse structure only the formal public sphere. At first blush, then, it may simply be argued that none of this is relevant to the informal sphere. If we focus more closely upon the role that the informal sphere plays in Habermas’s theory, however, the problem is not so easily solved.

Habermas argues that the job of the informal public sphere is to detect, identify, and thematize problems for the formal public sphere to take up. But if this is true, then the nature and structure of the informal public sphere is as important to the ultimate validity of legal norms as is the structure of the formal sphere. Surely, therefore, the informal “public sphere must be relatively free of serious distortions and blockages in communication” (Rehg & Bohman, 2002, p. 42). Consequently, the two-track model becomes problematic if one of the tracks (the informal public sphere) is subject to constant distortion. As Garnham puts it, “it is on the basis of understandings drawn from those communicative experiences and of identities formed around them that we arrive at more overtly rational and political opinions and actions” (Garnham, 1992, p. 374). This means two things: first, the kind of information that filters from the informal to the formal public sphere will itself be distorted, if the communicative practices within the informal sphere are distorted. And second, to a degree, there is an overlap between the participants of the formal and informal spheres: judges, lawyers, legislators, and public officials—who are responsible for working the formal public sphere where D is instantiated—are also, inevitably, participants in the informal sphere. Consequently, subordination and silencing will inevitably be carried over with the participants as they move between the two spheres. So not only will the information that gets to the formal public sphere suffer from distortion—but even more severely, the discourse within the formal public sphere (already affected by this) will itself be distorted.

As Nancy Fraser puts the point. Habermas's

conception assumes that a public sphere is or can be a space of zero degree culture, so utterly bereft of any specific ethos as to accommodate with perfect neutrality and equal ease interventions expressive of any and every cultural ethos. [But] in stratified societies, unequally empowered social groups tend to develop unequally valued cultural styles. The result is the development of powerful informal pressures that marginalize the contributions of members of subordinated groups both in everyday life contexts and in official public spheres. (Fraser, 1990, p. 64)

Fraser uses this insight to argue that we cannot bracket serious social inequalities when we sit down to deliberate in the public sphere, whether formal or informal—but rather, the public sphere(s) should be structured so as to eliminate these inequalities. Thus, if pornography is a mechanism of structural social subordination, then its a priori elimination from the discourse (through legal regulation) can be justified as a step towards achieving social equality, without which the discourse will remain permanently distorted (it may be argued that the real problem is not so much as free speech and distorted speech, as it is patriarchy itself. It is true that the underlying problem—as Fraser points out—is that of structural subordination. However, we are here concerned with a narrower issue: if the source of legitimacy of legal norms in a democracy is the effective institutionalization of D, then how are we to deal with one specific outcome of subordination—that is, the distortion of discourse?).

6.2 | The limits of the recursive process

In the previous section, we discussed the co-originality of private and public autonomy in Habermas's model. The model is circular:

in the form of subjective private liberties the legal code pre-exists for law-making and constitutional law-giving citizens, but only as the "deep grammar" of the language of law that must be transformed into the surface structure of the language of law by speakers themselves in order to be enacted at all. (Maus, 2002, p. 94)

This recursive relationship has been picked up by a number of scholars working in the Habermasian tradition.

It might therefore be argued that this recursive relation counsels against any limiting or curtailing of basic rights a priori. Since rights are constantly up for concretization, renegotiation, modification, and adaptation to specific social and historical contexts (Fraser, 1990), via the validating conditions of a properly constituted discourse, it is the discourse that should determine their concrete content. Benhabib provides the most important defence of the recursive process: "these normative constraints of discourses would themselves be subject to discursive validation; the rules of the conversation could themselves be challenged within the conversation itself" (Benhabib, 1994, p. 38). Because everything is subject to change and modification and challenge via discourse, there is no justification for any a priori exclusion.

But notice, however, that this puts a great deal of pressure at the meta-level—that is, the process through which recursive validation takes place. If it is true that basic rights, in their concrete forms, "result from the politically autonomous elaboration of the right to greatest possible measure of equal individual liberties"—then, as one scholar points out, even within the overall circularity, equal participation in the democratic legislative process is given precedence over particular formulations of liberal basic rights (Maus, 2002, p. 95). This implies that the procedural conditions that frame the discourse cannot themselves be subject to the process of recursive validation that takes place within the discourse, because it is those framing conditions that make recursive validation possible. To take an example—we cannot set up a discourse that expressly excludes a group of people from participation (e.g., slaves) and then argue that if at all they deserve to be brought in, the recursive process will ultimately ensure that they are (and incidentally, this is another argument in favor of a third principle to break the tie between inclusivity and equality).

As argued above, the scope of the right to free speech constitutes the discursive process, and instantiates D within the constitutional State. The right to free speech—its content, what it allows and what (if anything) it excludes—therefore sets the procedural conditions upon the conduct of the discourse, and cannot be itself subjected to the

process of recursive validation that it constitutes. So, while every other basic right or liberty is legitimately up for change and modification via the recursive process, the scope of the right to free speech must be the exception. Thus, when Benhabib quotes Dryzek's point that "participants should be free to reflectively and discursively override any or all" features of deliberative democracy (Benhabib, 1994, p. 44), this allowance cannot be extended to the ground rules, or discursive constraints, that make it possible for participants to do just that—that is, reflectively and discursively challenge and override contested features. And if pornography forms a background culture that distorts discourse and denies the very possibility of an inclusive and equal public sphere, then it is equally obvious that as long as such a form of expression continue to pervade the public culture, the recursive validation will not take place—and indeed, there is a stronger possibility of perpetuating an already distorted discourse.

To put it another way: Habermas believes that the basic rights do not present a finished structure, but are open to constant appropriation and re-appropriation, and are "fallible and revisable ... [and] realize[d] ... anew in changing circumstances" (Habermas, 1998, p. 384). The fallibility of the basic rights, however, is tolerable to us precisely because there is always an option—via institutionalized communicative freedom—to rectify present flaws.

By the same logic, however, it is clear that the processes of communicative freedom themselves cannot be given the same leeway, because it is those very processes that make it possible to appropriate and re-appropriate, revise and realize anew, and always keep open the possibility (an essential condition of legitimacy in the Habermasian world) of rectifying flaws. To put it simply: the Habermas–Benhabib vision is one of self-correction through discourse, whereas the issue of pornography, being part of a distorted discourse itself, cannot be self-corrected in that way. Chantal Mouffe puts the point well when she quotes Cavell: "What if there is a cry of justice that expresses a sense not of having lost out in an unequal yet fair struggle, but of having from the start being left out?" (Mouffe, 1999, p. 750).

The argument against pornography is precisely that it leaves something out from the start, and this incompleteness ensures that the discourse cannot run itself pure. Hence, we can agree with Gutmann and Thompson when they make the proposition that "deliberation must be part of any strategy to break out of the cycle of injustice created by background inequalities" (Gutmann & Thompson, 1998, p. 134). Certainly, deliberation must be a part of the strategy, but we must also take care to structure it in such a way that it actually ensures *breaking out from*—and not *perpetuating*—the cycle of injustice that we find troubling.

Of course, it might be argued that the very fact that the free-speech concerns of feminists and minorities are now on the table implies that in the long run, the discourse does run itself pure (a point Fraser makes while chronicling the efforts of feminists to politicize the hitherto "private" issue of domestic violence). To this, we may respond that the issue is not yet decided: despite their struggles, the voices of women and minorities are routinely distorted and silenced. In any event, it seems somewhat unfair to place the burden of clearing blocked channels of communication upon precisely those who are excluded, and treating the inevitable time that such processes take as necessary costs.

6.3 | Over-inclusion, under-inclusion and redundancy

The success of our theoretical argument depends upon pornography actually causing illocutionary disablement in the manner that we have outlined. As Langton concedes in her response to Leslie Green, this is a "contingent, context-dependent matter ... [that] cannot ... wholly ... be answered from the philosopher's armchair" (Langton, 1998, p. 264). While a conclusive, social-scientific empirical demonstration is beyond the scope of this article, here I simply wish to point out that there does exist enough evidence to make the argument plausible. Unlike controversial claims linking the consumption of pornography with sexual crime, the argument here relies upon

more moderate empirical claims about which there is likely to be more agreement ... that pornography helps to form and reinforce the view that women are sex objects, which manifests itself in how women are perceived and treated in society and so perpetuates women's inequality. (West, 2013)

links that are partially "common-sensical ... [and] already available from social learning theory" (Einsiedel, 1992, p. 267; Linz & Malamuth, 1993, Ch. 4). Beyond that, however, social science researchers have broadly divided the impact of pornography consumption into "arousal," "attitudinal" and "behavioral" (Harris & Bartlett, 2009). With

respect to the second (which is what concerns us), successive studies have shown that in laboratory conditions, violent sexually explicit materials mediated by “message cues” (such as an endorsement of sexualized violence) do bear a relationship with attitudinal changes, such as acceptance of rape myths, one of which is refusal of sexual relations (Einsiedel, 1992). With respect to non-violent, degrading material, although the link is more tentative, there is still some evidence of it, and there does seem to be a difference in the effects of degrading and non-degrading material (erotica) (Einsiedel, 1992; West, 2013). Of course, there remain two questions that this article cannot answer here: first, can social science come up with a test that is fine-grained enough to capture something as potentially illusive as systemic illocutionary disablement? And second, what is the strength of social science evidence that may justify the exclusion from the discourse of illocutionary material causing disablement (perhaps that question needs to be answered through the discursive process)?

However, in addressing this question of over-inclusion, we open ourselves to an immediate objection from the other side. Surely pornography, as defined in this article, is not the only form of expression that contributes to the illocutionary disablement of women? There are other, subtler ways in which the same message about women’s agency and role in the public sphere is communicated to consumers. This is a familiar objection (Skipper, 1993, p. 726), and one that has no straightforward answer. However, the purpose of this article has been to identify a specific kind of speech act (pornography) that has a specific outcome (the illocutionary disablement of women), and to show how discursive democratic theory ought to deal with this while concretizing D in a constitutional state. As we begin to examine other, more subtle speech acts, we will have greater problems of identification (that is, identifying and defining speech acts that cause illocutionary disablement), and greater burdens of justification to overcome if we want to exclude a greater part of the discourse. There may, at some stage, come a point when even if illocutionary disablement is proven, the violation of the inclusivity principle becomes too great to countenance, and that instead of straightforward exclusion, other remedies (such as amplifying the voices of the disabled through mechanisms such as increased speaking time and publicity, and so on) must be explored.

This, however, also leads us to a further, deeper objection. As should be obvious by now, illocutionary disablement is a consequence of a stratified society with substantial differences in power. One criticism of discursive democracy is precisely that it is insensitive to the differences of power between the participants of the discourse (of which pornography is an example), and this insensitivity is fatal to the theory as a whole.

Let me at the outset distinguish between two forms of the critique. A more skeptical version has it that discursive democracy fails on its own terms because it is a “conceptual impossibility” that discourse can ever be free of “power and antagonisms,” which have an “ineradicable character” (Laclau & Mouffe, 2001; Mouffe, 1999, p. 752). As a variant of this position, Ian Shapiro argues that “the Habermasian enterprise [that is, getting rid of unequal power relations] consists of setting as preconditions for democratic politics the very issues that give rise to the need for them” (Shapiro, 2003, 2012, p. 313).

However, this ignores the fact that there is plenty of scope for democratic politics even in a discourse in which illegitimate power differentials have been eliminated—issues of distribution and coordination problems, to name just two (Finnis, 1980, p. 276). It also seems to ignore the fact that the purpose of the discourse is not simply for the participants to express their preferences, needs or identities, but to formulate them as well.

Shapiro also argues—and this is the narrower critique—that the pervasiveness of power relations in society means that devising a “set of constraints that ... would banish the threats of power and coercion from political debate” (Shapiro, 2012) is impossible. The problem of power has not gone unnoticed in the deliberative democracy tradition. Habermas himself argues for mitigating powerlessness in its most severe form by arguing for a category of “social and ecological rights,” describing them as “rights to the provision of living conditions ... insofar as the current conditions make this necessary if citizens are to have equal opportunities to utilize ... civil rights” (Habermas, 1998, p. 123; Olson, 1998). As we have seen in section 6.1 above, Fraser’s entire conception of subaltern counter-publics is an attempt to respond to the inevitability of unequal power and hierarchies in society. And in this article, I have attempted to take Fraser’s insight forward, and through the principle of effective illocutionary communication, develop one method by which the impact of illegitimate hierarchies can be mitigated when it comes to participation in discourse. While it may be true that removing all such impediments to participation in the discourse is impossible, the claims of this article are

not quite so ambitious: here, I have merely endeavored to show that deliberative democracy contains the necessary tools to address and respond to the manner in which real-world hierarchies can and do distort discourse, and potentially prevent the fashioning of legitimate outcomes.

6.4 | The monologic problem

We now have a positive case for excluding pornography from the formal and informal public spheres, which is justified by the structuring conditions of discursive democracy. One possible (but by no means only) way would be to enshrine a constitutional right to free speech, but take pornography out of its ambit.

However, there are two problems that remain to be tackled. First, the condition of inclusivity is violated: certain forms of expression, and certain individuals who wish to participate through those forms of expression, are excluded. As discussed above, there seems to be a conflict between the conditions of inclusivity and equality. In a sense, the contradiction is written into the abstract conditions of D, because Habermas makes it clear that no participant can be subject to external or internal coercion. Our principle of effective illocutionary communication breaks this impasse, brings a sharper focus to the concept of internal coercion, and adds a normative gloss to the principle of inclusivity.

This, however, seems to be bringing us closer to Rawlsian territory, by introducing thicker and thicker ethical assumptions as preconditions of discourse. Effective illocutionary communication (or, for that matter, internal coercion) could now end up doing much of the work that “reasonableness” does in Rawls’s theory (Rawls, 2005). Although formally it acts as a condition of procedural validity, as we introduce more normative content into the procedural stage, at some point we will begin to smuggle in our own preferred outcomes as inbuilt constraints upon discourse. And this is the classic objection that discursive democrats bring to bear against Rawls. One of the three basic ways in which Benhabib distinguishes discursive democracy from Rawlsian thought is by taking issue with how Rawls imposes “certain standards upon how individuals, institutions, and agencies ought to reason about public matters ... [and these] standards for public reason are set by a political conception of liberalism” (Benhabib, 2007, p. 108).

The potential similarities with Rawls lead us to a second, possibly more important, problem. A crucial way in which Habermas sets his theory apart from that of Rawls is by criticizing Rawls’s monologic approach. Habermas argues that action norms must emerge out of an actual discourse, not one that is constructed in the mind of the solitary, reflecting theorist. If that is the case, however, *a priori*, substantive restrictions on the discourse must be anathema to Habermas, because they are imposed in precisely the monologic manner that he dislikes. We saw previously that scholars in the Habermasian tradition have tried to deal with the obvious problems that this poses (exclusion of racist and bigots) by invoking the recursive validation process of discourse, and we also saw how recursive validation fails to work in the case of distorted discourse itself (Olson, 1998, p. 225).

Fraser also emphasizes this, although in a different context. Taking the example of the feminist counter-public in 1970s America, which after a sustained effort, managed to make domestic violence a matter of public concern, she argues that “what will count as a matter of common concern will be decided precisely through discursive contestation. It follows that no topics should be ruled off limits in advance of such contestation” (Fraser, 1990, p. 71). This assumes, however, as we have stressed above, that the process of discursive contestation is working as it should, and that is precisely what is at stake when issues such as pornography are involved. If pornography distorts the discourse, then its exclusion must, *ex hypothesi*, be monologic; in other words, it has to be ruled off limits in advance of contestation, because otherwise it will skew the process of contestation itself.

It might be suggested that instead of a monologic proposal to exclude pornography from the discourse, it is better to characterize my argument as taking place within the discourse: that is, a proposal that is advanced from the vantage point of a participant instead of a theorist, and can be taken up and deliberated upon by other participants. As Rainer Forst suggests, it must be through the discourse that “claims are raised and veiled structures of power and inequalities masked as equalities come to the fore” (Forst, 1993, p. 302).

However, this perspectival shift to get rid of the monologic problem may raise more questions than it answers. Iris Marion Young correctly points out that “politics does not have a beginning, an original position. It is always a process in which we are already engaged” (Young, 1990, p. 190). The argument that pornography ought to be excluded from the

discourse, therefore, can be made only within a discourse that has already been distorted by the impact of pornography, and consequently, may not produce the legitimate outcomes that a Habermasian desires. We are simply back to the limits of recursive validation that was discussed above.

And second, even if the case for excluding pornography were to succeed, we have an intergenerational problem: given that the decision to exclude certain elements from the discourse will have an effect not just upon present participants within the discourse but future participants as well (the next generation, for instance, that will enter a discourse that has been purged of pornography), it must be asked to what extent can one generation bind the next by altering the character of the discourse.

Ultimately, the problem may be intractable. As Benhabib observes, the normative constraints upon discourse—which she describes as the two principles of equal moral respect and egalitarian reciprocity actually entail “strong ethical assumptions” (Benhabib, 1992, p. 29). One of these strong ethical assumptions, it would seem, must be a robust free speech principle that comes with inbuilt limitations upon those aspects that distort discourse, such as pornography.

Indeed, Benhabib seems to say as much when she directly addresses the charge of circularity and the question of the participation of the racist, the sexist, and the bigot in the discourse. The two principles of equal moral respect and egalitarian reciprocity are, of course, not shared by racists and sexists, so on what terms—if any—are they entitled to participate? Benhabib grants that they have the right to challenge these basic principles, but only within the moral conversation; that is, they can argue against equal moral respect and egalitarian reciprocity, but only by engaging in argument under structural conditions that instantiate equal moral respect and egalitarian reciprocity, and convince others of their viewpoint by participating in the discursive process, subject to its normative constraints. “By allowing that the presuppositions of the moral conversation can be questioned from within the conversation itself,” she argues, “they are placed within the purview of argumentation. But insofar as they are pragmatic rules necessary to keep the moral conversation going, we can only bracket them in order to challenge them but we cannot suspend them altogether” (Benhabib, 1992, p. 32). In this vision, then, there is an idea of what constitutes the moral conversation (with strong ethical assumptions)—a conversation that is conducted within the structural conditions of moral respect and egalitarian reciprocity.

The point is, however, that whatever the ethical thickness of the content with which we fill in moral conversation, again, it seems to be monologic. It cannot be the outcome of the discourse (and neither can it be co-original), but must prefigure it, in order that the moral conversation might happen. This becomes obvious in the specific examples that Benhabib invokes, when talking about the contested history of the public/private divide and the women’s movement. “Distinctions such as between justice and the good life, norms and values, interests and needs,” she argues, “are ‘subsequent’ and not prior to the process of discursive will formation ... as long as these are renegotiated, reinterpreted and rearticulated as a result of a radically open and procedurally fair discourse” (Benhabib, 1992, p. 110). It is the last part that is crucial, because the phrase “radically open and procedurally fair” does seem to contain strong, inbuilt ethical assumptions. And our endeavor has been to show that a discourse that has pornography as part of it or that takes place in a cultural background in which such expression is rife, cannot be a “radically open and procedurally fair discourse.” Thus, the renegotiation, reinterpretation, and re-articulation that Benhabib correctly deems crucial to the success of the discursive democratic project cannot take place.

Perhaps, however, there is a different upshot to Benhabib’s argument. Perhaps her point is that the pornographer is perfectly entitled to challenge the norm excluding pornography, only he cannot use pornography to do so. This is similar to Waldron’s argument for the regulation of hate speech. Countering claims that this effectively silences the racist, or the holocaust-denier, Waldron claims that those parties have every right to exercise their free speech in opposing hate speech laws and calling for their repeal—as long as they do it through permitted channels of discourse (Waldron, 2012).

In the context of Habermasian discursive democracy, however, there are at least two problems with this argument. First, considering the importance of communication to preference-and-identity formation, effectively blocking out a category of speech-acts for persons who consider those speech acts central to their formulation of preferences and identities undermines the equality principle. It is no surprise, for instance, that Benhabib herself understands the discourse-structuring norm of (what she calls) “egalitarian reciprocity” as requiring that “each [participant] should have the same right to various speech acts” (Benhabib, 2007, p. 107).

Second, we are faced with the following problem: what do we do if participants in an undistorted discourse select norms of action that will have the future effect of distorting the discourse? What if, for example, it is true that pornography does distort and silence the voice of women—but it turns out that a norm permitting pornography is the outcome of a discourse that was free of pornography—and therefore “radically fair and open”? Theories of discursive democracy do not—to my knowledge—provide us with the tools to decide this question. Yet it is also worthwhile to note that, with their focus on actual reasoning and deliberation, theories of discursive democracy—for all their attempts to instantiate an ideal-speech situation—cannot be blind to existing structures of power, hierarchy, domination, and subordination at any given time. Thus, perhaps questions such as pornography are best approached not from the perspective of building institutions and creating constitutional frameworks that try to instantiate an ideal-speech situation in the abstract, but also from the perspective of correcting existing deviations from the ideal-speech situation, deviations caused by social inequalities and domination. This, broadly, is the thrust of Williams’s argument when she calls for an “account of the circumstances—both sociological and institutional—under which deliberative processes can avoid structural bias against already disadvantaged groups” (Williams, 2000, p. 142). This article has been an attempt to provide one such account.

Thus, in sum: in our arguments we have tried to show that the moral conversation that is true to Habermas’s original vision requires the exclusion of pornography. Speakers within the discourse can still advocate it but they must do so under constraints that exclude them from using it, and exclude its practice more generally in the public culture. The decision to exclude pornography, thus, while open to contestation, must form part of the normative, structuring constraints upon discourse. In the sense that it is not an outcome of discourse, it is monologic.

Notice, however, that it is not entirely so. The very fact that we are conceptualizing pornography in the terms that we are—as distorting and drowning out women’s voices in the discourse—is precisely because successive generations of feminist scholars, writers and other advocates have managed to bring this issue into the discourse despite its distorted nature (Fraser, 1990). A decision to regulate pornography, then, might be better understood—and justified—not as an a priori constraint upon discourse, but as the result of according a special importance, or a presumption of validity, to claims about discursive inequality made by historically excluded and marginalized groups (Williams, 2000). While I cannot explore this suggestion in greater detail here, I leave it as a possible point of departure for considering other, similar controversies, such as hate speech regulation and so on.

7 | CONCLUSION

The issue of pornography raises some conundrums in the context of institutionalizing the discourse principle in a constitutional state. Pornography arguably distorts and silences the voices of women in a way that free speech, classically understood as a negative liberty against external coercion, need not be sensitive to; but discourse ethics, with its focus on shaping both preferences and identities through discourse, must take into account. The present model, however, with its structuring principles of equality and inclusivity, is inadequate for capturing the manner in which pornography affects discourse. Consequently, we suggested deepening our understanding of discourse ethics by adding a third condition of legitimacy: that of effective illocutionary communication. To the extent that pornography, and an environment saturated with pornography, adversely affects illocutionary communication, there is a case for taking it out of the discourse altogether.

Common objections raised by Habermasians to any a priori regulation of discourse—that is, objections arising out of the two-track model that leaves the informal public sphere unregulated, as well as the argument that discourse recursively validates itself, cannot answer the specific problems raised by the manner in which pornography affects discourse. Distorted communication in the informal public sphere raises precisely the kinds of legitimacy problems that discourse ethics is anxious to avoid, and recursive validation is difficult when the very conditions that are supposed to make it possible are not met. Consequently, Habermasians might end up having to write in strong ethical assumptions of a partially monologic, Rawlsian variety to the discourse, in order to preserve discourse in a form in which it can serve as a condition of legitimacy in the first place.

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