

POLICING THE INTERNET: *JAKE BAKER* AND BEYOND

March 9, 1995

QUESTION SEVEN: WILL FEDERAL LAW PREEMPT STATE LAW IN CASES INVOLVING THE INTERNET?

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PROFESSOR LOWENSTEIN: Question over here, in the tie.

(Laughter)

PROFESSOR LOWENSTEIN: That makes you unique here.

AUDIENCE PARTICIPANT:

I'm Kirk Gavin from the Michigan Computer Crimes Task Force and I trained cyber cops down with the federal government since (inaudible), as a matter of fact.

One of the issues we always have is the explosion of the traditional legal jurisdictional boundaries. We have fifty states with fifty different laws and they interact.

We have talked recently about the California couple that just drew two and a half year prison terms in Tennessee for operating a bulletin board in California where pornography was downloaded into Tennessee and they are now in a Tennessee prison. I'm wondering, is there going to be a federal preemption of the state jurisdictional laws concerning computer fraud and concerning pornography, because in very much reality, Mr. Baker has exposed himself in every single state to possible obscenity violations. There could be prosecution.

So does anyone have any thoughts on that? I'd like to tell these cyber cops that we could --

PROFESSOR LOWENSTEIN: Let's start with Barry Steinhardt.

BARRY STEINHARDT:

Well, I think we're going to have to completely re-examine notions of jurisdiction here.

I mean, if you take the Amateur Action case, which is the case you referred to in Tennessee, where there was a bulletin board in California and the bulletin board is accessed from Tennessee by, I think it was a Postal inspector. The crime is --

DANIEL WEITZNER:

In his official capacity.

(Laughter)

BARRY STEINHARDT:

Right. Well, he says in his official capacity.

The crime is interstate transmission of obscene material.

Well, it raises some very interesting questions. Not only does it call into question the Miller test for obscenity in which community values you apply here, but it also calls into question of whether it was even transmitted or whether it really wasn't the equivalent of his going to California, this case through cyber space, traveling through cyber space rather than physical space, getting the material, bringing it back to Tennessee. Those are all very complicated questions.

You know, we've been following the state analogues to the Exxon bill in various states.

One of them was in Oklahoma. In Oklahoma there's a bill in the legislature that would require that all bulletin boards, which is not a term that they defined, but it apparently would seem to sweep in everything from Internet providers to CompuServ to these little private bulletin boards, must display a notice that it is illegal in Oklahoma to transmit obscenity or pornography, which, of course, the later part not even true.

But I don't know how it is that international providers could ever -- let's assume that Oklahoma passes that bill and that forty-nine other legislatures pass bills with different requirements, how could anyone ever possibly be expected to know about or follow all of them?

We're getting into very complicated and uncharted waters here, and there probably eventually will have to be some federal preemption because of that.

PROFESSOR LOWENSTEIN: Professor MacKinnon.

PROFESSOR MACKINNON:

Just as to your remark about obscenity law.

Obscenity law, as I'm sure most of you know, is indifferent to whether an individual is named or used or not. In other words, it doesn't make it more obscene that someone is named.

It's also entirely indifferent to violence. That is no part of the obscenity test.

I'm interested in your assumption that the Internet pornography -- is pornography meaning someone is shown being killed in words, would be obscene in fifty states?

I suppose maybe the question is, if it wouldn't be, what would be?

But I think the conclusion is equally available that very little is.

The other thing that is really worth noting here is that even those very few things which have ever been found to be obscene, are available on the Internet now.

In addition, wholly apart from obscenity, we do have laws against child pornography in this country that flow from the use of children to make it.

Now, presumably, although no one's ever mentioned this, that might make a difference -- that might make a distinction between the use of a real child's name.

In addition, although child pornography is criminal in this country in a way that there has been actually some serious enforcement -- unlike obscenity -- with some consequences, it also is available on the Internet.

So that it's just important to keep in mind that as to this business of pornography, you've got obscenity laws. Even those few things which are found to be obscene are very much available now on the Internet. You can't get it over in Ypsilanti. You can get it on the Net.

The same with child pornography. You can't just easily walk in and get it, although any man who wants to get it can -- anyone who wants to get it can -- but you can easily get it on the Internet.

DANIEL WEITZNER:

I just want to on the one hand agree with Barry that the whole community standards doctrine is really, I think, faced with a critical challenge that the whole purpose there of enabling local communities to have some local control while not creating a national standard is clearly under challenge here.

But I actually think I want to disagree with the notion that there ought to be preemption, especially to the extent that we're talking about criminal charges.

One of the things that I found disturbing about the *Baker* case is that the FBI was involved at all. As far as I can tell, to the extent that this was a crime, this was a local crime.

It may mean that some states have to go back and look at their harassment statutes and look at their threat statutes, but I really believe very strongly that to the greatest extent possible, criminal law ought to be state matters. The FBI is totally unaccountable to local communities. I think clearly local police need to learn more about this technology so they can behave responsibly.

But I am absolutely opposed to the notion that we should federalize all of the crimes that occur on the Internet simply because they go across state lines.

The original statutes regarding harassment with telephones were put into place in 1968 at a point when people were using long distance telephone lines quite a bit more and there was a perceived enforcement problem and there was some evidentiary problems.

I don't see any of those kind of problems in the *Baker* case or in a number of imaginable harassment incidents where they're local crimes. I think they should remain that way.

With respect to Scott, I just don't think, you know, the federal government should be involved unless there's a clear reason.

PROFESSOR LOWENSTEIN:

Let me ask Scott Charney.

Do you want all those cases?

SCOTT CHARNEY:

I don't see preemption for a host of reasons.

First of all, there are sovereign issues with the states that have to be considered.

Secondly, the federal government doesn't have the resources necessarily to do all these crimes.

Third, you know, there are cases that have interstate implications, and, of course, the federal government is better suited to deal with some of those cases.

As for community standards, one of the things I think we also have to remember is with the Internet being global, are we going to the lowest world wide common denominator as the test? I don't know.