

POLICING THE INTERNET: *JAKE BAKER* AND BEYOND

March 9, 1995

BARRY STEINHARDT'S OPENING STATEMENT

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BARRY STEINHARDT:

Thank you. It's a pleasure to be here.

It occurred to me as I was preparing for this evening that I ought to spend some time thinking about the depth at which I wanted to discuss the *Jake Baker* case.

I think it's pretty clear from the turnout here tonight that not talking about *Jake Baker* would be a little bit like ignoring the dead horse in the room.

And Professor MacKinnon has put the case front and center, and I do intend to talk about it, but I want to try to put it into some context first, for a couple of reasons.

We are now, as a number of the people in the panel have suggested, undergoing a genuine communications revolution.

It's a communications revolution that certainly rivals the advent of broadcasting in the early part of the century, and I think probably rivals the introduction of the printing press. It is going to change the way that we all conduct our daily lives. It certainly is going to radically change the law, although at the moment the technology is changing much faster than the law is, and that's probably a good thing, because I'm afraid that the law may not do well in catching up.

It seems to me that interactive media, as Danny Weitzner said, has the potential, and I think Professor MacKinnon said the same thing, to be a tremendously empowering technology. It has the potential to empower all of us not only to be the recipients of a broad range of information but also to create that information, to provide that information. It has the potential to democratize speech.

You can begin to see around the world some of the potential. While in this country most of the debate about policing the Internet has been around the subjects of sexual expression, and that's what mostly we're going to talk about tonight, around the rest of the world where they're not quite so hung up about sexual expression, they really talk about political expression.

The Internet is already becoming a powerful political tool. When a dissident is arrested in China people in the west who are supportive of those dissidents, the Amnesty International, Human Rights Watch, et cetera, know about that almost instantly because of the Internet.

In Sarajevo a couple of winters ago, when they were under siege, there were people who were communicating with the outside world, via the Internet, using -- really I think a very poignant story -- since there was very little electricity they were generating their electricity by using the generators in their cars, using what little fuel they had, but they felt that using that fuel to

communicate through this new medium was more important, perhaps, than heating or lighting their homes.

And I want to return to that Sarajevo thing when we talk about *Jake Baker* in a minute.

But I do think that we have to appreciate what a tremendously empowering tool this new medium can become.

Nevertheless, whenever you have a revolution of any sort going on you have profound changes in society, there's a tendency for a lot of people to become frightened.

This technology, in particular, is a little mysterious. There aren't -- probably in this room there is a fair amount of knowledge about how to use the technology. And I know to a certain extent we're talking about generational differences in this country about knowledge of the technology, but to a large extent out in the general public, this is a somewhat mysterious and frightening sort of technology.

And there is a real possibility that the potential of this technology to democratize speech, to allow everyone to speak, you don't have to have a broadcast license, you don't have to own a cable company, you don't have to own the printing presses of the New York Times or the Detroit Free Press, but that potential can be cut off because of the fear of the technology itself and the possibility of overreaction to the technology by those whose first instinct, when they're confronted with a new technology, is to be fearful and they want to reach out and find some way to control it.

Nothing will cut off the potential of this technology quicker than a censorial reaction and then attempts to control it.

Now, how is the law developed here? As a number of people have said, there's not a whole lot of law. To a certain extent, when you think about the law in this context, you have to kind of pick your paradigm. You have to decide how it is that you want to look at this technology. We've had traditional broadcast law, laws that apply to the print media, et cetera, et cetera.

It seems to me that in approaching the legal issues you've got to do two things. First you have to understand the nature of the technology. And Danny, I think, did a pretty good job of explaining that. When you're attempting to apply legal principles, you have to keep the nature and the technology in mind. It is different. Certainly different than broadcast, certainly different than the print media, et cetera, et cetera.

Secondly, I think you have to -- since we are in a new area, you still have to apply core values. We probably in this panel have significant disagreements about what those core values are, but I think the core values that need to be applied are the values of free speech, of privacy, of equality, of opportunity.

What is going on now, I fear, in some quarters are attempts to reach out and control this new media, which really take two forms.

One, you have some attempts by people who misunderstand the media and attempt to apply the wrong paradigm. Those are, I think, well intentioned, but they have the potential to do a lot of damage.

Second, you have attempts to control this new media by people who understand it very well and who have recognized that it is a very powerful new media and that in order to control it, you're going to have to take more extreme measures, perhaps, then you would to control other kinds of media.

It's one thing to control the New York Times. You shut down their printing press. How do you shut down the Internet?

Let me give you a couple of examples. Let me first deal with the example of those who I think understand the media and its potential very well, are frightened by it, seek to control it and have recognized that they have to take extraordinary steps to control it.

Last year the Congress passed a bill that's gone by a variety of different names. Some people call it Digital Telephony. Some people call it the FBI Wire Tap Bill. It has some official name, which is sort of a euphemism that I can never remember, but the essence of the bill passed by the Congress is to require telephone providers, telecommunications providers to build into the new digital telecommunications systems a guarantee that the FBI and other law enforcement agencies can successfully wiretap.

Why did law enforcement propose this? Out of fear. We might argue about whether or not this fear was real or not, but out of fear that the new medium, the new form of digital communications, would make it more difficult to wiretap.

That may or may not be true at the moment. It's probably going to be true in the future.

But something extraordinary happened when the Congress passed that law. This is the first time in the United States history that the Congress in the United States has said to a major industry, or any industry that I'm aware of, not only do you have to cooperate with us in this surveillance but you have to guarantee our success. You must incorporate into your infrastructure, into your technology, the means of success for us.

Now, that has grave, in my mind, grave privacy, grave Fourth Amendment kinds of questions.

But law enforcement goes further than that, because they recognize that digital communications can be scrambled and crypted, and thus if you don't possess the keys to decrypt those communications, they can be hidden and you can wire tap, but you might just get gibberish, you might just get garbage.

So the very day after the digital telephony bill passed, Louie Freeh, who's the Director of the FBI said that if it turns out that encryption technology prevents us from being able to succeed in wiretapping, we're going to have to come back and ask for the authority to decrypt; to require decryption.

Now what that is, is a recognition by the government that these new tools are very, very powerful. And that they are, in fact, going to succeed. Extraordinary steps of the sort that we have not previously seen are going to need to be taken.

So that's, I think, the first example of a government that well understands the power of the new media and is willing to take, well, what I would regard as Draconian means to control it.

The second example is what I think is the attempt to apply existing law where it doesn't apply in a sort of well-intentioned effort to deal with problems.

That is epitomized by the attempts, both in the Congress and there are state analogs to this in various legislatures around the country, to deal with indecent communications; so called indecent communications.

The best known of those attempts is the Exon bill, which is Senator Jim Exon, now pending before the Congress.

We have available here some materials -- I don't where they're going to be, outside? Right there, Kim Stroud from our local office has them -- describing the Exon bill in greater detail, but let me just touch on it briefly.

What the Exon bill attempts to do is to apply the existing law with regard to telephone communications, indecent harassing telephone communications, to the Internet and other kinds of interactive media.

It's a rather crude attempt to do that in many respects, and I think is based on a misunderstanding of the medium.

As I think Danny said, telephone communications are basically point to point. The law, with regard to telephone communications and harassing communications or indecent telephone communications is based on the premiss that only those communications which are uninvited, non-consensual can be punished.

What the Exon bill would propose to do would be to make it a crime to transmit indecent, harassing, et cetera, communications.

Now, you've got to stop and think about that in the context of the technology for a moment.

Who transmits those communications? Lots of parties transmit those communications. Not only the authors of the communications, the publishers of the communications, the speakers, but everybody in the middle who acts as a conduit to get that information to the recipient or recipients.

It could be the University of Michigan. It could be every computer connected to the Internet on the way while the transmission is going.

The Exon bill is also not limited to non-consensual conversations. It would punish private E-mail between two consenting adults if it was found to be indecent, which is a rather slippery term that

no one really understands but seems to be based on notions of what is appropriate for children to hear.

But the literal language of the Exon bill would apply to sexually explicit conversations between two consenting adults and would cover not only those two consenting adults but everybody in the communication web that allowed the communication to take place.

So I think the Exon amendment is an example of the difficulty that government has in coping with this new technology and attempting to apply old analogies, old paradox.

Now, let me finish by turning to *Jake Baker*.

I think that *Jake Baker* is, in fact, a very unusual instance. It is not true, as Professor MacKinnon says, that people on the Internet have not figured out that they can engage in virtual pornography or use third parties, or whatever.

If you look at the particular news group that Jake Baker posted to, I think you will find that Baker is by far and away the exception in the use of a particular name of a real individual.

Those news groups are, in fact, fantasy. They are self described as fantasy. Baker himself in that posting made it clear that it was fantasy, described it as a sick fantasy, and I'm not going to dispute that characterization.

(Laughter)

BARRY STEINHARDT: But they are, in fact, fantasy.

The notion that people are out there routinely using the names of real people is simply not the case. It is not factually true.

That doesn't mean that I don't think that in this context that what Baker did may well not give rise to civil liability.

I think that the young woman who's name was used may well have a cause of action for invasion of privacy that she may well want to pursue and Professor MacKinnon may want to pursue it on her own.

The question is, what is the role of the government here? And I think we have to parse this a little bit.

The first question was, what is the role of the government with respect to the posting to the alt.sex.stories, which is the posting to a public news group? It's read, by some estimate, by a quarter of a million people. It is widely known among it's users to be fantasy. Baker himself in this context makes it pretty clear that it's fantasy.

I don't believe that the posting to that news group ought to be criminally punishable.

Fantasies are not crime. Acting on those fantasies are crimes. But fantasies themselves, are not crimes.

I think that under the circumstances the government has no business criminally prosecuting Jake Baker for those postings. That doesn't mean, as I say, that there may not be some civil liability for the young woman involved.

Secondly, we have to turn to the question of the private E-mail correspondence, which I think is a much more difficult issue. I'm not prepared at this point to draw a conclusion about it, because I haven't seen all this E-mail correspondence.

But I do think that it's important in this context -- we're talking about the law -- to recognize what the law is in this particular case.

The question is, was this E-mail correspondence a threat? I think that it's useful to look at what constitutes a threat under the section of the federal criminal code that Baker has been charged with.

What the courts have found is that in order for a threat to -- for speech, for words alone to constitute a threat, this is from *United States v. Kelner*, which is a Second Circuit case, that the threat:

on its face and in the circumstances which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened as to convey a gravity of purpose, imminent prospect of execution.

Now, there is no question that Jake Baker's fantasies are not the kind of thing that I want my children exposed to or that I would be particularly proud of if I was his parent. But the question is, did those E-mail communications constitute a threat under that standard? Was this a real threat? Was it an unequivocal threat? Was it unconditional? Was it immediate?

I don't know the answer to that question. I think that's going to depend on the context. You've got -- I've seen only what's attached to the government's affidavit and it's confusing. It's confusing in a sense that it's clearly a mixture of fantasy, of sort of fantasy role playing, which many of you know is quite common in interactive communications, and something that appears to be something else; perhaps real time conversations.

I do have my doubts to whether or not the government in this case is going to be able to show that these were unequivocal, unconditional, immediate and specific as to a person. That's going to have to be decided by the courts.

But I want to suggest to you that *Jake Baker* is -- two things need to be recognized about it.

One, it is an unusual case. There is not a lot of that going on out there; the use of real people in these kinds of postings.

Second, that I believe that it is an example of the overreaction of some people when faced with this new media.

Here you have an individual who's now spent nearly a month in preventive detention in what is at least a very close First Amendment case. It seems to me that's an example of over reaction, that there are more important things for the FBI and for the U.S. Attorney's Office to be doing

with its time. That there are real crimes out there, that there are real acts of violence occurring against women every day and that's what needs to be prosecuted. We need to put this in some context and not allow it to become the excuse for over arching censorship of interactive communications.

I want to end by coming back to my example of the communications from Sarajevo, and to try to put into some context what Professor MacKinnon says when she says that she doesn't think that the law ought to be any different in cyber space than it is anywhere else.

As many of you know, it's been Professor MacKinnon's theory that speech which puts women in postures or positions of sexual submission, civility or display, ought to be criminally punishable.

I want you to think about Sarajevo for a moment. Think about Bosnia and think about those people huddled together, God knows where in bombed out buildings, using their generators to transmit messages about the rapes of Bosnian women, whether or not those might not violate the very laws that Professor MacKinnon proposes?

Thank you.

(Applause)

On to the questions...