

PREFACE

Traditional objections to pornography were based on "Victorian priggishness"¹ and the unease of proper society with explicit written description or graphic displays of sex. During the twentieth century, Victorian standards of propriety have been abandoned, and with them much censorship. The current law of obscenity remains as a vestige of the thinking of an earlier era in which certain "forms of speech and thought were supposed to be incompatible with decent social community."²

The sexual revolution of the last decade, however, has bred a new pornography. Since "ordinary" sex is no longer a taboo subject, pornographers have explored new avenues of prohibited behavior to titillate their readers and maintain profitable circulation of their publications. This recent trend in pornography centers on the depiction of violence against women as an integral part of sex—including bondage, beating, torture, and self-inflicted injury—and the use of children as sex objects. In response to these trends, feminists have raised questions about whether current pornography poses a threat to public safety. They urge that the ever-increasing number of publications that equate sex with violence molds readers' attitudes toward women and toward sex, and physically endangers women and children. Recognizing that the media have a massive impact on the thoughts and desires of consumers, feminists are concerned that what is sold by the sex industry will be replicated in real life. Their aim is not to suppress sexuality, but to prevent its dehumanization.

The purpose of this colloquium was two-fold: to expose the legal community to the recent developments in pornography, and to familiarize feminists with the protection afforded pornography by the first amendment. We hoped to get the civil libertarians "unstuck" from addressing only the obsolete moralistic objections to pornography, and also to discuss what legal remedies may be available to women subjected to the dehumanization and the physical threats posed by violent pornography.

The feminist speakers described pornography and its effects in graphic and highly charged emotional terms. A slide show³ was presented, comprised of photographs from fashion and pornography magazines, record album covers, and billboards, which showed women and children abused, beaten, bound, and tortured for the sexual titillation of consumers. One frightening spread from *Chic Magazine* showed a series of pictures of a woman covered with blood, masturbating with a knife. The title was "Columbine Cuts Up."⁴ Several speakers reminded the audience of the movie "Snuff," in which women were

1. Panel Discussion: Regulation of Pornography [hereinafter cited as Regulation Panel], Audience Comment, at 298 *infra*.

2. Panel Discussion: Effects of Violent Pornography [hereinafter cited as Effects Panel], Opening Statement of D. Richards, at 236 *infra*.

3. Hommel, *Images of Women in Pornography and Media*, at 207 *infra*.

4. *Id.* at 212 *infra*.

supposedly tortured to death for the purpose of entertainment.⁵ Another speaker described a case in which the gang rape of a young girl was found precisely to replicate a dramatization of a rape shown on television a few days earlier.⁶

Phyllis Chesler expressed the sentiment of many feminists when she described her difficulty in "speaking about pornography in a reasonable tone. To me," she said, "it is like a Jew discussing reasonably Hitler's *Mein Kampf* or a black person talking reasonably about some Ku Klux Klan manifesto."⁷ A similar view was expressed by Larry Parrish, a Memphis attorney, who said:

I am finding it increasingly difficult to remain very cool and collected. . . . Just recently, I met with a little girl who between the ages of three and five had been sexually molested by her pedophile father. . . . What I want to emphasize is that the pictures that you have seen on the screen are not just isolated remote instances. We are talking about things that occur in Memphis, Tennessee.⁸

Andrea Dworkin spoke with rage of the failure of society to acknowledge the atrocity of widespread violence against women. "A woman, nearly naked, in a cell, chained, flesh ripped from the whip, breasts mutilated by a knife: she is entertainment, the boy-next-door's favorite fantasy, every man's precious right, every woman's potential fate."⁹

The feminist speakers sought advice from the civil liberties lawyers present about what legal action might be taken to eliminate violence in pornography. Leah Fritz insisted that "[t]he gentlemen who are lawyers must find a way to protect my civil rights."¹⁰ The attorneys, however, interpreted the outcry against violent pornography as a call for censorship, and most of their discussion focused on defending the first amendment against this perceived assault. Herald Price Fahringer conceded that violent pornography degrades women, and said he finds it "personally distasteful."¹¹ He urged, however, that "[u]nder a democratic system it is imperative that all new and unconventional ideas, no matter how offensive, be heard and read in order that we may discover the few that may be truly enlightening."¹² Professor Paul Chevigny said he did not believe "the law has any right to control writings with respect to emotions about sex. My reason is because I respect speech. I think speech is effective. I think it does change people's minds."¹³ He feared that the suppression of any speech would impair "[t]he discussion of the meaning of relations between men and women."¹⁴ Other speakers went further, asserting that

5. E.g., Smith, *Private Action Against Pornography: An Exercise of First Amendment Rights*, at 247 *infra*; Regulation Panel, Opening Statement of B. Feigen Fasteau, at 282 *infra*.

6. Brownmiller, *Pornography and the First Amendment*, at 256 *infra*.

7. Effects Panel, Opening Statement of P. Chesler, at 232 *infra*.

8. Parrish, Extemporaneous Remarks accompanying *The 'Taken as a Whole' Standard to Determine the Obscene*, at 259 *infra*.

9. Dworkin, *supra* note 5 at 216.

10. Effects Panel, Opening Statement of L. Fritz, at 238 *infra*.

11. Fahringer, *If the Trumpet Sounds an Uncertain Note . . .*, at 251 *infra*.

12. *Id.* at 252 *infra*.

13. Effects Panel, Opening Statement of P. Chevigny, at 233 *infra*.

14. *Id.* at 234 *infra*.

pornography was protected by the first amendment because of its social value. "Pornography," said Professor David Richards, "communicates a certain vision of sexuality . . . which is not rigidly marital or procreational. . . . I frankly do not see how mere offense at content is enough to permit its prohibition."¹⁵

Many of the civil libertarians seemed to believe that protection of first amendment rights forbids creation of a remedy for those possibly injured by pornography. They addressed the issue of government censorship, and criticized current standards for deciding what may be censored, but bypassed consideration of other avenues of relief. A few speakers discussed remedies short of censorship, suggesting possibilities of government regulation and actions which could be taken by private groups that would be consistent with the first amendment. Marjorie Smith urged that private action by groups opposed to violent pornography, including picketing, boycotting, and leafletting, was a permissible exercise of first amendment rights. Smith noted, "I think the ACLU would say that to the extent that the group seeks the removal of material to which members of the public may wish access, their activities are questionable."¹⁶ Smith disagreed with this view, urging that the first amendment banned only governmental action seeking to limit speech. Private action, she said, does not violate the Constitution even if its "effect would be to diminish the diversity of expression in the community."¹⁷ "Those who direct their boycott at media advertising are acknowledging the power of ideas and expression to influence action. They are taking ideas seriously, a result which can hardly be deplored by civil libertarians."¹⁸

Current Supreme Court standards, under which each community may make its own determination of what is obscene, were much criticized. The community standards rule creates administrative difficulties for magazines which are distributed nationwide.¹⁹ Marshall Berger advocated the establishment of "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."²⁰ Brenda Feigen Fasteau suggested that if we are to have community standards of what is obscene, they should be set by women, since they comprise the "community" most affronted by pornography.²¹

Several participants believed that certain pornography falls outside the protection of the first amendment, and may be regulated. According to Ephraim London, it would be permissible to "draft an ordinance which would prohibit the display of offensive material to people who did not want to see it."²² Feigen Fasteau favored expanding the unwilling audience exception to ban displays of pornography which are "against the will" of the viewer.²³ She also

15. *Id.*, Opening Statement of D. Richards, at 236-37 *infra*.

16. Smith, *supra* note 5, at 248 *infra*.

17. *Id.* at 249.

18. *Id.* at 250 *infra*.

19. Regulation Panel, Statement of B. Feigen Fasteau, at 294 *infra*.

20. *Id.*, Opening Statement of M. Berger, at 281-82 *infra*.

21. *Id.*, Opening Statement of B. Feigen Fasteau, at 283 *infra*.

22. *Id.*, Opening Statement of E. London, at 285 *infra*.

23. *Id.*, Opening Statement of B. Feigen Fasteau, at 283 *infra*.

posited that a statute could be enacted that would prohibit incitement of violence against women. She thought it would be permissible to ban literature or movies that describe in detail "how to rape a woman or how to violate a woman."²⁴ Such a statute, Feigen Fasteau noted, would not violate the first amendment.²⁵

Other suggested remedies avoided first amendment problems by avoiding censorship. Feigen Fasteau recommended extending the libel laws or creating a new tort that would allow "a group of women injured both mentally and physically by a particular movie or magazine" to sue for damages. Plaintiffs might be victims of crimes which replicated acts depicted in pornography magazines, or persons mentally disturbed by public displays of violent pornography.²⁶

Paul Chevigny was doubtful about the likelihood that legal remedies created to compensate women injured by pornography would be enforced to that end. Recognizing that violent pornography is "bad for women," that it creates "a degrading atmosphere," and that "specific connections [to criminal conduct] could probably be shown," Chevigny stressed that any censorship law would inevitably be used against the very group it was intended to benefit.²⁷ "Censorship laws are always enforced on the side of the most powerful people If you are an oppressed class in society, the last thing you want are laws controlling speech."²⁸

Perhaps the most telling occurrences at the colloquium were the things that did not happen. Although some speakers bridged the gap between the feminists and the civil libertarians, there was a general failure of communication. The lawyers spoke legalese; the feminists spoke feminese. In addition to their non-intersecting dialects, the speakers in the two groups tended to address different issues. The lawyers defended free speech, seeming not to understand that the feminists had come for help. Even those attorneys who saw the importance of the problem and the need for legal solutions had difficulty in pigeonholing the injury, in identifying the applicable legal remedies. In part this difficulty occurred because the "atrocities" were presented in a form not easily susceptible of legal packaging. Paul Chevigny articulated this problem, saying, "I thought we were going to hear about effects of pornography. I did not hear anything about specific effects. *Not a syllable.*"²⁹

The feminists described the evils of violent pornography in subjective, emotional terms. They were oblivious to the need for specificity, proof of injury, or "hard evidence." (One feminist even suggested that the demands for empirical information in the form of "hard evidence" was a Freudian slip, an assertion of masculinity.)³⁰

This colloquium was the beginning of a dialogue. The failure of the feminists to produce whatever "proof" exists that pornography triggers acts of vio-

24. *Id.*, Statement of B. Feigen Fasteau, at 300 *infra*.

25. *Id.*

26. *Id.*

27. Effects Panel, Opening Statement of P. Chevigny, at 233 *infra*.

28. *Id.*

29. *Id.*

30. *Id.*, Statement of A. Dworkin, at 238 *infra*.

lence against women, and the failure of the lawyers to produce fully developed legal solutions to this problem, are consequences of the newness of the discussion. Bert Pogrebin, an attorney in the audience, suggested that legal thinking in this area must change before this problem can be solved. He observed that “[w]e want a society that provides for the free and robust exchange of ideas Some of us have only recently come to the realization that we also want a society free from the kind of statistics [relating to violence against women] that have been quoted today Part of our problem is that most of us have paid little attention to the societal interests represented by these statistics. 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.”³¹

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31. Regulation Panel, Audience Comment, at 297-98 *infra*.

