

Transcript of Hearing of the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights and Property Rights, held March 16, 2005

NOTE: THE FOLLOWING IS NOT AN OFFICIAL TRANSCRIPT

SEN. SAM BROWNBACK: Welcome to this first meeting of the Subcommittee on the Constitution, Civil Rights and Property Rights of the U.S. Senate Committee on Judiciary of this session of Congress. I hope to be holding a number of different hearings on various topics; this is the first one we're kicking off with. We appreciate all of you joining us. I would note my colleague, ranking member Senator Feingold, I believe his amendment is actually up on the floor, is what I've been told, so he may be late coming back and forth for this. Now, that situation may change, and if we hear differently, we'll adjust. We may have to break into some of your testimony if he comes here at a particular time and he has to get back to the floor; we'll accommodate the opening statement that he would make.

The editor and publisher of Adult Video News, the journal of the pornography trade, stated recently that 'It's scary how much money is made on porn,' and of this, there can be little debate. The porn industry has grown rapidly in the last decade. Part of the reason for this growth is that the nature of and access to sexually explicit material in the marketplace has been radically transformed and expanded. According to many legal scholars, another reason for the industry's growth is a legal regime that has undermined the whole notion that illegal obscenity can be prosecuted. Indeed, just last month, federal judge Gary Lancaster of the Western District of Pennsylvania threw out a 10-count Justice Department indictment against Extreme Associates, purveyors of the most vile sort of pornography. Defendants were in the business of producing films that, according to one report, 'even porn veterans find disturbing.' A co-owner of Extreme Associates even boasted that the films which depict rape, torture and murder represent 'the depths of human depravity.' He [ph.] also found they admitted the films covered by the indictment met the legal definition of obscenity. Judge Lancaster not only dismissed the indictment but also took the case as an opportunity to rule all federal statutes regulating obscenity unconstitutional as applied to these admittedly infringing defendants. In order to achieve this result, Judge Lancaster cobbled together hand-picked strands of 14th Amendment substantive due process, decisions from *Roe*, *Lawrence* and others and ruled that the statutes at issue violated an unwritten constitutional right to sexual privacy. Amazingly, even if such a right

existed, it would not apply to the defendants since they were producers and not consumers of the material.

There was a reason why Judge Lancaster had to bypass First Amendment jurisprudence in reaching the results he wanted. Numerous First Amendment precedents distinguish between protected speech and illegal obscenity. For example, the Supreme Court held almost half a century ago that 'implicit in the history of the First Amendment is the rejection of obscenity as thoroughly without redeeming social importance.' Thirty years ago, the Court rejected the notion that 'obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only.' Rather, the Court specifically held that there are legitimate state interests at stake in stemming the tide of commercialized obscenity. It also been held – it was – it also has held it to be categorically settled that obscene material is unprotected by the First Amendment. If the *Extreme Associates* decision stands, we will have gone from the flat statement of former justice William Brennan, who advocated perhaps the most expansive vision of constitutional liberty of any justice in Supreme Court history, that obscenity 'was outside the protection intended for speech and press,' and we will be going to the notion that obscenity cannot constitutionally be prosecuted at all. Many constitutional scholars believe that blatant judicial activism, as exemplified in the *Extreme Associates* decision, has been responsible in large part for creating a climate in which the porn industry has flourished. I was pleased to learn that the Department of Justice is appealing Judge Lancaster's ruling; such a ruling effectively would gut decades of precedent. I also have been encouraged by recent statements by Attorney General Gonzales that he would make it a top priority to vigorously prosecute those who violate federal obscenity statutes. In a recent speech to the Hoover Institute, the attorney general stated, 'Another area where I will continue to advance the cause of justice and human dignity is in the aggressive prosecution of purveyors of obscene materials.' This renewed effort is particularly important since mainstream American companies seem increasingly willing to associate themselves with pornography, even hardcore pornography. Over half of all pay-per-view movies in hotels across the country are now pornographic. According to recent studies – recent reports, Adelphia Communications, reversing a long-standing policy, just became the first leading cable operator to offer the most explicitly – explicit category of hardcore porn. Los Angeles Times writes that, 'Adelphia joins a marketplace already teeming with ways to procure hardcore sexual content. The Internet has become a carnalopia of graphic

images, videos and cartoons. Echostar Communications Corporation, the nation's second ranking satellite TV provider, has offered XXX programming for several years on its Dish Network. Satellite leader DirecTV Group, Incorporated, peddles fare that falls just shy of XXX.'

The explosion of sexually explicit material is not a problem that exists in the vacuum of constitutional theory. Government has a compelling and real-life interest in the matter because of porn's adverse effects on individuals, families and communities in the forms of criminality, in addiction and family break-up.

Several months ago, I chaired a hearing where scientists and psychologists testified about the growing problem of addiction to sexually explicit material which is destroying individuals and their families, adversely affecting productivity at work and negatively impacting healthy child development. Four years ago, a scientific survey found that six percent of respondents met the criteria for a full-fledged pornography addiction. Other estimates of the percentage of the population suffering from an addiction to porn are considerably higher. Seventy-two million Internet users visit pornographic Websites per year. One expert in cyber-addiction asserts that 15 percent of online porn addicts develop sexual behavior that disrupts their lives. She writes that, 'the Internet is the crack cocaine of sexual addiction.'

The expanded reach and pervasiveness of pornography also affects our families and our children. According to recent reports, one in five children ages 10 to 17 has received a sexual solicitation over the Internet, and nine out of 10 children ages 8 to 16 who have Internet access have viewed porn Websites usually in the course of looking up information for homework.

There is strong evidence that marriages are also adversely affected by addiction to pornography. At a recent meeting of the American Academy of Matrimonial Lawyers, two-thirds of the divorce lawyers who attended said that excessive interest in online pornography played a significant role in divorces in the past year. Pornography by itself, not as part of an accusation of adultery, has begun to arise with alarming frequency in divorce and custody proceedings, according to divorce experts. Pornography had an almost non-existent role in divorce just seven or eight years ago. Roughly 65 percent of the people who visit the Center for Online Addiction do so because of marital problems created by pornography, according to the founder of the Center. Now, just recently, we have in Southern California

examples of human trafficking, of individuals trafficked into the porn industry for use by the porn industry.

These and others demonstrate effects providing – provide an important real-life backdrop to this hearing, which will emphasize two well-established legal principles. First is that the Supreme Court has clearly and repeatedly held that obscenity does not merit First Amendment protection. The second is that the government has a legitimate and constitutionally valid interest in regulating obscenity through, among other things, enforcement of relevant federal and state statutes. We also will hear the opposing view, that the First – and for the first time, 14th – Amendment protects – protections applied to obscene material that has traditionally been seen as harm outside of those protections.

We have a distinguished panel to speak today. First is Professor Robert Destro, Catholic University of America's Columbus School of Law. Professor Destro is co-director and founder of the Interdisciplinary Program in Law and Religion, and he previously served as Commissioner on the U.S. Commission on Civil Rights.

Second is Patrick Trueman, senior legal counsel of Family Research Council. Mr. Trueman previously has served as the chief of the Child Exploitation and Obscenity Sections of the Criminal Division at the U.S. Department of Justice.

Our final panelist is Professor Frederick Schauer – did I say it right? – Schauer of Harvard University's Kennedy School of Government. Professor Schauer is a former professor of law at the University of Michigan, chair of the section on constitutional law of the Association of American Law Schools, and Vice-President of the American Society for Political and Legal Philosophy. It's an excellent panel on a current and tough topic.

Gentlemen, thank you very much for being here today. As I mentioned, if Senator Feingold comes in, we may have to break into your testimony to hear his opening statement. We'll just play that as it goes along. We'll run the time clock at seven minutes; you're entitled to – if you need to go a little longer, that's fine; we just have the one panel here today, and if you want to put your full statement in the record and then just summarize, that's acceptable as well. And your full statements will be placed in the record.

Professor Destro, thank you for joining us.

PROF. ROBERT DESTRO: Thank you, Senator. Thank you for having me today.

And I would, with your permission, put my statement into the record without objection.

All right. Let me – I'm just going to do a little bit of summarizing of the testimony. I think there's nothing more boring than just reading it into the – into the record. Let me start out with something that – I'm going to use a kind of a common name, but you know, the importance of name-calling in constitutional law, and in this area, when you're talking about the regulation of the sex industry, you know, if you call it pornography, it's not protected, you know, but if you call it speech, it is protected. Now, in constitutional law, we have a name for that name-calling. It's called characterization, and in constitutional law, it's – he or she who controls the initial characterization usually wins the case. And what my testimony is about today is the perspective with which I think this committee should look at the – look at the issue of regulation of this topic.

Now, you can start by looking at this as a question of market regulation, and focus on the pornography industry. That has certain advantages to it, in that, you know, what you're really talking about is business transactions and lots of money and lots of – lots of illegal behavior. And if you focus on it from that perspective, you never really even get to the First Amendment unless you are of the view that Justice Douglas was, that sex acts between consenting adults were a form of free speech, and he talked about that in *Griswold v. Connecticut*. But setting that aside, nobody else really takes that view.

Or you could look at it as a perspective of, we're going to be regulating content. That then gets you into the content and the perspective of speech, and in really almost an endless morass of First Amendment analysis where you get into the question of how much redeeming social value is there in this particular movie or videotape or Website or virtual reality, and you get into kind of almost unanswerable questions about just how – you know, how much, you know, under the Court's decisions, does this really appeal to someone's prurient interest? I suppose the easy answer to the question is that if they're willing to pay for it, it must appeal to them.

And so that's why I think that a case like *Extreme Associates* is such an interesting case, because it quite properly, in my view, ignores the First Amendment. The judge, I think, took great pains not to mention the First Amendment. The problem is that as he did so, he ignored the rest of the Constitution at the same time, and that he forgot John Marshall's, you know, oft-quoted comment that 'it's a Constitution we're expounding', and he focused only on the rights side and not on the regulatory pieces of this puzzle.

He creates a right to privacy that, if taken to its logical conclusion, would legalize outcall prostitution, because if indeed you have a right to sexually explicit material that's made by others out in Hollywood or wherever they make it, I suppose you could make the same argument that under *Griswold* and *Lawrence*, you would have a right to have it made right in your living room. At least, under the judge's reading of the – of those 14th Amendment cases, the Congress's power to regulate the economy and the industry just drops out of the equation altogether.

So what – you know, what I'd like to suggest is – is an initial question, which is, as this committee opens its deliberations, whether its goal is to score easy symbolic points, you know, which brings me back to that question of whether or not you're going to be in this to do some finger-pointing or name-calling, or whether or not you want to regulate certain very specific behaviors that are both easily defined and not constitutionally protected.

So if you – let me give you some examples. The sale of sex as a commodity is against the law in almost all the states. A few years ago, our law review published a – published an interview, so it's a couple of law professors sit down with Larry Flynt, and as many of you know, Larry Flynt has always been held up as the paragon of the defenders of First Amendment values. And the article I didn't think was very good – I mean, the writing around Larry Flynt's interview was not very good – but Larry Flynt's interview was actually quite fascinating, because, you know, they asked him about the First Amendment; he says, 'Well, no, that wasn't really the point.' He said that his goal really was to open up – and I'm putting words in his mouth, but it's the rough equivalent – he wanted to have a chain of sex stores, you know, that in the end, he thought that there should be a freedom to buy and sell sex just like you did any other commodity. I thought, well, finally, you know, he's

actually – you know, when you get the Larry Flynt unvarnished, he's a salesman, and that's what I would suggest that we're looking at here, is that we're looking at the sale of sex as a commodity; we're looking at sex slavery and trafficking, which is a serious problem not only here in the United States but around the world.

In the case of Extreme Associates, you're looking at exploitation, at battery and at all kinds of other behaviors that certainly can be regulated under the criminal law, and it seems to me that if you were – even if you take Professor Schauer's view that the primary focus should be on the regulation of child pornography, that's simply another example of exploitation, and I would say, yes, let's go ahead, and we've already started with that; we've all gotten quite [ph.] agreement on that; now let's look at the other kinds of exploitation that need to be regulated as well. So my suggestion to the committee is that, you know, you too, like the judge in Pennsylvania, Judge Lancaster, you too can avoid the First Amendment. You can do it if you're clear and if you focus on the commercial aspects of what's going on.

Thank you.

SEN. BROWNBACK: Thank you very much.

Mr. Trueman.

PATRICK A. TRUEMAN: Thank you very much, Chairman Brownback, and thank you for your leadership on this issue of obscenity.

I, as you mentioned, served as the chief of the Child Exploitation and Obscenity Section of the U.S. Department of Justice at the end of the Reagan administration, through the entire administration of President George Herbert Walker Bush. I worked under three attorneys general and they had – those three attorneys general Meese, Thornburgh and Barr had a very active effort under way to prosecute producers and distributors of obscenity. We brought many cases all across the country.

The nature of obscenity with respect to its constitutional status had been clear for decades before this, but the Justice Department prior to the term of Attorney General Meese for 20 years had not prosecuted obscenity hardly at all. Then the Justice Department reversed course because of the Attorney General's Commission on Pornography, when it issued its findings, it called

for a strike force or task force of attorneys at the Justice Department to lead the effort against the producers and distributors of obscenity. That is something that Mr. Meese established. It later became what's called the Child Exploitation and Obscenity Section of the Criminal Division.

It goes without saying that the leadership of the attorney general, the nation's chief law enforcement official, is critical in defeating crime, and that was certainly the case with General Meese and his two successors in the Bush administration, General Thornburgh and General Barr. Each took a strong hand in making sure that U.S. attorneys across the country as well as federal investigative agencies pursued obscenity cases.

During my several years at CEOS, we found that obscenity law was quite workable, and moreover well understood by jurors who had to make decisions on the guilt or innocence of fellow citizens. To those who argue that the prosecution of obscenity crimes is a waste of time or an unwise use of resources, I'd like to point out that during the time that I was chief of CEOS, we received more than \$24 million in fines and forfeitures as a result of our aggressive prosecution efforts. That is more than the budget of CEOS during those years. And I would point out that the public expects the Justice Department to enforce the law. Some want to say that if you enforce obscenity laws, you will necessarily reduce the number of prosecution of child exploitation laws. However, I don't believe that's true, that one can be pitted against the other. Sure, there's finite resources, but I think when the public looks at the lack of enforcement on obscenity, they may say, Why is the Justice Department spending tens of thousands of dollars prosecuting Martha Stewart and incarcerating her, whereas the pornographer who is spamming illegal pornography into my son's e-mail account goes free?

There were two large-scale obscenity prosecution projects undertaken by the Department of Justice when I worked for CEOS. One was Project PostPorn, which targeted mail-order distributors of illegal pornography, obscenity, who advertised their material by buying up mailing lists of – indiscriminately of people across the country, including children, and would send sexually explicit advertisements. Advertisements themselves were found to be obscene in many of our cases. In that case, Project PostPorn, we had 24 individual – excuse me, 50 individual or corporate convictions in 24 cases spread across 20 federal districts, U.S. attorney districts. That prosecution effort effectively ended the practice of sending pornographic advertisements through the mail by these companies.

For the second large-scale prosecution project, we targeted the major producers and suppliers of obscene material in the United States. With the cooperation of the Los Angeles Police Department Vice Squad, we assembled a list of the top violators of federal obscenity laws, which was about 50 companies at the time. Most of them were located in the Los Angeles area. We brought then all the United States Attorneys who had an interest in prosecuting obscenity together in a Los Angeles conference, outlined who these distributors were and these producers, with the help of the Los Angeles Police Department, and divided up the cases in about 30 United States Attorneys' districts, and then we vigorously prosecuted these companies, about 20 of which were convicted, and I think there were at the time, probably of those 20 companies, something in the neighborhood of 75 to 100 individual convictions.

Our prosecution strategy in this project was ultimately to bring cases against all the major producers and distributors, and against a wide variety of material. We didn't just select the hardest of the hardcore material; we wanted juries to decide what they found to be obscene in their district, and that's the nature of what *Miller v. California*, the seminal obscenity case by the Supreme Court, allows. We believed it was important to let juries decide what was obscene, and we found that juries, looking at a variety of materials, from the hardest to the most mild of what we considered to be obscene, regularly said that the material was obscene and were willing to convict. I've done several grand juries myself, where we asked the people in the jury to decide whether the material is obscene, and my own experience has been that people who regularly watch movies that are obscene, will ask questions in the grand jury about – saying that they didn't know it was obscene; are they doing something illegal? But yet those people, when told that yes, in fact it may be obscene, will also vote for an indictment on obscenity against a pornographer.

By the end of the administration of President Bush, we were successful not only in gaining convictions throughout the country but in actually changing the nature of hardcore material that was produced in the United States. Themes of rape, incest, bestiality, pseudo-child pornography, all common themes prior to our prosecution efforts, disappeared from store shelves in many cities, and were no longer produced at all by the major producers of obscene material. Many of the distributors of hardcore pornography that had

not been prosecuted refused to ship products into states where we brought prosecutions.

I will end here just by saying that I am encouraged by the attorney general's recent statement that he will vigorously prosecute obscenity. I think that you'll find that he has the public's support in doing so, and that the juries across America will convict. I encourage the Department to prosecute on a wide variety of material; don't be afraid to prosecute anywhere in the country. We got convictions in Las Vegas, so-called sin city; in Los Angeles, Minneapolis, Florida – wherever we brought cases, we got convictions.

I would ask, Mr. Chairman, that my full statement be introduced into the record.

SEN. BROWNBACK: Without objection, thank you very much. I know you're getting over the flu, so thanks for hanging in there. And if he starts to motivate [ph.] the witnesses, I would move too. But thanks for making it.

Professor Schauer.

PROF. FREDERICK SCHAUER: Thank you. And I would like to enter my statement in the record, and in addition, before I start, I would like to thank you for starting this hearing somewhat later than hearings normally start in this city; this was done as an accommodation to me because of my class schedule, and I very much appreciate it.

I should mention at the outset, I have been writing about the law of obscenity for about 30 years now, including a book entitled 'The Law of Obscenity.' I also served in 1985 and 1986 as a commissioner of the Attorney General's Commission on Pornography. I was the principal draftsman of the commission's findings and recommendations.

But I should say that although there are many people who believe that obscenity law as it now exists is unconstitutional and violates the First Amendment, I am not one. I have long believed that obscenity as strictly defined by the 1973 case of *Miller v. California* lies outside of the coverage of the First Amendment. I still believe that. But that obscenity prosecutions as defined according to *Miller v. California* and seven other cases decided on that day and a number of cases decided thereafter, remains

constitutionally permissible under the First Amendment, that does not as you know end the inquiry. The inquiry then moves to the question of, under what circumstances would the constitutionally-permissible-under-the First-Amendment prosecution of obscenity be desirable? In addressing that question, I ask the committee and I ask you to at least take into account three considerations.

The first of those considerations is guided, Mr. Chairman, by your own statement in the article you wrote with Senator Hatch about the *Extreme Associates* case, that judges should not ignore the law in favor of their own agenda. I one hundred percent agree with that. I also believe, however, and I would hope that you would agree, that ignoring the law in favor of their own agenda is not only a judicial vice, but is also potentially a prosecutorial vice. I raise this issue because I believe the same applies to prosecutors, and I raise the issue against the background of two specific and possibly some number of other examples.

I am troubled by Professor Destro's statement in his written statement that obscenity law is a mess and that we need legislative redefinition and legislative resuscitation along different lines in light of the fact that obscenity law is now a mess. Somewhat more troubling to me are the continuing statements from 1986 until the present, most recently last spring in an event at which I was present, by Mr. Bruce Taylor, now senior counsel at the Department of Justice and with principal responsibility for obscenity prosecution, that there ought to be a *per se* rule about what is or is not obscene, and that – and here I quote from him – 'penetration clearly visible,' the important component of the standard for determining what is or what is not obscene.

These and other efforts to move or change or adjust or modify the existing and in my view constitutionally permissible *Miller v. California* standards from 1973 are a cause of some concern to me, and I would ask you, Mr. Chairman, in investigating this issue, to seek assurance on behalf of the committee the prosecution will be in accordance with the *Miller* standards strictly defined rather than be used as a way of modifying, expanding, changing, redefining, resuscitating or in some other way changing the existing, and as I said, in my view constitutionally-permissible-under-the-First-Amendment law of obscenity.

I also believe that priorities are a genuine issue. I agree with Mr. Trueman that one cannot say that there is one thing that is top priority and everything else ought to be eliminated simultaneously. No sensible policy analyst, and I am now surrounded by many of at my institution, would believe that. Nevertheless, as long as we divide up the prosecution, as long as we divide up the agenda, as long as we divide up the structure of the Department of Justice the way we do, that unless there is a substantial infusion of new funds, there is a high risk that an increase in obscenity prosecutions will be at the expense in the short term, the intermediate term of child pornography prosecutions. To do so, to substitute obscenity prosecutions for child pornography prosecutions, would in my view be an unfortunate reallocation of scarce governmental resources away from what in the view of myself and many others is the most pressing issue.

Finally, if I may make reference back to the Report of the Attorney General's Commission on Pornography, it has been mentioned a number of times in this hearing – I don't want to play [ph.] too much pride or place here – it can be read by everybody – nevertheless, if we are to go back to the report and draw guidance from that report, in my view, one of its central teachings was that it divided the category of *Miller*-defined legal obscenity into the categories of material that endorsed and promoted explicitly violence against women, material that endorsed and promoted explicitly the degradation of women, and material that was neither endorsing of violence against women nor that was endorsing the degrading of women. In light of those three categories, the Attorney General's Commission recommended prosecution of legal obscenity in the first category and in the second category, but as to the third category, the commission made no recommendation.

I am troubled here in part by the attempt to use the report of the commission as endorsement for the prosecution of legally obscene materials that neither promote nor endorse explicitly the violence against women, but I am much more concerned, Mr. Chairman, by the fact that the issues of violence against women, the issues of degradation of women, the issues that frame the Report of the Attorney General's Commission on Pornography, seem to have so significantly dropped off the agenda of these hearings. The agenda – the issues have been dramatically transformed from the issues as they were understood by the Attorney General's Commission, and I would very much hope, in thinking about what to prosecute, or whether to prosecute, the enormously pressing issue of violence against women and what might foster it, and the evidence about that, not be removed from center stage.

Thank you.

SEN. BROWNBACK: Thank you. It's an excellent discussion, and for me, a great tutorial calling on the hearing we had last fall about the addictiveness of pornography and the impact on families, so we get to – the factual basis of what we're having and the legal arguments taking place here are very useful, to put those side by side.

I want to enter into the record an article from the Los Angeles Times dated March 5th of this year, about a probe into human trafficking to the sex slave trade, and I want to get – I want to draw your attention to this, if I could, particularly, I think Professor Schauer on this one, if I could. And I met with a city councilman just yesterday, Councilman Cardenas, about this topic. I don't know – have you seen this article?

PROF. SCHAUER: I have not seen it, no.

SEN. BROWNBACK: Okay. I hope we're finding – I worked with Senator Wellstone and his wife on sex trafficking before his – their untimely deaths, and it's a topic that – it's one of the lead slavery issues in the world today, and what we're finding in this, apparently, we're seeing people trafficked into the pornography industry for porn. This is just a quote here from the article: 'A lot of people are promised jobs once they come here, but when they get here, they're forced into labor or the sex trade.' That's a lawyer with the Department of Health and Human Services, and apparently this is a lucrative business to move people into.

I take it from your statement, Professor Schauer – pardon me on that – this would clearly fall in the category, what you think we should be prosecuting, because it is violence against women.

PROF. SCHAUER: I think there is – there is an issue here that we need to address, that distinguishes obscenity from child pornography. I have absolutely no doubt that the underlying conduct that you have just described ought to be prosecuted with the greatest vigor that the law has available. The underlying conduct is conduct that undeniably exists. It existed in 1985 and 1986. It is recounted in great detail in the Report of the Attorney General's Commission. However, it is an existing and pretty well settled across the spectrum of the First Amendment and across the spectrum of First

Amendment authorities that the fact that the underlying conduct is itself illegal and appropriately prosecutable does not necessarily mean that photographs of it, films of it or descriptions of it can themselves be prosecuted. Child pornography is a notable exception to that, and when the Supreme Court, in *New York v. Ferber* in 1982, allowed the prosecution of child pornography on the theory that the underlying conduct was illegal and exploitative, it made clear to reaffirm that this was a principle that applied to child pornography and that it was not at the time changing its underlying views about whether that principle applied to obscenity.

On the existing state of the law, the illegality or appalling exploitation of the underlying conduct justifies drying up the market for photographs and films of that conduct – for child pornography, yes, but on the existing state of the law, for adult obscenity, no. That is to some extent consistent with a wide arrange of cases including the Pentagon Papers case, *Landmark Communications v. Virginia*, *Bartnicki v. Vopper* and others, in which the illegality of the underlying conduct does not affect the question of First Amendment protection. The less obscenity is moved into the child –

SEN. BROWNBACK: Let me – let me just narrow [ph.] my question on that then, because I've been working on this for some period of time and this is really an awful trade, and I've met with girls who've been trafficked in Nepal and Israel and Thailand and America, and that's where this is taking place, and we're even finding reports – we haven't verified this, but people doing the pornography filming in a foreign country, developing country, and then shooting it in here – because then you don't have to traffic somebody in; you just traffic the film in. But if you don't address that marketplace basket here, aren't you just continuing to ask for more that – as I understand, you're saying, prosecute the crime that's being conducted but don't prosecute the distribution of material, and yet this has been okay overseas that we've started seeing this being brought in or people going over to film in places, central Asia, and shooting it in – aren't you going to have to get at the product to be able to truly address this?

PROF. SCHAUER: In order – All I'm suggesting is that in order to get at the product, existing law would have to be changed dramatically. I don't deny the economics of the fact that when one dries up the product, one makes it harder to engage in the underlying conduct. That's what the Supreme Court said in *Ferber*, the economics of that relationship exists. I am here in part consistent with the earlier things that I've said, to warn against, for pragmatic

reasons as well as constitutional ones, of pressing too hard against existing and well-settled law, and in this area, the law is pretty well settled. I would enthusiastically support redoubled prosecution of the underlying conduct and the fact that the underlying conduct is itself aimed at potentially being part of the film is no First Amendment defense whatsoever. I would agree with you entirely, the underlying conduct is something we should deal with. I would like to deal with it within the boundaries of existing law, because attempts to change the existing law are always fraught with danger.

SEN. BROWNBACK: Professor Destro, you talked about regulating on this. What about regulate the filming of somebody that's trafficked into here, or let me draw the example we did – or I did earlier about overseas, the filming of this by – then the movement of the product into this marketplace. How would you regulate or deal with that?

PROF. DESTRO: Well, I agree with Professor Schauer. The reason that I say that the law is a mess is that if you're trying to get at it in terms of what is the effect of the film on the viewer, then you're gonna run into all these – the well-settled law that he described, and I don't disagree with the description of that at all. My suggestion is that, you know, what you do is that you focus on the underlying behavior that's going on here, and when what you have is trafficking in – I mean, these people are accessories to prostitution, and the – you're going to have to, just like you do in trying to interdict the drug trade, to figure out where the important pressure points are going to be, and so if you can – you can easily prosecute someone for the – not so much under a pornography theory but under an accessory to prostitution theory.

SEN. BROWNBACK: Overseas? Overseas? Let's say this filming takes place somewhere overseas in a developing country.

PROF. DESTRO: Well, you could make the – you could make the importation, you know, of that kind of material, focusing on the underlying behavior, illegal, too. Congress does control the borders, and it can do it, but if you are an accessory to prostitution in another country and you're bringing in your wares, whether they're the people or they're the products of their labors in those countries, I think if you keep the focus on that behavior, you're gonna be on much stronger grounds.

SEN. BROWNBACK: Mr. Trueman, if the *Extreme Associates* case is allowed to stand, upheld, will we be able to prosecute any obscenity cases in the future?

MR. TRUEMAN: No, I can't imagine that you would. I think that *Extreme Associates* – the ruling itself is so extreme that obscenity prosecution would go by the wayside.

Can I add something on this – about something that was said here today?

SEN. BROWNBACK: Yes, certainly.

MR. TRUEMAN: I just want to take issue with something that Professor Schauer said here with respect to him. He mentions that the Attorney General's Commission divided up the nature of pornography into material that's violent or in the second category degrading to women, should be prosecuted; other pornography, the commission didn't form an opinion on, and I think he has argued that just those two categories should be prosecuted.

I think there's a real danger in the Justice Department drawing these lines. Communities should draw the lines. The Supreme Court has outlined what may be found to be obscene. Now, at the Justice Department when I was there, we would bring prosecutions for a variety of material. We wouldn't just go after the pornographer and pick the worst film, which we would likely get a conviction on, because then the community standard becomes that that material – you know, that worst film – meets the community – it's out of bounds for that community. But if you bring a prosecution across the range of material a pornographer is selling or distributing in the beginning, and the jury convicts on all of it as obscene, then you've established a community standard, and pornographers are thinking, We've got to stay out of that state or that community because a variety of material has been found to be obscene. I think that's wise, to let your community decide rather than the Justice Department.

SEN. BROWNBACK: This is just as a layman question, and as somebody who runs for public office and then meets people all the time: The people are just fed up with getting hit with this stuff in their face all the time, and their kids on the Internet and at the grocery store when they exit or on a billboard or – and it wasn't that long ago it wasn't this way, and this industry is a very

large industry now. I don't know how many billions; I've seen different numbers on it, but it is a substantial business. Is it because of the lack of prosecution that we see the pervasiveness of pornographic material in America today?

MR. TRUEMAN: Yes, I certainly think it is. And by the way, we have a witness who turned in one of our biggest cases, a prominent man, who told us that there's as much money under the table in the pornography industry as there is above, and we certainly think that's true, and did at the time in the Justice Department. But the – when there's a lack of prosecution, the people don't have a voice. The prosecutor substitutes his judgment for the judgment of people, the juries who decide these questions. If the prosecutor ignores the law and refuses to prosecute, as we're seeing across the country, and then the pornographers have free rein of the community.

You're also seeing, as a result of this lack of prosecution, mainstream companies, as you pointed out in your opening statement, thinking, What's the down side? Now, you mentioned Adelphi [sic] Communications, the cable company – just one of the cable companies that's distributing potentially obscene material. There's also many hotel chains that are distributing potentially obscene material. By the way, we opened an investigation of hotel chain distribution of obscenity when I was at the Justice Department. Apparently that was closed in the next administration. But these corporations would not venture into this area if they knew the Justice Department was serious about enforcing obscenity law. When I was at the Justice Department, we prosecuted what was at the time the only satellite distributor of obscene material. I mentioned it in my testimony. That company was distributing material via a GTE satellite. We prosecuted them in Utah, where we had a complaint. Utah, under the GTE –

[Tape change; approx. 10 seconds lost]

MR. TRUEMAN: (continuing) – Sullivan, a prominent Washington attorney, to Utah to tell the U.S. Attorney's office that GTE didn't realize until the grand jury began that they could be indicted for distributing obscenity even though they were only a conduit for the obscenity. They cut that company off and refused to allow it.

Again, I think things have changed now, so what I'm saying is, if you begin prosecuting these mainstream companies, Dow-traded or NASDAQ-traded

companies are not going to continue distributing obscene material for fear of losing shareholder value.

SEN. BROWNBACK: Thank you. We've just gotten a vote call, so I'm going to turn to Senator Feingold for any statement he might want to make before we have to go over and vote.

SEN. RUSSELL FEINGOLD: Well, Mr. Chairman, I want to apologize – in fact, the vote is on the Feingold amendment and that's the reason why I wasn't here, and I certainly would not have chosen this time to offer my PAYCO [ph.] amendment but I was not given a choice by – I want to apologize to you, Mr. Chairman, for not being here, and also to thank you. You wanted to hold this hearing a few weeks ago and because of not getting certain testimony at that time, you were kind enough to postpone the hearing, and I really appreciate that. I look forward to working with you as the chairman of this committee. I will simply put my statement in the record, and I want to thank the witnesses for coming and I also will review the record, perhaps submit some questions on Friday, if that would be acceptable.

SEN. BROWNBACK: It is so.

SEN. FEINGOLD: I thank you, Mr. Chairman.

SEN. BROWNBACK: Thank you.

If I could, Mr. Trueman – I've had some attorneys say to me that they would prosecute these form of cases but they're local prosecutors and they will come up against national lawyers on the other side of the case, and they need information and assistance; they don't know how to prosecute, on a local basis or a state basis, an obscenity case. Do you offer any – is there any help for them in prosecuting these cases?

MR. TRUEMAN: Well, the pornography defense bar is very small. There's about nine or 10 attorneys who defend the – these cases when they are brought [ph.] around the country, whether it's a federal prosecution or a local prosecution. A local county prosecutor will be overwhelmed with pre-trial motions and find that their office is spending a huge percentage of their budget on one obscenity prosecution, and win or lose, they usually don't give [ph.] a second one. That is the intent, I think, of the pornography industry.

Reuben Sturman, when he was alive, and identified by the way by the Attorney General's Commission on Pornography as the top pornographer, offered to provide defense counsel to any pornography shop carrying his material, and – so local prosecutors have a difficult time; I'll acknowledge that. They can get help from the Justice Department in terms of pre-trial motions. Bruce Taylor at the Justice Department, as mentioned here earlier, has participated in more cases than anyone; he's got a brief bang [ph.] that's, I think, available to anyone. Justice Department also has them. But this is the reason why I always advocated, when I was at the Justice Department, and still do, that prosecutions should primarily be done by the U.S. Department of Justice, because they can match, shot for shot, the defense bar in these – in these cases. The Justice Department won't be overwhelmed, they won't stop [ph.] to take a case just because it's been drawn out and expensive to do, so I think it's vital that the Justice Department gets back to a point of vigorously prosecuting.

SEN. BROWNBACK: I have to say, gentlemen, I'm very pleased with your testimony and information on this. This is very a troubling topic to me today in our society because I have intel [ph.] previously on this, its impact on families, expansion taking place, trafficking now into it, an extremely lucrative business, and it's something that spans the political spectrum. This is something that the councilman I'm working with in Southern California is a Democrat; remember, Paul Wellstone and I worked on the trafficking issue – it is really hurting this society today, and I'm hopeful that we can get some vigor in constitutionally prosecuting cases of this nature because of its impact on the overall society and culture, and it must be done constitutionally and it must be done wisely in us moving forward, but I also believe it must be done, and if you don't do these sort of issues, your society continues to further and further engage and to allow and you just continue to, as Senator Moynihan would say, define deviancy downward. He, I got to work with on cultural issues before, and I consider him a great tutor before he left the Senate and passed away, would always view culture as one of the central issues, and in many cases, more important than government. But here you have government kind of allowing the culture to move in a way that's not there in the law, that if you don't enforce it, nothing particular happens.

I would appreciate any further thoughts any of you might have on this, because if we are looking at an increased prosecution in this area, it needs to be, must be constitutionally, must be done wisely, and hopefully effectively so that what is constitutional is allowed; what isn't, isn't, and we don't

further harm our families. I get more complaints from people than anything about, 'Look, I just don't want the culture to attack my family anymore. I just – I'd rather have a culture that buttresses, builds it up,' and then when cases come along where you effectively eliminate all prosecution of obscenities if they're moving forward, I can hear those same families saying to me, 'Now what do I do?' in the society, so I do hope you can help us as we move forward on this.

Appreciate the panel, of your work. Many of you have worked a great deal in your professional lives on this particular topic.

I will keep the record open for seven days should other members wish to submit their statements or other materials for the record.

Thank you very much. Hearing's adjourned.