

PRIVATE ACTION AGAINST PORNOGRAPHY: AN EXERCISE OF FIRST AMENDMENT RIGHTS

MARJORIE SMITH

The feminist movement has increasingly devoted its attention to the subjects of sexual assault and battered women, in part as a response to the whole stereotyping of women as weak and ineffectual. There have been a number of efforts associated with this, one of the most prominent of which is by a group on the west coast, Women Against Violence Against Women. This group describes itself as "an activist organization working to stop the gratuitous use of images of physical and sexual violence against women in mass media, and the real world violence against women it promotes through public education, consciousness raising, and mass consumer action." Their activities included a protest of the showing of the movie "Snuff" in Los Angeles.

A spokeswoman for Women Against Violence Against Women elaborated on their purpose, particularly in connection with the group's efforts to remove degrading images of women from record album covers:

The record album covers perpetuate the myths that women like to be victims, that they're easy and appropriate targets, that as victims they're sexually exciting and entertaining, as well as the myth that this is appropriate and natural behavior for men. We think that it's harmful in that it contributes to the overall environment that romanticizes, trivializes, and even encourages violence against women.

The group has stated that it neither advocates nor supports censorship; it urges that the recording industry demonstrate a sensitivity to women that parallels its willingness to refrain from advertising that is racist or that glorifies drug usage. They have engaged in typical consumer boycott techniques such as picketing and letter-writing campaigns.

I will address myself to how one who is a civil libertarian feminist should respond to this program. That the activities of this group, even though it does not advocate government censorship, raises civil liberties questions seems undeniable. Although the first amendment prohibits only government interference or control of free expression, a boycott or other effort designed to eliminate expression of a particular kind may curtail the diversity of expression which the first amendment seeks to protect.

It is fundamental that the suppression of first amendment rights does not become acceptable because the cause is holy. Thus, in deciding whether to support the activity of a group such as this, one does not begin by deciding whether one agrees that addressing these problems, problems of rape and battered women, and other very negative consequences, are important or even

whether one believes that violent pornography contributes to the incidence of violence against women. These decisions concerning the merits of the position being urged are relevant only after it has been decided whether the means being used are consistent with the first amendment, not beforehand.

The ACLU Board of Directors has re-examined its position on the question and in 1977 issued a statement that it is, of course, a first amendment right for anybody to picket or boycott, to influence the decisions of those responsible for deciding what material a medium of communication will present. But they express concern that such organized group activities

can result in removal of materials to which members of the public may wish access. Therefore, although such activity may be legally permissible, [the ACLU believes that] in situations where the result or the likely future consequences of such activity will be to remove materials or close down a media outlet, the ACLU may call attention to these consequences and urge media officials to respect the principle of public access to all materials.

They went on to say that "what should be considered are the exact methods employed by the pressure group, the number of available outlets, and all other criteria that might be relevant in the particular instance." The ACLU position is plainly consistent with the campaign of Women Against Violence Against Women, so far as it utilizes picketing, leafletting, and so on, to raise the consciousness of those who market records and those who purchase them. Obviously, however, the point of the picketing is to stop something from happening, to stop these violent portrayals of women on record covers and through other media outlets. The question is how does that square with the civil libertarian position? 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. The ACLU position starts with the premise that a civil libertarian must favor the individual's right and opportunity to communicate as broad a spectrum of ideas as desired and concludes with the concept that diminishing of expression of a particular idea, whether brought about by law or public pressure, is inimical to the goal of freedom of expression. According to this view, the distinction between private pressure and government regulation is not very important.

I think a case can be made that the distinction is an important one. For example, take the recent Supreme Court decision striking down a block-busting ordinance which prohibited people from placing signs on their property saying that their house was for sale.¹ In striking down that ordinance as inconsistent with the first amendment, the Court said that if dissemination of this information can be restricted, then any locality could suppress any facts that reflect poorly on the locality, as long as a plausible claim could be made that disclosure would cause the recipients of the information to act irrationally.

However, there is an alternative to this highly paternalistic approach. The "alternative is to assume that information is not in itself harmful, that people

1. *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977).

will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."² The court further stated:

In invalidating this law we by no means leave Willingboro defenseless in its effort to promote integrated housing. The township obviously remains free to continue "the process of education" it has already begun. It can give widespread publicity—through "Not for Sale" signs or other methods—to the number of whites remaining in Willingboro. And it surely can endeavor to create inducements to retain individuals who are considering selling their homes.³

Just as the government cannot suppress a particular point of view but can participate in the system of freedom of expression in its effort to persuade individuals to follow a particular course, so a private group in a township could organize to persuade other townspeople either that it was not in their interest or that it was morally wrong to participate in the white flag movement by placing such signs. If a private group succeeded through discussion and other peaceful protest methods in convincing all the townspeople to refrain from placing such signs, it is my position that a civil libertarian would not have to deplore the result even though the effect would be to diminish the diversity of expression in the community.

Is this result acceptable just because it would occur only if each individual made a decision not to place a sign and hence the removal would not be removal of material to which members of the public wish access? In the commercial sphere, I think that there is no ready analog to the effort to convince all prospective purchasers of the disputed item that it should not be purchased. An advertiser will change its ad campaign as soon as it finds the sale of a product is slipping to any significant degree below that of a similar product promoted by a different type of advertising. It is recognized that in the world of commerce, only products and ideas that are wanted by a certain minimum percentage of persons will be produced. In the commercial world, the competition of the market does not result in all goods finding a ready outlet. Similarly, in the world of ideas, as Mr. Justice Stevens has written, reliance is placed on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless.⁴ In Justice Holmes' famous formulation, "The best test of truth is the power of the thought to get itself accepted in the competition of the market."⁵ Of course, should any company believe that, as a matter of principle, it should continue the advertising which is the subject of the boycott, no protest can force it to change its course. In this crucial respect, pressure exerted by members of the public is different from a law prohibiting certain types of communications.

2. *Id.* at 97, quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

3. *Linmark Associates v. Township of Willingboro*, 431 U.S. 85, 97 (1977).

4. *Smith v. United States*, 431 U.S. 291, 321 (1977) (dissenting opinion).

5. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

The very process of reaching social decisions assumes that pressures from various sources which may affect the volume, content, or manner of expression will be constantly at work. People do not, as a rule, become involved in a boycott, whether related to the media or other causes, unless they believe very strongly in the position being espoused. The system of freedom of expression by itself does not produce any particular results. It is an instrument to be used by groups in society to conduct their affairs without resort to force. 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.

Although a boycotting group probably cannot demonstrate that any particular media portrayal is directly responsible for antisocial conduct, that does not make it irrational to believe that the offending material may have harmful effects. As Women Against Violence Against Women claims, when millions of people see women portrayed as victims day in and day out, an impression is created that women are victims, that it is okay, or even normal to pick on women. Further, a great deal of record advertising uses images of violence to women in a joking manner, which is, at the least, an outrageous insult and, at worst, trivializes and demeans the very real pain that raped and battered women suffer.

Civil libertarians are rightly concerned about consistency and devotion to neutral principles. A civil libertarian could uphold, as a matter of principle, the right of any group to attempt to influence the media through persuasion and peaceful boycott techniques. Beyond that, civil libertarians would be free to oppose or support any group's activities based on whether the positions espoused seem worthy of support and the tactics used appropriate. The civil libertarian concern that private pressure groups will have the effect of diminishing diversity and controversial endeavors by the media does not seem a neutral basis for deciding to oppose such activities. Moreover, while such pressure group activities have waxed and waned, in most instances it does not appear that these activities have significantly limited diverse expression. While it is possible, in short, for reasonable people to disagree about whether the problem of media glorification of violence against women in pornography or elsewhere is sufficiently widespread or has sufficiently serious consequences to warrant involvement in the activities of a group such as Women Against Violence Against Women, the decision to become involved in the group's efforts can be made by a civil libertarian feminist without abandoning civil liberties principles. Thank you.