

POLICING THE INTERNET: *JAKE BAKER* AND BEYOND

March 9, 1995

CATHARINE MACKINNON'S OPENING STATEMENT

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PROFESSOR MACKINNON:

It's really great to be here, and to see so many people who's faces I know.

I'd like to talk about some of the broader issues of the Internet, and in particular, speak about some of the pornography questions in a first amendment setting, that are raised by it. And, particularly, that are raised by the Jake Baker incident.

I want to just begin with the observation that I think that the kind of possibilities that are open for access to speech by the Internet, are extremely exciting and important. Particularly as the cost of the technology drops. The availability of less mediated access to speech that it offers, opens the possibility for greater equality in access to speech than we have had.

The question that comes up is: as we create this new speech community in societies that remain unequal, will we be bringing the inequalities that have plagued, not only existing society, but existing mediums with us? Or will this be a new opportunity, to take a fresh look at those issues, and actually address them in a better way than we have so far?

Now, imbedded in this way of thinking about it is that words and pictures in cyber space do what words and pictures anyplace else in society do. I think that the issues of quantity and depth of penetration, if you will, are important, but they don't make it unique. They don't make it something that is different in kind. Although there are new important and complicated issues of delivering on any regulatory commitment that one may wish to make.

In other words, I don't think the Internet is different from anything else as form of speech, and that leads me to my view that the material on the Internet, *prima facie*, should be protected, unless there is some sort of showing of harm.

In order to think further about this, I would like to talk more about the incident surrounding Jake Baker. We could just get beyond it right away, but it is a real incident. And that's one of the things that law thinks well about: real incidents.

One of the questions I'd like to talk about here is: is there a showing of harm? Without getting extensively into the evidence, Jake Baker was indicted for a threat over the Internet. The evidence of this threat, includes substantial E-mail communications for which he waived his privacy rights. These communications include discussions of plans, dates, times, places and other individuals with whom to carry out the kinds of activities, that were discussed in both his other E-mail, that E-mail and in what I will refer to as the pornography.

The pornography laid out, of course, an account of abducting, raping, elaborate torture, and murder. One piece of the E-mail says this, now think threat, is it or isn't it:

I've been trying to think of secluded spots, but my area of knowledge of Ann Arbor, is mostly limited to the campus. I don't want any blood in my room. Though, I have come upon an excellent method to abduct a bitch. As I said before, my room is right across from the girls bathroom. Wait until late at night, grab her when she goes to unlock the door, knock her unconscious, and put her into one of those portable lockers, forget the word for it, or even a duffle bag. And then hurry her out to the car and take her away. What do you think?

Now, blood suggests threat to injure, the whole thing suggests a plan to kidnap. One of the legal issues will be: would a reasonable person have an apprehension, upon reading that? Then there are other comments, such as, "It's not enough anymore to think about it, I have to do it," and so on. Statements like that make a tie to future action rather transparent.

I would suggest that if the authorities had waited until these things had been acted on, if they were, you should ask yourself what you would think of those authorities if you knew that they had had this information. I mean that's a long way around of saying, if this isn't a threat, what is? I mean what further words are you waiting for, for it to be one?

Now there is the thing called the story, which is a piece of snuff pornography and makes very clear the "it" that is referred to in, "It's not enough anymore just to think about it, I need to do it." And together with the E-mail, makes very clear what is, apparently, the motive for what is going on here, and that is to say sexual pleasure, or sexual arousal, sexual enjoyment.

But what I'd like to ask here, is the question of whether this thing that is called the story, which is sexually graphic, and elaborately and in detail describes the doing of an activity to a named individual, is that an injury in itself?

Now I am not saying that the reading and writing of this thing is violence. I am asking you to think about whether it does anything. Now I would say that if your name was in it, it might put you in fear, in some kind of apprehension, that something might happen to you. And it also might make you feel creepy, that at, something like an estimated 260,000 computer sites world wide, your name was being made into pornography with specific acts of violence directed against you.

In other words, this item makes pornography of someone's name. In addition it targets an individual for assault, not only by the individual who may be thinking to carry it out, but by other people who consume it, that is to say, who are sexualizing this violence against this particular named individual. That is, there is a real danger from these other consumers.

Now I would say that this is no more true on the Internet, than in any other pornography, but it certainly is no less true.

And in addition, another way I would put what is actually done here, and this is not the same as the threat issue, but this individual who is named in this material has been pimped to the world to masturbate over. I mean that is concretely what is done with this material.

Now the First Amendment issue, it seems to me, in that perspective, is whether this is going to wind up being protected more because it is in cyber space than it would be elsewhere, or whether it is going to be protected more than it would be if, say the threats were put in the mail, or more

than these words would be protected if the FBI had overheard them on a wiretap between two people speaking them orally.

Or more to my point, will it be protected more simply because it is sex? That is to say, because it is pornography it will be seen as being less real. The way this works in libel law is false facts, which are defamatory, and involve a private person, when published are generally considered to be libel. However, when that is done in pornography, it is very often considered to be protected speech under the phrase rhetorical hyperbole. In other words, it's protected because it's sex. That's even though the acts that are described are highly capable of being performed.

Now what I'm wondering is, this stuff is a threat, the E- mail together with the pornography. What I think is going to be said, and has been said, is, no, it isn't, it's a fantasy.

The word, "fantasy," means it is sex. That's the code that it runs under. And what it's supposed to mean is, you use this term when you're trying to say that it isn't really real, you're just sexually enjoying thinking about it.

What I also notice is that the word "fantasy" is used to describe actually doing it.

For example, a man in California got a prostitute, put her in a bathtub, strangled her and actually killed her, although he probably wasn't intending to kill her. And this was described by him and reported in the newspapers as, "prostitute dies during fantasy."

Does this make my point? In other words, the acting out of these fantasies is called a fantasy even when people are doing them.

Now, the other thing is that when people are consuming these fantasies, they are masturbating. Now, masturbating is not a harm in itself, however, I wish merely to point out that it does occur on a physical plane. It is actually the doing of something.

I call all of this stuff called "fantasy" First Amendment protected sex. It's regarded, generally speaking, as speech, it would seem.

Now, what I would like to just leave you with is it seems to me encouraging, even miraculous, actually, that the government has comprehended that something real was done when Jake Baker sent this communication and called it a real thing, a threat.

After fifteen years of working with other women who have been coerced into pornography, whose names and in addition bodies, faces, visual embodiments of them, have been stolen by pornographers and used and trafficked, that hasn't been regarded as a threat to anybody, the reality status of it has been essentially nothing, even though it is rape, and in some cases murder. But the materials that do it haven't been regarded as anything. Not even as a threat to those women, which, indeed, they have been-- targeting them for further abuse throughout the rest of their lives. I'm not saying that's all they have been, but they have included that.

It also strikes me as incredibly amazing and wonderful that people on the Internet have regarded this as a serious matter, as well as other things that they have called rapes in cyber space. That is when names that people use on the Net have been taken from them and the individual has been

raped under that name as if she was allowing it to happen to herself, this is another real incident, that provoked a massive discussion about a thing that was called, "Rape in Cyber Space."

It wasn't called "Fantasy in Cyber Space," it wasn't called, "Thinking about Raping People in Cyber Space," it wasn't called, "Discussion of Rape in Cyber Space," or even "Advocacy of Rape in Cyber Space," it was called, "Rape in Cyber Space."

Now, what I am trying to suggest to you is just to understand the moment in time we are at in which at least the people on the Internet know that when you do something through words, you do something.

In addition, the district attorney in this district has realized that. The fact that this is coerced pornography, one instance, also, among many, has not eliminated that. It hasn't erased it, at least not yet.

Just to finally end, I think that it is a further very important thing to notice that increasingly with technology, it does become less necessary to use real women to produce pornography.

That is to say with all the manipulations that are available, with all the fictionalizations and fantasizing that can be made concrete, at least in theory that would raise the possibility that there would need to be fewer Linda Lovelaces and Vanessa Williams and Paula Jones and other women, including Susan Brownmiller, by the way, who was made into pornography that was exclusively words, through the use -- and the use of her name, that there would be less of the use of real women because of the availability of this technology.

The point that I'd like just to leave you to think further about is that even though they could do that, they aren't doing that. And the Jake Baker incident is a real example of that.

That is, he could have made up a name. He could have used a no-name name. He didn't. He used a real woman.

So the potential that technology offers is not being used to liberate women, and our continued existence as a slave class for sexual use to be appropriated at will and sold for sex seems only to be taking yet one more further loop.

Thank you.

(Applause)

LOWENSTEIN: Barry Steinhardt?