PANEL DISCUSSION: REGULATION OF PORNOGRAPHY

DEAN NORMAN REDLICH, MODERATOR

DEAN REDLICH: This panel discussion is on the regulation of pornography by law or private action, on how to mitigate adverse effects without offending the first amendment. I ask all of our panelists, particularly the lawyers, to note that the subject also includes private action. I think there is always a tendency on the part of lawyers to view this subject within the framework of governmental action—the first amendment and the fourteenth amendment—rather than some of the other issues we have discussed this morning and this afternoon relating to private action.

Two members of the panel you have already heard from—Herald Price Fahringer and Susan Brownmiller. They will speak again toward the end of the discussion.

Our first speaker is a civil liberties lawyer who has worked in the area of the first amendment. He is with the firm of Hahn, Hessen, Margolis & Ryan, and is a graduate of the Columbia Law School. We are pleased to welcome Mr. Marshall Berger.

OPENING STATEMENT OF MARSHALL BERGER: I am not a civil liberties lawyer. I would say I am a media lawyer, and I did not raise my hand when asked if I was a first amendment absolutist. I am a first amendment pragmatist. In the present Supreme Court my views would be best represented by Justices Stewart and Brennan. The thing that has disturbed me about a lot of the comments I heard today is the notion that because things are done for profit they are necessarily bad. I think that in examining the first amendment one must acknowledge that profit is the motivating force behind our free press. There is a section of the Constitution—the copyright section—that is based upon the concept that free dissemination of information and ideas requires the prospect of commercial gain. I am proud of participating in a copyright case, *Rosemont Enterprises v. Random House*,[1] which held that although something is done for profit, it still is valuable and therefore will enjoy the protections of the fair use defense in copyright. I submit, therefore, that the presence or absence of the profit motive is irrelevant to first amendment protection.

My second point relates to a wrong-headed idea first articulated by Mr. Justice Harlan in his dissent in the *Roth* case that is being given increased support in the present Supreme Court. The idea is that a local community can set standards for what can be seen and read in it. One of the glories of the United States Constitution and the American economy is that we live in a big country with an overwhelming proportion of people who speak the same language. That

means that you can publish a magazine that will sell from Maine to California, whether you are publishing on the scale of *Time* or *Ladies Home Journal*, or on the smaller scale of *The Atlantic*, or on the still smaller scale of *Dissent* or the *Partisan Review*. All such magazines can reach a lot of people. One percent of 220 million is a big number, and one-tenth of one percent is still a significant number. I think we need a common market of ideas and expression, and I do not want to have some judge in Montana telling me that something that may be okay for the rest of the country does not meet Montana standards. I think that there has to be a minimum standard that no state can tamper with, a standard upon which publishers can rely when publishing something which will be distributed coast-to-coast.

DEAN REDLICH: Thank you. I would just like to zero in on some of the issues that were raised so sharply this morning and this afternoon. I think that the question of obscenity as it relates to the degradation of women was narrowed quite dramatically today. The issue in the minds of many of our panelists was not so much the expression of an idea as the promulgation of violent attitudes with regard to women or the promulgation of a degraded status with regard to women I would like our panelists not to discuss whether the Constitution protects an absolute right to express political ideas, but to try to apply that broad principle to the very narrow issue that is being discussed today. That issue is whether those first amendment principles which I suspect we all agree on in the political arena should be extended to the violent pornography which is the subject of today's discussion.

Our next panelist is Brenda Feigen Fasteau who is a lawyer in the firm of Fasteau and Feigen. She is a graduate of Harvard Law School. She was director of the Women's Rights Project of the American Civil Liberties Union, is a national Vice-President of N.O.W., and has been very much involved in the issues which are the subject of today's program.

OPENING STATEMENT OF BRENDA FEIGEN FASTEAU: Thank you. We have here an enormously difficult topic. To put my comments into perspective, I would like to try to identify myself. As a feminist and as a lawyer, I do not think it is possible to be a feminist without believing in the first amendment. I remember when I was involved in Bella Abzug's campaign for mayor a summer ago, when we were trying to come up with a position on pornography. I could not do more than suggest that we engage in active boycotts of newsstands that advertise blatantly pornographic or obscene magazines, and that we engage in active demonstrations against movies like "Snuff." I was proposing that we exercise our first amendment rights as feminists. I have done some thinking since then, and I have not really come up with a better solution, but I do want to share with you some of my concerns and some of my own confusion.

Recently, I was talking to one of the mainstays of the American Civil Liberties Union, who said that the problem of brainwashing with groups like the Moonies or the folks in the People's Temple is one to which the Civil Liberties Union is prepared to address itself. I gathered that they are prepared to even go so far as to say that brainwashing should be outlawed. I asked this

civil libertarian why. The person's response was that brainwashing is performed against the will of the subjects, and that it involves using technological advancements of which people are unaware. I said I did not think that was a very good standard because it abridges the rights of the people who do the brainwashing. I immediately leapt to a book that I had with me called *Subliminal Seduction* in which there is a very detailed and graphic description of the kind of media advertising that goes on in practically every advertising company in the country. For instance, one company prints the word "sex" across doll sleeves, others use pictures of vaginas and various other genitalia to try to seduce the buyer into buying a particular product. This is something of which most of us are not aware. These advertising companies use very fast cameras in a highly sophisticated way. It takes about three weeks to train your eye to look for these words or pictures. The question is whether this kind of subliminal seduction, using the most advanced technology and effectively impacting on us without our knowledge, is something that is okay. Do we want to condone that, if we believe in the first amendment? Should they be able to seduce us without our knowledge or permission? I do not know the answer to that, but I do know that if the Civil Liberties Union or any other group is prepared to defend the first amendment rights of people being brainwashed, then they should also look at phenomena like subliminal seduction. Carrying it just a bit further, you can also get to the question of what happens if I am walking down the street and I see some horrendous poster showing a woman whose genitals are being hurt physically in some way. Should I walk around the block to avoid seeing it? As with brainwashing, my viewing of that poster is against my will. I cannot avert my eyes until after I have seen it. If we use the "against the will" standard, many of us have already been injured, certainly "used" without our consent. I can raise one other issue; that is that we can, consistent with first amendment principles, regulate commercial writing and speech. Among the cases that have regulated commercial speech, many have regulated the use of illegal and unfair advertising. Those are government regulations. The person trying to sell the product *cannot* say anything he or she wants about that particular product. That "speech" is not protected by the first amendment.

One of the questions raised by the Supreme Court cases of *Roth* and *Miller* is this business about community standards. I think even if we want to talk about the whole community of the United States, there must be something we can come up with, some alternative standard. It may, therefore, be our obligation as lawyers to take cases which would attempt to overthrow these bad standards. But to do this sensibly, we have to substitute some other standards for "community standards." We may, for instance, begin to find meaningful standards by seeking suggestions from the group that has been violated. In this case we have to talk about women. Shouldn't we be asking women what affronts them? Shouldn't that be the community of people to whom we look for a definition of what is obscene or pornographic? If something were degrading to blacks or to Jews in this country we would ask those people what is offensive to them. We have in the past assumed that women have no right to help define a standard of obscenity. There are few if any women judges and legislators

who can be said to have had any impact on this issue. And, of course, there are none on the Supreme Court.

Incidentally, I still come down very vehemently saying that if we don't recognize the first amendment, then *Ms. Magazine* will end up being banned. They did try to ban the magazine when stories on lesbians came up. We have to establish what we mean both by the first amendment and by obscenity and I do not think we are anywhere near it. I have not heard words like that today so the closer we can come the better a service we will be doing. Thank you.

DEAN REDLICH: There is one person I know who is as capable as anyone to clear up some of the confusion which our last speaker says exists, and that is my friend Ephraim London. Ephraim has been dealing with the legal issues involving obscenity for a long time, since the cases in the 1950's. He handled *Kingsley v. Board of Regents*, *Jacobellus v. Ohio*, *Bertein v. Wilson*, and *Afston v. Kentucky*. He is the author of a twin volume set, *Law as Literature* and *Law in Literature*. He is a graduate of this law school and holds three degrees from NYU. At one time we were classmates in the graduate program here. He is an adjunct professor of law at NYU Law School. Ephraim London.

OPENING STATEMENT OF EPHRAIM LONDON: I do agree with Susan Brownmiller that obscenity or pornography, whatever the word may mean, degrades women. I think it also degrades men and it also degrades sex. I am willing to assume for the purpose of discussion that pornography is harmful and specifically that pornography dealing with the torture of women, the rape of women, and the degradation of women is harmful. Effective speech of that kind can, I believe, be harmful. The real question is not whether the problem exists, but how it might be solved.

One solution we cannot resort to is government intervention. We can resort to private action, any legitimate kind of private action—boycotting, other economic sanctions, the publication of information, the process of education—those are the ways one should proceed in a democratic society. But the minute you give the government power to regulate what is to be read or seen or heard, you violate our constitutional freedom of expression. We should not forget the great number of fine writers whose books, published prior to 1950, were banned. Those authors include Mark Twain—all of his work—Voltaire, and almost every great writer you can think of. When I started in practice a long time ago, there were arbitrary rules governing motion pictures. A kiss could not last longer than sixty seconds and had to be horizontal—I mean, vertical. (Laughter.) If a man was sitting on a bed in which a woman was lying, covered of course, the man had to have one foot on the ground. (Laughter.) A woman's skirt could not be more than about eighteen inches off the floor. That sort of nonsense is the inevitable result of government regulation. One cannot take the position that the first amendment prohibits government censorship of any kind except that which relates to the degradation or the abuse of women.

In a democratic government one must resort to private action. Brenda Feigen Fasteau just spoke about showing a naked woman on a poster. I think that the assault of passers-by by showing them something which will be offen-

sive to them should certainly be prohibited. That is not a violation of the first amendment. Indeed, Norman Redlich will remember that when he was in the Corporation Counsel's office, he and I worked together to try to draft an ordinance which would prohibit the display of offensive material to people who did not want to see it, but that, it seems to me, is not a constitutional violation of the right to speak or the right to write. It is, in effect, a statement that you cannot appropriate a public area for the display of material that would be offensive to a substantial number of people who must use the streets. Susan Brownmiller asked those of you who believe that the first amendment is absolute to raise your hand. I did not raise my hand. Neither did Dean Redlich or Marshall Berger. I think the three of us believe in extending the first amendment protections as far as they can be extended. I do not know of anyone who believes that the first amendment is absolute in that it protects all speech of every kind and in every circumstance. If, for example, speech is used in an attempt to extort money, it obviously is not protected and it should be punished. Speech that is brigaded with unlawful action is prohibited and punished. It has been suggested that it should be unlawful to show a film of a woman being raped. But that is not an act of rape then taking place. It is a statement of what is said to have occurred previously. Even if the film is intended to titillate, the exhibition of the film should not, in my view, be prevented. There may be many very difficult questions, but we cannot surrender vital first amendment protections because one group or another may suffer as a result of the freedom guaranteed to speech and expression. The remedy then proposed is much more harmful than the injury suffered. To abandon the first amendment is to abandon hope for a democratic government.

DEAN REDLICH: I remember that occasion when at least you and I seemed to agree on a text of a statute. I could never get the Civil Liberties Union to agree to it, (laughter) so that the bill never got very far, at least at that time.

Our next panelist was a staff counsel to the New York Civil Liberties Union, has taught at this law school, is a graduate of Yale Law School, is now partner in the firm of Clark, Wulf & Levine, which is by definition a firm of civil liberties lawyers. I am pleased to welcome Alan Levine.

OPENING STATEMENT OF ALAN LEVINE: I took what the Dean said before as a plea to us lawyers not to address a painful, human problem with abstract legal principles. Nevertheless, in thinking about what I had prepared to say, I keep falling back on those abstract legal principles.

DEAN REDLICH: An incurable disease. (Laughter.)

ALAN LEVINE: I listened to what some of the speakers this morning said, particularly to what Leah Fritz and Andrea Dworkin said. I shared some of their pain, I understood the degradation that women must experience given the depiction of women in the media, in print, and in public that they describe. The problem I am still left with is what to do about it. Let me quickly discuss the question of private action. I, with Ephraim, believe that anyone can protest and boycott and picket, without raising the line-drawing problems that are

raised when the state acts. You go out and protest against what you do not like, what offends you, what you believe degrades the group to which you belong and you are doing what the first amendment authorizes.

Public action is the problem, action by the state. When you ask the state to do something, you *do* have line-drawing problems. When you ask the state to censor, I think it is incumbent to look at the state's track record as a censor. That record is simply not very good. As Ephraim says, every great author has been subject to censorship. The women's movement attempts to make a distinction, when it talks about censorship of pornography, between erotica and pornography. But the censors do not make those distinctions. They censor both.

It is important to understand, however, that they do so not because they want to censor erotica. Censors never urge that they have the right to ban that which is merely erotic. They always describe what they have banned as pornographic. But when we look back at what has been banned, it often turns out to be material most of us would call erotic. In other words, until we are the ones given the power to censor, we are not going to be very happy with the decisions that others make about what books we can read and movies we can see. And you can be sure that as soon as we become censors, drawing our own lines between erotica and pornography, that there will be just as many people attacking our decisons.

Some say that the problem lies with the standards that have been applied by the courts. The task, they say, is to sensitize judges to the social and personal harm that pornography inflicts so that they will more easily recognize it and be more willing to ban it.

But the problem is not in failure to recognize pornography. Most of us, like Justice Stewart, "know it when we see it." So do judges. Nor is the problem an unwillingness to ban it. For at least twenty years—since the Supreme Court first wrestled with the obsenity issue in *Roth*—a consistent majority of the Supreme Court has been willing to allow states to ban pornography.

The problem is a different one. Or, rather, two different ones. First, even when we do recognize pornography, we don't always want to ban it. Take, for example, the display in the lobby in front of the auditorium. (The display included photographs from European pornography magazines, mostly depicting a woman having sex with a pig.) If ever material was, in the words of the Supreme Court, "utterly without redeeming social value," that is. So ban it, right? Prohibit people from seeing such displays.

But what about showing it at this conference? Hasn't it served some purpose here? Hasn't it helped many people to understand better the cruelty and ugliness of some pornography? In other words, hasn't it had some redeeming social value? Should the state be permitted to ban it at this conference?

If not, you then invite the state to determine the people who may and may not see certain pictures. Which people? And under what circumstances? And how do *you* feel if you are one of those not permitted to see them?

The other problem is in defining pornography. We may "know it when we see it," but how do we define it so somebody else will know it the next time. Precisely that problem led Justice Stewart to abandon the whole enterprise, to

concede that, though he could recognize pornography, he could not describe it, except in terms so vague that those who attempted to apply those terms were unable to distinguish between protected and unprotected speech.

When you grant to the state the power to censor on the basis of guidelines that even the Court concedes are vague, you may find not only hard-core pornography censored but also *Ulysses* and D.H. Lawrence's *Lady Chatterley's Lover*. The modern versions of those landmark cases are going on in school districts and in state courts around the country. They involve censorship of books by J.D. Salinger, Kurt Vonnegut, Bernard Malamud, Richard Wright, and Eldridge Cleaver. The track record of the state simply does not warrant giving it the authority to determine what is offensive. In dealing with the Nazi march through Skokie, the courts were a little troubled, in strict first amendment principles, that Skokie did not have the power to regulate that speech no matter how offensive. I am with Ephraim in believing that it is less offensive to first amendment values to regulate public displays of offensive speech than to absolutely ban it. On the other hand, the Skokie case teaches us that it will never be easy to draw lines with even public displays of offensive speech. I think the law is rather helpless here. That does not mean we are helpless in the face of this serious social problem. My consciousness has been raised and many other men's consciousnesses have been raised by the women's movement. As a result I think the stereotypes in the movies and on television have begun to abate, just as one no longer sees those crude stereotypes of blacks shuffling and stumbling, bowing and scraping. So I think there is hope and I think the hope comes through private action. Those stereotypes of blacks were not changed by government action and I think it would have been a mistake to have attempted to have invoked judicial remedies to do that. I similarly think it would be a mistake for the women's movement to try and do that. Thank you.

DEAN REDLICH: Thank you. It has interested me that Ephraim London and Alan Levine have treated private action as if it is not a problem at all as far as free expression is concerned. It is true that the first amendment applies only to governmental action. But we all recall that the followers of Senator McCarthy during the 1950's made effective use of the boycott. They boycotted the products of Ed Murrow's sponsors. Civil libertarians at the time complained about the efforts of Jewish groups to get *The Merchant of Venice* and *Oliver Twist* off the shelves, the effort of black groups to keep "Porgy and Bess" from being shown again. What I hear coming from this panel is an absence of concern about any of this in terms of a freedom of expression issue as applied to the subject of obscenity and pornography. It was for that reason that I was hopeful that we could deal with the question of private action. I would now like to turn to the two panelists who spoke earlier in the afternoon. Susan Brownmiller.

OPENING STATEMENT OF SUSAN BROWNMILLER: I really appreciate the thoughtfulness of this discussion and indeed the entire day's thoughtfulness. To Alan I want to say there is no money today in stereotyping blacks and Jews but there is an awful lot of money to be made in perpetuating the stereotypes of women in pornography. Yes, to Ephraim and to Alan, it was appalling that books like *Ulysses* were banned, or that certain localities wanted to ban *Ulys-*

ses or even *Lady Chatterley's Lover*, a book I do not feel really is important one way or the other, but no I do not think it should have been banned, and yes, it was an important thing that it was not banned. But you know all of this was before the women's movement started to grow powerful, and started to claim that we had a moral position on pornography, and I don't think those mistakes would have been made twenty years ago if the women's movement had been allowed to define pornography then. Surely nobody in a women's movement would say that *Ulysses* was a pornographic book. It is a great book and it is a book that has affected my reading and my writing.

I want to say a word about regulation—everyone here seems to be so afraid of government regulation. You trust the government to regulate airlines, TV, food and drug, atomic energy. You don't want the government to regulate atomic energy? You don't want the airlines to have rules on the regulation of who is flying where? For goodness sake, what do you expect? Anyway, we trust the government implicitly in many areas of our lives because we figure it can really make some sense out of some very complicated stuff. So why are we so hesitant when it comes to something like pornography?

I would love to take private action and sue *Hustler* and *Screw* in particular because I feel they have libelled me personally. They have each run really embarrassing stories about me purporting to be facts. *Screw* said that I was the illegitimate daughter of a half-breed mother who was a two-dollar a night prostitute and I was so ugly—I'm going to say it because it's significant—that the only way I could earn the two dollars was to give blow-jobs right, and the owner sent it to me as he sends me every piece of scurrilous stuff (laughter) that he writes about me, hoping that I will sue. Similarly, after my book *Against Our Will* was published (and that book was about rape), *Hustler* had a story written about me which purported to be from a guy who knew me well, had met me, and we got together one evening and he realized in the course of the evening that my sexuality was that I really wanted him to rape me. Both the *Hustler* and the *Screw* things were quite personally offensive to me and caused me a lot of emotional anguish. It really did, you have to take my word for it. It wasn't a joke to get these things in the mail and to know that people I knew read it, because *Hustler* and *Screw* are very clever about sending free copies of their publications to all journalists and I found out about these articles through journalists who said hey, hey, you should see what's in there about you and a lot of people read the smears on me in *Hustler* and *Screw*. So I went to my best friends, the civil liberties lawyers, and said, "How would you like to take on this case?" And of course my friends the civil liberties lawyers said that unless I could prove that I have lost money, the way the libel laws are today, unless I could prove that my work had suffered, I would not win a libel case against *Hustler* or *Screw*. Since then I've decided that perhaps there should be a class action, because I am not the only feminist who has been maligned. Sherry Hite, Gloria Steinem, Jane O'Reilly, I mean, in fact, any woman who at all steps out of the stereotype that the porn magazines want her to be in, is subject to abuse in the magazine. But the thing is that all the women do not know that it has happened to the others. They only know that it has happened to them because they only see what is written about them. We

don't monitor these magazines all the time. So I think a class action suit is a possibility, it's something I would be very interested in. I'm waiting for the civil liberties lawyers to feel ready to take my case.

Of course, another reason why I haven't done it is that it is obvious that it would be a circus in the newspapers, it would be a real laughing-stock, which is what they want. I mean, that's why they would love me to sue, they would love the kind of publicity which would come out of this. One more point, no one spoke of banning here today. I'm not for banning *Hustler* but I am for getting it off the newsstands, and *Screw* and *Playboy* really offend me, too, and of course there's *Penthouse*. And I sense from my fellow panelists that you're not opposed to some sort of City Council regulation that would get them off the newsstands.

One more word about money. I happen to know a newsstand dealer who went out of business because he refused to carry pornography and a guy set up shop right across the street from him and carried all the dirty papers and made the money that this guy didn't make. So it's interesting how money keeps entering into the picture.

DEAN REDLICH: Thank you. It was Mr. Fahringer who used the phrase "speech brigaded with unlawful action" and I guess it was Mr. Justice Douglas who anticipated Mr. Fahringer's use of that phrase. (Laughter.) But would you like to add some comments?

OPENING STATEMENT OF HERALD PRICE FAHRINGER: I would like to make just a few comments. I have said about all I have to say on this complex subject, except that I do think it is unseemly to constantly talk about the amount of money that pornographers make. No one ever raises that complaint about *The New York Times* or the producers of "Carnal Knowledge" or "Jaws". I think it has no place in this forum. As far as Ms. Brownmiller's concerns about personal attacks against her, I think it would be undignified for me to become involved in that, except to say that most publications are financially responsible and she has a remedy available to her. I mean this in earnest—anyone who is maligned by a publication has the right to sue. There may be considerations that dissuade them from doing so.

I am a first amendment semi-absolutist (laughter) and I would say that libel laws do have a place in our community. What I am opposed to is enjoining those publications which print libelous statements. I much prefer a system which gives someone harmed a right to collect damages against the publication. That strikes a reasonable balance between the right of the public to know and the harm suffered by an individual.

One thing that distresses me very much is that there is an enormous demand for pornography which may be unaffected by private action. I am very disturbed by the amount of this type of material available and by the fact that it is obviously fulfilling a very large demand. In our work we hear the complaints of theaters which can no longer survive on PG motion picures, but which have to show X-rated films. Ms. Brownmiller just told you about a newsdealer who went out of business because he would not handle sexually explicit material. I

find something very unhealthy about this preoccupation with what I consider to be gross sex. Gross sex is that which is not tastefully portrayed, that which is not erotic. It is unlike that which is exciting, that which we saw eight years ago in *Playboy*, for example, a beautiful woman. I don't know what the attitude among the audience is today (hisses) but if a woman is portrayed very attractively, (hissing continues) speaking for myself, I find it enjoyable. In any event, I may be a distinct minority in that regard. But what bothers me is that although you have every right to engage in picketing, boycotting, and so on, to discourage people from going into these places, I don't think that protest can be successful given the enormous demand. For that reason I wonder how successful any form of private action will be.

DEAN REDLICH: Thank you. In fairness to Susan Brownmiller, I think it only fair to point out that she is probably a public figure.

HERALD PRICE FAHRINGER: So was Barry Goldwater.

DEAN REDLICH: And she would have quite a burden to bear in a lawsuit to demonstrate not only that the statements were false but that they were maliciously false. Under the line of Supreme Court cases starting with *New York Times v. Sullivan* in 1964, a person who is a public official or a public figure suing a publication for libel must demonstrate not only that the statement is false but that it was maliciously false, and that it was published with reckless disregard for the truth. I would think that Ms. Brownmiller certainly could be considered a public figure and would therefore have to meet that higher standard.

HERALD PRICE FAHRINGER: It could be met.

DEAN REDLICH: It could be met but I think for the benefit of those in the audience who did not know about it, her failure to sue should be viewed in that context. I think at some point one figures that the lawsuit would be so difficult that one does not pursue it.

I have one final observation. The assumption seems to have permeated the entire discussion from the morning on, that we are faced with a choice of either allowing everything to be published or having a form of regulation which could encompass *Ulysses* and *Fanny Hill* and some of the other publications which were the subject of famous lawsuits. I would think that if Earl Warren were sitting here, he would have said (at least as of the time he died) that the Supreme Court fashioned a rule which would subject violent pornography to governmental regulation on grounds that it was obscene as defined by the Supreme Court. He might regard it as patently offensive, appealing to the prurient interest, as being utterly without redeeming social value, or under the present *Miller* test, as not having serious literary, artistic, political, or social value. I think that Warren would say that the material Ephraim London is talking about is not obscene within that standard and therefore can be protected.

I do not get any sense from the civil liberties portion of the panel that anyone agrees with that. The civil libertarians seem to be saying that unless you adopt the Black-Douglas position (and what is now the Brennan-Marshall posi-

tion), namely that you cannot have any definable standards and therefore must allow all publication, you run the risk of prohibiting serious literary works.

My comments are not about public displays of sexually offensive material. I am talking about the distribution of material through movies and books that is not publicly displayed. Do any of you think that it is possible to draw these lines and deal with the type of material that the women's organizations are finding so offensive?

EPHRAIM LONDON: The Supreme Court ruled that works of serious artistic value may not be prohibited as obscene. It also held that the greater protection against works said to be obscene may be afforded children, and there may be greater protection against material thrust upon people in public places. In Allen Ginsberg's case the Court indicated that pandering could affect the Court's judgment of whether a work should be condemned, that even material that would not otherwise be punished as obscene could be punished if the seller were offering it as pornographic material.

DEAN REDLICH: I gather you think that the only thing that is a valid subject of regulation is material that is directed toward children or sexually offensive material which is publicly displayed.

EPHRAIM LONDON: I think what you are saying is that we should accept the Court's ruling in *Miller v. California*, which permits the suppression of a great deal of material. My answer is that we have no alternative. We have to live with it.

But that is not the question that is being posed today. The question is whether we should have some additional regulation and whether we should also suppress material that degrades women. I do not think such material should be suppressed for that reason, or because it degrades men. I think that is the question that we have before us.

There are other statements I would like to answer. One is Susan Brownmiller's statement saying that we accept regulation of busses and airplanes and the like. Of course we do, but that is quite different from regulating speech protected by the first amendment. The first amendment dictates that government shall not in any way inhibit freedom of the press or speech. That does not prohibit all regulation of other activities.

As to Dean Redlich's comment that private action can sometimes be evil, as it was in the McCarthy era, very few in the audience would know better than myself because I have represented people accused of being subversive. But just because there are abuses, one does not abandon a lawful remedy. Certainly there are effective means of dealing with material degrading to women other than by government intervention. I might add that I completely agree with my friend Marshall Berger and with Mr. Fahringer that the advice Ms. Brownmiller received from a civil liberties lawyer was unsound.

SUSAN BROWNMILLER: Unfair comment. (Laughter.) Anyway, Ephraim, I hear what you are saying. You are saying, "Come on women's movement, do what the civil rights movement did. Picket—you know what the civil rights movement

did. Get the public consciousness to the point that an image like Little Black Sambo is considered so offensive that nobody will use it, or as the Chicano movement did with the Frito Bandito." That commercial was taken off television. Because Mexican-Americans said that the image in this potato chip commercial was offensive, the broadcasters pulled it off the air because they did not want to offend Mexican-Americans. When we in the women's movement, however, started to talk and said that images of women in pornography were degrading, the first thing we heard from civil libertarians was that we could not tamper with free speech. In the last few years, our effort has been to try to educate the public to try to build up sensitivity to the issue.

EPHRAIM LONDON: I would like to say one thing about Susan Brownmiller's confidence in the women's movement. I hope what she says is true, but if the women's movement is all that powerful, why doesn't it stop offensive speech without relying on the government?

SUSAN BROWNMILLER: No, I said we weren't that powerful. We are beginning to grow powerful and on this issue we have had to really fight harder than on the rape issue to turn the liberal establishment around. Each of our issues seems to cause the liberal establishment to have to do a lot of rethinking of its positions.

BRENDA FEIGEN FAUSTEAU: As a feminist I would like to say one thing. That is that the whole question of libel fascinates me. We might want to call it libel or we might want to create a new tort. Anyway, it might be possible for a class action to be brought by a group of women injured both mentally and physically by a particular movie or magazine. It is not inconceivable to me that our civil laws will change and a remedy will be created by extending the libel laws. New York may be the most liberal jurisdiction in this country, liberal from the point of view of being hostile to libel suits. Almost everyone is a public figure. I am troubled by that, but I think that if we could become slightly more creative, the possibility exists of civil rights of action being developed that would eliminate works like the movie "Snuff."

What we have not done here is distinguish clearly enough between the public posters that confront us on the streets and that we seem to agree should be eliminated—posters that show a woman with her legs spread, about to be beaten "down there" with chains, and the literature or movies that describe in detail how to rape a woman or how to violate a woman in some other way. I would like someone to address, I think, *himself* (in this case) to that issue. Why is it okay to regulate pornography? I have a feeling that that is a harder question, so everybody skipped it.

MARSHALL BERGER: I think it would be against the law if I made a movie on how to rob a bank, a training film.

BRENDA FEIGEN FASTEAU: But what about a film on how to degrade and violate a woman?

MARSHALL BERGER: Well did you want to say it would be illegal to show "Birth of a Nation?"

BRENDA FEIGEN FASTEAU: I can't remember what was wrong with "Birth of a Nation." (Laughter.)

DEAN REDLICH: It degraded blacks. I was trying to get the clarification because most of the films that we saw in that slide this morning would be obscene by present court standards. I am still not sure that Ephraim London and Alan Levine, Mr. Berger, Mr. Fahringer are taking the position that that material should be constitutionally protected. I think there is a vast difference in how the law would apply to material and magazines like *Screw* and *Hustler* and *Playboy*. I hope that somebody will talk about whether they are satisfied with the law as it is, or whether they think that even the films that were shown this morning should be entitled to constitutional protection.

TERESA HOMMEL: I challenge the idea that a bona fide attempt is being made here to solve the problem of the degradation of women for men's entertainment. My overwhelming sense is that the male panelists still do not understand what the women are saying, or agree that there is a problem. This type of denial or trivialization is one reason violent and degrading images serve male fantasy and lead to actual violence and degradation. The problem is not just the men who commit acts of aggression against women. The problem is the vast sense of permission the actors feel because they believe they are acting out the fantasies of the majority, and because acquiescence by the majority of men confirms their belief. I am talking about your acquiescence when you say that as lawyers you cannot figure out a way to do something about even the worst types of pornography. I am also talking about men in our legal institutions: the judge who dismisses a charge of attempted rape with the comment, "There's no harm in trying," those who refuse to censure the judge, cops who refuse to arrest, prosecutors who refuse to prosecute, judges who allow humiliation of the victim in court, defense lawyers who accuse rape victims of being immoral or prostitutes of "looking for it" when they know that's not true, not to mention male members of the press who write about these crimes in a titillating way. All these men contribute to the commission of sexist crimes. Their acquiescence endorses a one-sided perspective, a pornographic fantasy of sexist aggression and violence as entertaining and fun, as essentially harmless, as a male prerogative. The narrow, technical, and unimaginative approach of some of the panelists here is part of this acquiescence.

The climate of permission this acquiescence creates if reflected in some statistics I have read. As many as one out of every three American women is raped during her lifetime. Fifty percent of rape victims are under eighteen, and 25% are under age twelve. As many as one out of every two wives has been beaten by her husband. At least one out of four girl children is sexually abused during childhood, primarily by close family members or family friends. As many as 70% of young prostitutes have been forced into sexual relations with their father, brother, or uncle. As many as 80% of female drug abusers were early victims of incest. As may as 80 to 90% of women who work outside the home report being harassed on the job due to their sex.

I think the great majority of you men still do not realize the implications of these statistics for your own lives. Some of you say you are willing to join the

women, but I do not see a willingness to act on your own initiative. I do not see men acting to redefine their own image and to take back from pornographers the right to define sexual masculinity, to reclaim masculinity as a human form of being. If we were discussing degradation and violence toward any other group in society, I believe your ability to grasp and solve the problem would be greater. For example, if one out of three men in this country were castrated in violent attacks by women, and if tens of millions of magazines were being sold per month glamourizing such an act, I am sure that some members of the panel would find their imaginations stimulated both in regard to governmental and private action.

EPHRAIM LONDON: If you think any of us here has been in any way sanctioning child molesting or rape or publishing matter demeaning to women simply because we believe in the first amendment, that's nonsense. To use the example given before, we do not agree that it is proper for the police to refuse to interfere in a family quarrel if a woman is being beaten up. In fact, the police are being re-educated in that area. As to the humiliating questions put to a rape victim, that to an extent has been changed by recent law. I don't believe anyone here believes that the conduct you outlined is appropriate.

ALAN LEVINE: I am appalled by the fact that 40 to 50% of black youth in this city are unemployed, but I do not think that banning literature or movies or restricting what the press can say about the problem will do anything about it. I don't think you know me well enough to know whether I've taken a first step toward establishing masculinity as a human value. What I have not done is seek to give the state the power to say what you and I and everybody else may read on matters of sexuality. I haven't taken that step because, as I've said before, I think the state has historically abused that right. I would finally say that if we gave it that right, that the problems of wife beating and child molestation that you're talking about would not be affected one whit.

AUDIENCE QUESTION: I have a question for Ms. Fasteau. You suggested an alternative to the community standards test, that women, the targets of pornography, should be asked to define the standards of permissible pornography. Does that mean that former concentration camp victims get to say when and where Nazis march? Does that mean that right-to-lifers get to say when and where and what is published by pro-abortionists? If that is what you are saying then I suggest as a women in relation to pornography and as a Jew in relation to the Nazi issue, that that's an unacceptable standard—you can't draw the line.

BRENDA FEIGEN FASTEAU: I don't really have a good answer. I think there are very complicated answers which we haven't yet figured out. I was proposing and I stand by my proposition that there has been in the civil liberties world a great deal of consternation and subsequent elimination of all standards, because the Supreme Court has handed down decisions that are absurd. The community standard in Iowa is different from the community standard in New York. Therefore *Ms. Magazine* can be sent to New York but it can't be sent to Iowa. What I was saying is that if we are going to have any kind of standard established by Congress or by the Supreme Court of the United States, then why not have the group that is the most affected, rather than a geographical entity,

help decide the standard? Why is it so sacred that Des Moines or New York be the determining factor when there are a million different people reading it? If you wanted to you could say that the women even in that particular locale disagree with each other. What I'm suggesting is that I don't like the *geographical* community definition. But if we reject that then we have no standard and everything goes, unless we get the Court to accept a new definition. If you think about reality and what goes on in the business community, it is the groups that are offended; it is the blacks, it is the Jews, it is the Chicanos, who are looked to for their opinions when things are taken off the air and banned and censored—which they *are*. I don't think it is so ridiculous to think about it in that way.

MARSHALL BERGER: I think Ms. Fasteau is saying two different things. One is that in private action you should be the group that speaks out. I have no problem with that. But if you're also saying that women are the group that must determine what the government will do, that's something else, and I think that the government must be by majority.

AUDIENCE COMMENT: You suggested that it was "sensitive" for certain people in the audience to hiss at Mr. Fahringer's comments about *Playboy*. I suggest to you that there may be women in the audience who didn't hiss, not because they are insensitive about pornography as it relates to women, but because we are very sensitive about the first amendment issue. Women should not be put in the position of choosing one or the other.

SUSAN BROWNMILLER: I didn't mean to imply that it was sensitive to hiss. I was referring to the sensitivity behind the hissing, which I don't think would have been around a few years ago, before the women's movement began to politicize the issue.

AUDIENCE QUESTION: I have a first amendment question with regard to the legality of boycotting under the Sherman Antitrust Act. The Sherman Act prohibits a boycott such as N.O.W. is conducting against states which have not ratified the ERA. The first amendment recognizes only the conduct of the boycott itself as speech. Some of the convention facility management people in the boycotted states are bringing suit now, and I wonder if the first amendment will prevail?

EPHRAIM LONDON: There is no question in my mind that one has a perfect right to sanction expression of opinion to conduct some boycotts. Certainly this would apply if the women's rights movement is boycotting a particular producer, or boycotting the state. But I think they can boycott a producer of food—it's done all the time. In the area of television broadcasting boycotting is extremely effective. The broadcasters are scared stiff and will blanch the moment someone suggests that the products they are advertising or the material they are releasing will be boycotted. I don't think one runs afoul of the antitrust laws by conducting a boycott of that kind.

AUDIENCE COMMENT: The party plaintiff in these lawsuits hasn't offended anybody. It's someone who runs a hotel in the state. It's the state which has been boycotted. And there has been a combination in restraint of trade.

DEAN REDLICH: You're raising a good question and it is a more difficult question than I think Mr. London has indicated. I don't think the answer is that clear. I think the quesiton is: Is what is being done an exercise of a first amendment right, one that the Sherman Act was never intended to apply to, even if such a boycott would otherwise be a conspiracy in restraint of trade? I am inclined to think that the boycott will be upheld but I think it's not that simple a question.

EPHRAIM LONDON: All I can say is that the only time I recall a boycott or picketing being prevented was when there was behind it an unlawful attempt with another competitor to hurt the product or the workers in the area.

DEAN REDLICH: I don't think we ought to dwell on it. It's a secondary aspect of the problem you're raising here. It's boycotting people who have nothing to do with the decision that I think is raising the question.

AUDIENCE QUESTION: I would like to ask whether pornography could be attacked as a public health issue. Brenda talked about brainwashing; I think pornography is a means of brainwashing male children to assume a certain role in society.

DEAN REDLICH: I suspect you would end up with the same constitutional questions. When I was Corporation Counsel in the City we went after massage parlors, peep show machines, and book stores; we ended up with the conclusion that we had the cleanest and safest brothels and book stores in the world by the time we got through. They all complied with regulations. All we did was raise the cost of doing business in those areas. I think if one were to address the publishers the way we suggested it would really raise the first amendment issue in another form.

MARSHALL BERGER: You would also run into a question of whether you would have selective enforcement of the law, which would be unconstitutional.

AUDIENCE QUESTION: I have a few comments for Ms. Brownmiller. I'm a little concerned about your comment. I don't think you really answered it, about the woman's movement having raised consciousness to the point where now the *Ulysses* thing couldn't happen. I'm a little frightened by your statement that what makes you feel uncomfortable, what makes you feel offended, you don't want in the newspaper. I might share you feeling on that, but I think that's a very dangerous thing to start handing over to the government. I agree with Mr. Levine that the problems we discussed won't be solved by government regulation, and I want to go a little further and say that perhaps the cause of women's liberation might be hurt by having certain ties in the government, because as we've been taught, the government in this country is very male-dominated and I think that a lot of values that may start showing up in legislation are necessarily the ones that women want to see.

SUSAN BROWNMILLER: Well, a comment on the last part. That's been said to us throughout the history of feminism. "Don't give the state powers, because you're not the state, and they're not your kind of people." I really would

prefer to work within law and order and have a state that is responsive to my needs, because many radicals have felt that the state has not been responsive to their needs, and have gone off and commited illegal acts that have caused great damage. And I think you should be—you should understand the dilemma of somebody who is enraged. You have to understand our rage and our reluctance to go tomorrow to 42nd street and smash windows or throw bombs or whatever.

AUDIENCE QUESTION: I didn't say that the law can't be used, or that civil remedies can't be used. I'm saying, how do you intend to use them? If you hand this over to the government it's a very dangerous thing.

SUSAN BROWNMILLER: But the government—the FCC—controls television, doesn't it? Are you worried about the powers of censorship? Are you concerned about that?

AUDIENCE QUESTION: What if literature were regulated the way television is?

SUSAN BROWNMILLER: We're not talking about literature. We're talking about porno magazines.

AUDIENCE COMMENT: I am very afraid of government control. It really frightens me that the government might ever tell me what I should do with my art. Looking to the government to solve this problem for us is a very passive approach. Perhaps the best way to stop an activity is to eliminate the demand for its product. We might eliminate the demand for this particular product by creating better pornography, perhaps feminist pornography or erotica. I think that if more women controlled the pornography industry the market might change a lot.

AUDIENCE COMMENT: I agree that the only sensible way to approach this problem is the economic one. If this is as it seems to be, a very profitable business, women and other people who are offended by pornography have got to make it an unprofitable business. And then worry about the rest of it.

AUDIENCE COMMENT: I was just wondering if part of the problem is the way we have framed the issue: the first amendment versus pornography and the degradation of women. The question as posed is loaded in terms of the sensibilities of most of us here. In other words, as lawyers and civil libertarians, we are accustomed to fighting for the first amendment not as some abstract principle, but because of what it represents as an interest in our society. We want a society that provides for the free and robust exchange of ideas because it makes for a better place in which to live.

Some of us have only recently come to the realization that we also want a society free from the kind of statistics that have been quoted today. Those statistics, dealing with the kind and degree of violence being perpetrated on women by men represent a society I'm sure that none of us want to live in. It may be that after having been sensitized to these conditions, some restrictions on speech may be supportable as a means of reaching that kind of society. I

think part of our problem is that most of us have paid little attention to the societal interests represented by these statistics.

Why should we be so committed to the first amendment as against the pernicious dissemination of ideas and images that lead to this kind of violence? Once we accept these values as perhaps of equal interest, then the problem becomes one of reconciling these values to create a society that reflects both interests as best it can. That is, a society where the free exchange of ideas creates a climate in which women will grow up and live free from violence.

We have learned to live with some restriction on speech. We already accept the idea that we cannot see people drink beer on television. We all manage to survive without that image. We restrict speech that results in fraud, or speech that results in extortion. We don't find any problems subordinating freedom of speech to other interests we regard as more deserving.

What is being demonstrated with respect to the issue of pornogrpahy is that it promotes violence towards women. Therefore, rather than simplistically rejecting any kind of government regulation that supports both interests, I don't think we have to pose this as "either/or." The basic problem is that most of us civil libertarians have not yet come to the conclusion that this pornography business is really a serious issue. Once we reach that point, the first amendment has to be reconciled with this interest.

The Supreme Court does not approach the issue from the same perspective as Susan Brownmiller does. The sensibilities of the Court are informed by Victorian priggishness. One of the problems is understanding this issue in a new light. It's not that we don't want to see naked calves of ladies or read books like *Ulysses* or *Lady Chatterley's Lover*. What we're looking at now is a new sensibility. I think many of us have never even considered the objections posed by feminists. When this issue of pornography was first presented, I thought it was some kind of joke. I have learned since to hold my laughter. I think most of us interested in civil liberties and free speech are all coming to this from a totally different direction. We are used to defending free speech against oppressors who are not connected with the interests we are talking about now. We are not talking about Victorian standards of modesty or taste. We are talking about very broad societal interests, the welfare of women. A number of us do not yet understand how to deal with that.

AUDIENCE QUESTION: As a civil libertarian and a psychologist, I share the rage about the degradation of women and I share the horror of the censor. I would like to hear some discussion about local law that could be used, which would not come up against the first amendment.

DEAN REDLICH: The only thing that localities can do involves building codes, local health laws, things of that kind that relate to the particular physical establishment. Once you move into the whole area of content—the display of sexually offensive material—you then run up against the constitutional question.

Judging by my experience in trying to deal with this at the law enforcement and local government level, we kid ourselves if we think that the standards that are written into the law are going to be that significant. The relevant question is whether this is something that law enforcement can deal with

regardless of what the standard is. If one has a standard that would make the display of "Deep Throat" illegal, a prosecution would be brought, "Deep Throat" would be found to be obscene or degrading or whatever the standard is, and the distributor would pay a fine. Then would come another film. I think that one must ask, assuming we could come up with the standard, what resources would be required for a law enforcement effort to deal effectively with this type of material. You may find that resources required, in terms of inspectors, police, and courts, which would be necessary under any standard are so enormous that it would become simply unacceptable in terms of the competing demands on law enforcement in this country. You may question whether society is making the right allocation of law enforcement, but I don't think you can talk about this issue only in terms of standards.

MARSHALL BERGER: Part of the problem is that a New York law that is enacted will be scrupulously observed only by the most responsible of the media. Time, Inc. and CBS and *The New York Times* and Random House have consulted counsel and will comply with the law, but the fly-by-night operator on Eighth Avenue will not.

AUDIENCE QUESTION: I would like to know if there is anybody who could propose a substantive statute that would mitigate the effects of pornography and still be within the bounds of the first amendment. I think it is very frustrating to say yes it is a problem, something should be done about it, but we cannot do it by law.

ALAN LEVINE: I think on their face the *Miller* standards sound rather good. I end up coming to believe that they, too, run into first amendment problems. But I do not think you can devise anything that meets the concerns of this group better than these two standards: whether the work depicts or describes in a patently offensive way sexual conduct, and whether it lacks any serious social, political, or artistic value. What those standards exclude is worthless material. Now that's a good start for a statute. The problem, however, is not in the standards, but in how the courts apply those standards. What is patently offensive to one person is not patently offensive to another.

BRENDA FEIGEN FASTEAU: I totally disagree with Alan. I think that the *Miller* standards are absolutely awful. First of all, patently offensive to whom? Secondly, the standard does not prescribe any required degree of seriousness. You would probably find very few works that would lack *any* serious literary, artistic, political, or scientific value. Somebody could argue that some horrible photograph—like the Rolling Stones album jacket—has some kind of artistic value.

ALAN LEVINE: You say the problem is finding patently offensive to whom. How do you work that out?

BRENDA FEIGEN FASTEAU: I do not know. If our legislatures were 100% women and the Supreme court were 100% female I think we would have different standards, but I know that most people would not agree with that. I just sense it. I know there is something different about the way women would look

at most of these things. Unfortunately, I cannot create a 100% or even a 50% female legislature or even a slightly feminist legislature. I have attempted to come up with two possibilities in direct response to your question. One is a tort action by an individual woman or a group of women representing a class alleging physical or mental injury and showing some damages to the group or to the individual. I think it is possible to create that without offending the first amendment if you can show damage. The question is what kind of damage. The other possible remedy would be a statute prohibiting incitement of violence against women. It would prohibit publications that demonstrated how to rape a woman, how to mutilate a woman. I think that such a statute would not offend first amendment values, though I consider them practically sacrosanct. Like some members of the audience, I feel we have to do some kind of balancing.

DEAN REDLICH: We are out of time. Thank you very much.