PORNOGRAPHY AND THE FIRST AMENDMENT

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I must begin with a couple of clarifications. One is for Mr. Fahringer. If he really believes that pornography can be used to sublimate the violent sexuality of men, he must also believe that the problem of child beating can be eliminated by having bookstores and movie theatres devoted to the pictorial representation of parents beating children, so the impulses of real parents to beat real children can be sublimated.

And now a very important clarification for Mr. McGeady, and also for the Supreme Court. We have heard the phrase "appealing to prurient interest" used a lot here today, as a definition of what is pornographic, or what is obscene. I must make it clear that this is not the feminist definition of pornography. We are not afraid of prurient interest. We are not troubled by the idea of people thinking about the sex act; we are not troubled by the idea of people being stimulated by seeing an explicit picture of the sex act. What we object to is the sexual humiliation and degradation of women that is the essence of pornography. Pornography's purpose is to distort and ridicule female sexuality; pornography's intent is a call to violence against the female body. We object to the presentation of rape, torture, mutilation, and murder for erotic stimulation and pleasure.

I want to say to the civil libertarians here today that the pornography question has become a first amendment issue in the 1970's not because of the growing power of the women's movement, but because of the growing power of the pornographers. We feminists now find ourselves in the curious situation of having the sexual intimidation of women actually buttressed by some free speech advocates—the so-called absolutists.

The question I want to raise is whether a powerful group, a sick group, a mentally unstable group, an evil group, has a protected right to promote sexual violence against an oppressed group for commercial exploitation and gain. I agree with Earl Warren that the federal and state governments can constitutionally punish the purveyors of obscenity.[1] I would like to remind this audience of the words of Warren Burger: "To equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the first amendment and its high purposes in the historic struggle for freedom. It is a 'misuse of the great guarantees of free speech and free press'. . . ."[2]

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1. Roth v. United States, 354 U.S. 476, 496 (1957) (Warren, C.J., concurring).

2. Miller v. California, 413 U.S. 15, 34 (1973), *quoting* Breard v. Alexandria, 314 U.S. 622, 645 (1951).

Some of you may recall that the Hollywood Ten went to jail in the 1940's because they refused to testify before a congressional committee about their political affiliations. They tried to use the first amendment as a defense, but they went to jail because there were few civil liberties lawyers who would champion the first amendment right to free speech in those days when the issue involved was the Communist Party. But the Hollywood Ten were correct in claiming that the first amendment, the high purpose of the first amendment, is the protection of unpopular ideas, political dissent. It was tough, real tough, to be a first amendment absolutist in the 1940's and '50's when the issue was the right to hold an unpopular view—and it's such fun to be a first amendment absolutist today, isn't it, when the issue is a pornographer's right to make a million dollars off the bodies of women.

The first amendment of late has been stretched out of shape to protect all kinds of acts that were never intended to have constitutional protection. One example was mentioned here this morning. A judge on Long Island (New York State) ruled that a topless-dancing bar was legal because in his opinion the dancers were merely giving vent to creative expression, an extension of free speech. And another interesting case has come out of Maryland. The Maryland National Bank discovered that the Olympic Baths, a house of prostitution, was using its Master Charge program. Men were actually able to put the purchase of a woman's body onto Master Charge. The bank did not want this kind of business and cancelled the Olympic Baths account. Olympic Baths brought a first amendment suit, claiming the bank had no right to deny them credit privileges for moral reasons.[3] I think this case is still in the courts.

In August, the National Broadcasting System won a civil suit brought by a nine-year-old girl who was gang-raped after the "Born Innocent" program was shown on television. The TV program featured the gang-rape of a young girl, and three days later a live gang went out and replicated the act. (To people who maintain that we cannot prove that pictures of sexual violence cause real sexual violence, I say that this case is a perfect example of proving cause.) NBC got this case dismissed on a first amendment basis.[4] The girl and her mother are appealing the judgment.

I will now discuss a few cases that might be difficult even for the first amendment absolutists in this room, because both sides, I think you will agree, have merit. It is a question of superseding interests. Does the right of privacy supersede the first amendment, the right of free speech, and the public's right to know? Does the right of public safety supersede the right of privacy? Are there any interests that take precedence over the first amendment, even for first amendment absolutists?

Here is an interesting case. A newspaper wanted to do a series on Medicare abuses, and sued to force a hospital to release its records, claiming first amendment, free speech, and the public's right to know. The hospital moved to bar the release of information on the grounds that it involved the pri-

3. The N.Y. Daily Metro, Sept. 26, 1978.
4. The N.Y. Times, Aug. 9, 1978 at A8, Col. 1.

vacy of its patients.[5] How would you vote on this one? I can see merit on both sides.

Another example: Massachusetts passed a state privacy law prohibiting press and public access to criminal case indexes maintained by state courts. The law was declared unconstitutional.[6] How would you vote on that one? Do you think the press should have access to all criminal records, including arrest records? Even if the arrested person was not found guilty?

Aryeh Neier of the ACLU wrote an entire book on this very important question of privacy, as he defines it, and yet I am certain that Neier considers himself a first amendment absolutist.[7] Under Neier's logic, a person with three rape arrests and no convictions ought to be protected from having his record made public in order that he might get a job as a New York taxi driver. I would claim the first amendment and the public's right to know on this one, superseding privacy. I don't want to ride in a cab with a guy who had three rape arrests and no convictions because I understand something about the conviction rate for rape in this city.

Privacy can be construed in another way. As women we are saying that our privacy is being invaded on a daily basis by the pornographers. It is not true, as Justice Douglas wrote, that no one is "compelled to look."[8] To buy a newspaper at the corner stand in New York City today is to subject oneself to a forcible immersion in pornography, to be demeaned by the flagrant cover of a *Hustler* magazine.

I have been talking about how one public interest can override another public interest, depending on one's perspective. During the recent New York City newspaper strike most of us struggled to follow the Jascalevich case, and as it happens, the Myron Farber case. Farber was a tough one for first amendment absolutists. Jascalevich was on trial for murder and he deserved the best defense he could get, and that included any notes the reporter Farber might have had. The absolutists argued that unless Farber could protect his sources, free speech would ultimately be vitiated. I think it is very dangerous to say that a reporter's right to free speech is more important than a defendant's right to a fair trail. The state of New Jersey felt similarly, and Farber stayed in jail until Jascalevich was found not guilty; the Supreme Court has refused to review the reporter's conviction.[9]

The Farber affair occurred during a pressman's strike that shut down all New York City newspapers, and those of us who keenly wanted to follow the developments were certainly denied our "right to know." Why, however, didn't some absolutist try to use the first amendment and "the chilling effect" against the strikers? How come nobody said, "The pressmen are infringing upon free speech"? No good liberal would suggest that the first amendment be used to break a strike. It would go against all good liberal canons. I am waiting for the day when liberals are as sensitive to the concerns of women.

5. The N.Y. Times, April 12, 1978 at B2, Col. 2.
6. *Id.* at B2, Col. 2.
7. A. NEIER, DOSSIER: THE SECRET FILES THEY KEEP ON YOU (1975).
8. 413 U.S. at 44 (Douglas, J., dissenting).
9. New York Times Co. v. New Jersey, 439 U.S. 996 (denial of certiorari); TIME, Dec. 11, 1978 at 68.