Testimony of

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March 16, 2005

I am, of course, speaking at this hearing only for myself, and not on behalf of the Kennedy School of Government, the Harvard Law School, or Harvard University.

STATEMENT OF PROFESSOR FREDERICK SCHAUER
HEARING ON OBSCENITY PROSECUTION AND THE CONSTITUTION
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
March 16, 2005

My name is Frederick Schauer, and I am the Frank Stanton Professor of the First Amendment at the John F. Kennedy School of Government, Harvard University. I also regularly teach courses in the First Amendment and in Evidence at the Harvard Law School. I am a member of the 1 Massachusetts Bar, and have previously been Professor of Law at the University of Michigan, Cutler Professor of Law at the College of William and Mary, Visiting Professor of Law at the University of Chicago, and Ewald Distinguished Visiting Professor of Law at the University of Virginia. In 1985-1986 I served as a Commissioner of the Attorney General's Commission on Pornography, and was the principal drafter of the Commission's analysis and recommendations. Among my publications are The Law of Obscenity (BNA, 1976), Free Speech: A Philosophical Enquiry (Cambridge, 1982), articles specifically on obscenity and pornography law in the American Bar Foundation Research Journal, the Georgetown Law Journal, the North Carolina Law Review, the Supreme Court Review, and the West Virginia Law Review, and more than fifty articles on First Amendment doctrine in publications such as the Harvard Law Review, the Columbia Law Review, the California Law Review, the Northwestern Law Review, and the Texas Law Review.

I appear before the Subcommittee by invitation of the Subcommittee and not on behalf of or in any way connected with any individual, organization, or group of any kind. I should note in this connection that my political affiliation is independent, and that I have not registered as a member of a political party in almost thirty years. Moreover, I have no political, financial, organizational, or fiduciary connections with anyone who might be helped or hurt by any legislation or government action that might originate in this committee. Indeed, consistent with my longstanding practice, and consistent with my views about academic independence, I do not represent clients, directly or indirectly, nor do I draft or sign legal briefs, nor do I enter into any consulting relationships to provide legal services or legal advice.

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See, e.g., Pope v. Illinois, 481 U.S. 497 (1987); Smith v. United States, 431 U.S. 291 2 (1977). And in Ashcroft v. American Civil Liberties Union, 124 S. Ct. 2783 (2004), the Supreme Court made clear that even with respect to material targeted at or available to children, the legal test remained the Miller test for obscenity (although one that might take account in its application of the actual age of the audience, Ginsberg v. New York, 390 U.S. 629 (1968)), and could rely on a different "harmful to minors" standard.

This is the term used by the Supreme Court in Miller to emphasize its understanding of 3 the expected application of the Miller test.

New York v. Ferber, 458 U.S. 747 (1982). See also Osborne v. Ohio, 495 U.S. 103 4 (1990).

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). See also Renton v. 5

Playtime Theatres, Inc., 475 U.S. 41 (1976).
FCC v. Pacifica Foundation, 438 U.S. 726 (1978). 6
This is the principle supporting the Supreme Court's invalidation of, inter alia, the Child 7
Online Protection Act, Ashcroft v. American Civil Liberties Union, 124 S. Ct. 2783 (2004), the
Child Pornography Act of 1996, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), and the
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The sale and distribution of obscene materials has been unlawful in most of the American states since the early 1800s, and has been prohibited by federal law since 1873. In the face of occasional suggestions that obscenity law was inconsistent with the First Amendment, the Supreme Court casually affirmed the constitutionality of prohibitions on obscenity several times in the late 19 and first half of the 20 centuries, but not until 1957, in the case of Roth v. United th th States, 354 U.S. 476 (1957), did the Supreme Court squarely address the issue, concluding that obscene material lay outside the coverage of the First Amendment. From 1957 until 1973 the Court struggled with various approaches to defining the material that remained beyond the First Amendment, but in 1973 it both reaffirmed the basic holding of Roth (Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)), and settled on a test (Miller v. California, 413 U.S. 15 (1973)) for the determination of obscenity. In the face of a widespread but mistaken belief that the Miller test left the determination of obscenity to local community standards, the Supreme Court in 1974, with then Associate Justice Rehnquist writing for a unanimous Supreme Court in Jenkins v. Georgia, 418 U.S. 153 (1974), made clear that the definition of obscenity was a matter of federal constitutional law, and that the role of local standards was minimal and interstitial. Although there have been occasional Supreme Court obscenity cases in the ensuing thirty years, none have 2 challenged the basic conclusions of the 1973 cases - that material that is legally obscene according to the Miller definition of "hard-core" material may be subject to civil and criminal 3 penalties, but that material that is not legally obscene, unless it is child pornography, or unless 4 the restrictions relate to non-prohibitory zoning or broadcasting, remains fully protected by the 5 6 First Amendment.7
Communications Decency Act, Reno v. American Civil Liberties Union, 52 U.S. 844 (1997).
See, most recently, Frederick Schauer, The Boundaries of the First Amendment: A 8
Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765 (2004).
Bruce A. Taylor, Hard-Core Pornography: A Proposal for a Per Se Standard, 21 U. Mich. 9
J.L. Ref. 255 (1987-88).
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Although the exclusion of Miller-defined obscenity from the coverage of the First Amendment has been subject to extensive academic and political criticism, I continue to believe that such exclusion is consistent with the core principles of First Amendment law, and that Miller-defined obscenity is sufficiently far removed from the central concerns of the First Amendment that the basic structure of the Supreme Court's approach is defensible. I thus agree that prosecution of 8 legally obscene materials using a faithful application of the Miller test does not violate the principles of the First Amendment.

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It as, of course, a basic principle of constitutional law, and one that is drummed into the heads of law students from the first day of a constitutional law class, that not government action which is constitutionally permissible is necessarily desirable as public policy. As a matter of constitutional law Congress could eliminate speed limits on interstate highways, prohibit the growing of numerous crops, double the marginal income tax rate, and re-institute military conscription, but few people believe that the constitutional permissibility of these and countless other actions is an argument for their desirability. So too with obscenity prosecutions, and the correct conclusion that obscenity prosecutions are permissible under the First Amendment merely shifts the inquiry to the question of whether it is desirable that they take place, and, if so, to what extent. And as Congress considers that question, three issues seem particularly important.

1. The first issue to be considered is the extent to which obscenity prosecutions are being or would be used as a way of attacking and undercutting the existing and well-settled definition of obscenity. When the Attorney General's Commission on Pornography conducted its hearings and invited submissions in 1985 and 1986, a number of representatives of the federal law enforcement community urged that the Commission

recommend rejecting the Miller standard and replacing it with a per se test of obscenity that would make obscenity prosecutions easier. And by replacing Miller with a per se test, or by redefining the Miller standard in per se terms, this proposed strategy would have made the prosecution of obscenity more efficient and at the same time made the extent of First Amendment protection narrower. The Commission rejected this approach. Shortly thereafter, however, a law review article urging just that approach was published by Mr. Bruce Taylor, then with the Citizens for Decency Through Law and now, since 9 Hearings of the Committee on the Judiciary, United States Senate, October 15, 2003. 10 Conference sponsored by the Harvard Journal of Law and Technology, Harvard Law 11 School, Cambridge, Massachusetts, March 19, 2004.
See Orrin Hatch and Sam Brownback, "'Extreme' Judicial Activism," Washington 12 Times, February 5, 2005, p. A19.
Indeed, even if new funds were to be made available, there remains the question of 13 whether those funds should be used for obscenity prosecutions rather than for efforts to control

2004, Senior Counsel to the Assistant Attorney General in the Department of Justice, and with principal responsibilities in obscenity enforcement. In both 2003 and 2004 Mr. 10 11 Taylor again urged that obscenity be defined and understood so that the key feature of the definition be something easily identifiable, such as "penetration clearly visible." Because Mr. Taylor is now the principal individual managing obscenity prosecution at the Department of Justice, and because such a "per se" approach would be inconsistent with Miller, inconsistent with thirty-one years of obscenity law since Miller, and inconsistent with a proper understanding of the First Amendment, any move to increase the level and scope of federal obscenity prosecution in 2005 must be evaluated against the declared motivations of the official principally responsible for such prosecutions to attack the existing and well-settled state of the law, an attack supported by witnesses at this hearing, and to move obscenity law in a direction that has no grounding in any part of existing or historically identifiable First Amendment doctrine. Until and unless there is far better assurance than has existed to date that such pressure to expand or modify or re-interpret the long-settled definition of obscenity will be abandoned, and that prosecutors will not "ignore the law in favor of their own agenda," there remains a substantial risk that what 12 is described as an effort to enforce existing obscenity law will be, at least in part, a mask for what is in fact an effort to change existing obscenity law.
2. Apart from the risk that renewed prosecutorial efforts will be aimed largely at the goal of changing the well-settled law, there remain questions about the appropriate allocation of scarce prosecutorial resources. Because the production of child pornography by definition involves the abuse of real children, and because dealing with such child abuse should remain at the highest level of priority, there is a risk that increasing the quantity of obscenity prosecutions in a world of limited prosecutorial resources -- both financial and human -- will be at the expense of child pornography prosecutions. Such a reallocation of prosecutorial efforts away from child pornography would be inconsistent with wise policy, inconsistent with the recommendations of the Attorney General's Commission on Pornography, and, most importantly, inconsistent with the welfare of children.
Such a reallocation would not be necessary, of course, were new funds to be granted for obscenity prosecutions. But any decision by the Congress to spend additional money on 13 child pornography. Every dollar spent on an obscenity prosecution is a dollar not spent on child pornography prosecution, and only under circumstances in which it can be said that no more can be done about child pornography would this tradeoff fail to exist..
"Although the social science evidence is far from conclusive, we are on the current state 14 of the evidence persuaded that [material that does nor endorse violence against women and that does not depict the degradation of women] does not bear a causal relationship to rape and other acts of sexual violence." Final Report, Attorney General's Commission on Pornography, July 1986, p. 337. For my own roughly contemporaneous description and explanation of the Commissions's conclusions, see Frederick Schauer, Causation Theory and the Causes of Sexual Violence, 1987 Am. Bar Foundation Res. J. 737.

obscenity prosecution should be based on a calculation of the benefits of such expenditure

compared to the costs. And here the Miller standard once again becomes relevant. Under any conceivable understanding of the harms of obscenity as obscenity, the Miller definition, and any other definition that might be imagined, is extremely under-inclusive. Whether the harms be understood as environmental, or moral, or anything else, the vast majority of sexually-oriented or sexually-explicit material that would produce those harms is and will remain for the conceivable future fully protected by the First Amendment. Sexually explicit but non-obscene material pervades the society, and in virtually every domain except broadcasting does so under the well-entrenched protection of the First Amendment, as well as under the social protection of a society that is increasingly accepting of such material. In the face of a constitutional terrain that makes obscenity prosecution destined at best to involve a large expenditure of new funds to deal with only a minuscule slice of whatever the larger problem may be, the case for increased obscenity prosecution is a very difficult one to maintain.

Even the best case for such increased prosecution, however, would have to be premised on a congressional determination of what the harms of obscenity actually were. To repeat, the constitutional non-protection of Miller-tested obscenity says nothing whatsoever about it harmfulness, and on that issue, subject to what I have to say in the following section, there is virtually no evidence. Apart from scientifically-unsupportable claims about so-called "pornography addiction" and such, there exists no evidence that sexual explicitness as sexual explicitness produces sexual violence or any other consequence with which government can or should deal. This was the conclusion of the Attorney General's Commission two decades ago, and this conclusion, hardly the 14 product of a group of libertines or sympathizers with the industry of sexually explicit material, remains consistent with all of the scientifically serious research that has been produced since the Commission issued its report.

3. The significant exception to what is in the previous paragraph is the relationship between material endorsing or promoting sexual violence or violence against women and the incidence of sexual violence or violence against women in the society. Although there

was at the time of Report of the Attorney General's Commission on Pornography no evidence that sexual explicitness as explicitness bears a causal relationship to the incidence sexual violence, and although there is still no such evidence, there was then, and apparently is still now, evidence that endorsing portrayals of violence against women - most commonly some variation on the rape fantasy in which many men erroneously believe that women enjoy being raped or enjoy being the victims of sexual violence - do bear a causal relationship to the incidence of sexual violence in the society, an effect that is independent of the degree of sexual explicitness. Endorsements of sexual violence, false portrayals of women as enjoying being victims of sexual violence, and various related images and messages do indeed, according to most of the existing serious research, bear a causal relationship to the overall level of sexual violence, and it was the conclusion of the Attorney General's Commission in 1986 that prosecution of legally obscene (under Miller) material that also contained such endorsements or glorifications of violence against women might be prosecuted, even though the category of such material was vastly under-inclusive vis-a-vis the full universe of written, printed, and visual material endorsing or glorifying violence against women. The Commission reached this conclusion in part because of the symbolic effect that such prosecution might have, but it was a symbolic effect that existed precisely because of the conclusion that endorsing depictions of violence against women were a contributing factor in a genuine and serious social problem.

Unfortunately, this concern for violence against women has largely dropped out of the most recent efforts to increase the level of federal obscenity prosecutions. Although a concern about violence against women is occasionally mentioned these days, such mention is rare and decidedly secondary, and there is little indication that prosecutions are to be restricted to the subset of the set of legally obscene materials that explicitly endorse or glorify such violence. Moreover, there are repeated references in the current discussions to bestiality and other practices whose depiction might offend most people, but which are not in any of the serious research shown to be related to violence against

women or sexual violence in general. Indeed, there even seems to be some pressure from some groups to have the government conclude that violence against women is not the problem with respect to obscene material, and to conclude that the allegedly harmful effects of highly sexually explicit material are independent of its depiction of violence against or degradation of women. Unlike the evidence on the relationship of endorsing images of sexual violence to the level of sexual violence, however, and unlike the evidence of the relationship of endorsing images of violence in general to the level of violence, there exists still no serious research supporting the view that sexual explicitness as explicitness bears a causal relationship to the levels of violence, whether sexual or otherwise. That the current pressure to increase the level of obscenity prosecution is based on issues of sexual morality, or on the supposed evils of pornography addiction, or on undocumented harmful effects on children, but virtually not at all on the real and scientifically supportable issue of violence against women, is inconsistent with the evidence, inconsistent with the conclusions of the Report of the Attorney General's

Commission on Pornography, and inconsistent with the wise allocation of scarce prosecutorial resources into areas where the problems are real, documented, and genuine.