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STOPPING CHILD PORNOGRAPHY: PROTECTING OUR CHILDREN AND THE CONSTITUTION

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

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WEDNESDAY, OCTOBER 2, 2002

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 10:09 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Patrick Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Hatch, and Grassley.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Senator Hatch is now here and we can start.

I do want to recognize the family of Elizabeth Smart, who are here. I want the Smart family to know that both Senator Hatch and I have you in our thoughts and prayers. I think I could safely say that everybody in my State of Vermont feels the same way. I have heard so much about your terrible tragedy when I have been home. Like all of us here, if we could, somebody press a button and find your daughter, it would be a wonderful, wonderful thing. But the outpouring in my own State thousands of miles away of grief and prayer and thought for you was something I just wanted you to know about. I know Senator Hatch has spoken to individual Senators very movingly about the tragedy. He and I have discussed this on a number of occasions. I did also with a former colleague I was elected with, Jake Garn, who lives near you.

Beginning this hearing, it is clear that we are all against child pornography. That vote is an easy one. The harder task is finding those kinds of legislative solutions that are not merely designed to be tough on child pornography in the short term, but can withstand the test of time and the scrutiny of the courts. We need a law with teeth, but not false teeth.

This hearing is going to allow experts from all perspectives to come together as we work toward a solution that protects our children and honors the First Amendment. Too often, the issues can become temptations to demagoguery. The reason Senator Hatch and I have joined together on this is that we owe our children a lot more than a press conference. We owe them action that will be effective in helping prosecutors build solid cases and then obtain convictions that actually stick.

Earlier this year, the Supreme Court in *Ashcroft* v. *Free Speech Coalition* struck down portions of the 1996 Child Pornography Protection Act. The *Ashcroft* decision should not have been too surprising, as this Committee had been warned in 1996 that parts of the law were unconstitutional. So we have to work now to make sure we do not repeat those earlier mistakes.

We cannot just have quick fixes that do more harm than good. Even with parts of the CPPA struck down in the *Ashcroft* decision, there are many effective Federal laws dealing with child pornography still on the books. A review of the Department of Justice and FBI press releases show that Federal enforcement of the child pornography laws continues, and it is resulting in people being investigated, prosecuted, and sent to jail. We have to see if there are other tools that we need.

That is again why Senator Hatch and I joined together in S. 2520, the PROTECT Act, shortly after the Supreme Court's decision in the *Ashcroft* case. It is a response to the decision, not a challenge to it.

In *Ashcroft* v. *Free Speech*, the Supreme Court voted seven-to-two to strike down a provision banning virtual child pornography, that is, child porn made with morphed computer images, without real children. They faced a difficult task, the Supreme Court did, in trying to balance the First Amendment with the computer age. The Internet has a lot of areas that we can all benefit from, but it also has a potential for harm in some areas. The majority opinion found that the CPPA was overly broad, that it covered such non-obscene movies as "Traffic"—I believe Senator Hatch was one of the stars of that movie—one of the major stars of that movie—"Romeo and Juliet"—he was not a star of that movie—and "American Beauty."

So we have worked together to try to get a bill within these limits. We have narrowed the definition of virtual child porn by requiring consideration of literary or educational value so that films like "Traffic" are not covered and banned. It fixes the specific concerns raised by the Supreme Court decision. I look forward to hearing from the constitutional scholars here today if there are further refinements warranted. It is not going to do our children any good if we write a law that is simply going to be thrown out again. We want a law that works.

Our legislation, unlike the administration's proposal, provides new tools to help police and investigators prosecute child pornography cases. As a former prosecutor, I know these tools are going to help. We have got the victim shield law, so we have a first-time ever children's shield law to keep the identity of child victims out of court, protect them from being traumatized again in the court process. In my days as a prosecutor, that is the thing I worried about the most, when you had a child who had been a victim, they will become a second victim in the court proceedings or in the news articles or anything else.

We have sentencing enhancement for child sex offenders. The current sentencing guidelines carry a lower sentence for someone who actually travels across State lines to sexually molest a minor than for somebody who possesses child pornography that has crossed State lines, so we correct that.

We have a new felony for using pornography to induce a minor to engage in illegal activity. We have notice requirements to prevent surprise defenses. We create a right of action for victims. This I like, because those who peddle child porn, they are going to get hit where it hurts the most, in their pocketbook.

It is far easier to come up with a quick fix without attention to constitutional limits, so that is why we have tried to improve the Justice Department's proposal because we want it to stand up to a court challenge. The first one did not, as the *Ashcroft* case shows. We want to make sure when the next case goes up, it does stand up.

I hope we can do that. I hope we can protect our children and do it within the constitutional restrictions.

[The prepared statement of the Chairman Leahy appears as a submission for the record.]

Chairman LEAHY. Senator Hatch, I appreciate so much working with you on this, as I have on so many other issues we have worked together on.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman. I appreciate working with you, as well, and I appreciate you holding this hearing on this critically important piece of legislation.

As you know, a number of us have worked for years to protect our nation's greatest resource, and that is its children. I am pleased to report that our efforts have always enjoyed strong bipartisan support. The protection of our children, of course, matters immensely to those of us on both sides of the aisle.

I appreciate having members of the Smart family with us here today. None of us can express adequately how deeply we feel about the ordeal that you folks have been through, and others who have also suffered because of some of the terrible things that go on in not just our country, but around the world, and a lot of it comes from smut on television and movies and from people who are mentally ill and sick and some who are just plain criminals. But our hearts and prayers are with you. We just want you to know that, and with all folks who are suffering from these type of reprehensible activities and crimes.

We recently introduced, along with——

Chairman LEAHY. I understand Congressman Pomeroy has to go to vote——

Senator HATCH. Why don't we have him give his statement——

Chairman LEAHY. Do you have time to speak before you vote?

Mr. POMEROY. I will give you the short version.

Senator HATCH. I will interrupt mine for you.

STATEMENT OF HON. EARL POMEROY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH DAKOTA

Mr. POMEROY. Mr. Chairman, Senator Hatch, thank you for allowing me just to briefly say that the matter you have called for hearing today is, in my opinion, urgent, that at the very time Internet technology allows for the dissemination of child pornographic materials more than ever before, we have a serious problem in the

wake of the Supreme Court ruling striking down prohibitions against virtual child pornography.

In visits with prosecutors in North Dakota, they have told me their abilities to move cases have been very seriously disrupted by what they now carry as an offensive burden in prosecution of conclusively showing that the children in the materials were real children, and something that is all but impossible in light of the global distribution of these materials under the Internet.

I believe that the legislation Senator Carnahan has advanced, identical to what we have advanced in the House and passed 413 to eight, is carefully crafted and thoroughly considered. The Chairman has it precisely right when he says we need a law that will withstand court muster, and I believe in working with the Justice Department, the bill that passed the House was created for that express purpose.

I do not have time to go into the particulars in terms of how it passes muster, but I believe it was crafted not as a press release to show we did something, but to actually put back on the books the prohibitions that we need to protect our children.

If the Senate could move on this at this time, I believe it would be extremely important. I believe that cases literally are awaiting prosecution or determinations are being made by prosecutors not to prosecute in light of the state of the law of the land as it is today. I think that prompt action on the House-passed bill, drafted in bipartisan cooperation with the Justice Department, would allow us to get something to the President and have it actually enacted before we go home and not have this unfortunate state of the law of the land linger any longer than it should be.

I commend Senator Carnahan for bringing this important legislation up on the Senate side and urge your favorable consideration.

Thank you again for letting me speak today. Thank you.

Senator HATCH. Thank you.

Chairman LEAHY. Thank you very much, Congressman. I appreciate you waiting for that. You have worked extremely hard on this and I wanted you to have a chance to testify. I especially want to thank my good friend from Utah for yielding to you.

Senator HATCH. I hope you make your vote.

Mr. POMEROY. Since Senator Conrad and Senator Dorgan never defer to me, I was very pleased that you did, Senator.

[Laughter.]

Senator HATCH. You will find me always doing that.

[The prepared statement of Mr. Pomeroy appears as a submission for the record.]

Senator HATCH. I recently introduced, along with Senator Feinstein, the comprehensive Child Protection Act of 2002, and I hope we can get support for that bill, as well, and I want to thank you especially, Mr. Chairman, for cosponsoring our efforts to protect our children in the troubling area of child pornography, the PROTECT Act of 2002. I also appreciate you, Senator Carnahan, and am glad to have you here before the Committee and we welcome you.

I do not think it overstates the matter to state that child pornography represents one of the greatest dangers to the young and most vulnerable members of our society. Society has benefitted

greatly from the technological advances of the last decade, but an unfortunate byproduct of the growth of technology and the rise of the Internet in our country has been the proliferation of smut involving children. Child pornography itself is repulsive, but even more damaging and more concerning are the purposes for which it routinely is used. Perverts and pedophiles not only use this smut to whet their sick desires, but also to lure defenseless children into unspeakable acts of sexual exploitation.

In sum, child pornography is a root from which more evils grow. It creates a measurable harm in our society. On this record, I am absolutely convinced that Congress must act and act decisively.

Mr. Chairman, I am a staunch defender, as you know, of the First Amendment. Everyone not only has a right to his or her opinion, but also a right to talk about it. We justifiably should be proud that the United States leads the world in fostering tolerance for the free exchange of ideas, particularly where political views are discussed. But there is no place for child pornography even in our free society. I believe that the overwhelming majority of Americans stands shoulder to shoulder with us on this issue.

Earlier this year, a majority of the Supreme Court struck down some provisions of the CPPA under the First Amendment. Let me make clear that I respect the Supreme Court's role in interpreting the Constitution. But that decision left gaping holes in our nation's ability to effectively prosecute child pornography. The PROTECT Act is designed to patch these holes in a way that permits effective prosecutions in a manner that does not offend the Constitution.

We can all agree that the government has a compelling interest in protecting children, policing pedophiles, and enforcing our child pornography laws. The PROTECT Act does many things to aid these efforts. Let me just briefly summarize some of its most important provisions.

First, the Act plugs the loophole that exists today after the Supreme Court's ruling in *Ashcroft* v. *Free Speech Coalition*. In the wake of that decision, child pornographers can effectively escape prosecution by claiming that their sexually explicit material did not actually involve real children. Technology has advanced so far that even experts often cannot say with absolute certainty that an image is real or "virtual" computer creation.

For this reason, the PROTECT Act permits a prosecution to proceed when the child pornography includes persons that appear virtually indistinguishable from actual minors, and when this occurs, the accused is afforded a complete affirmative defense by showing that the child pornography did not involve a minor.

The Act also prohibits any depictions of minors or apparent minors in actual acts of bestiality, sadistic or masochistic abuse, or sexual intercourse where such depictions lack literary, artistic, political, or scientific value. This type of hard core sexually explicit material merits our highest form of disdain and disgust and is something that our society ought to be doing its best to eradicate.

Finally, the PROTECT Act directs the Attorney General to appoint 25 more trial attorneys who are dedicated to the enforcement of Federal child pornography laws. I think Congress needs to send a clear, unequivocal message to those child smut peddlers who continually evade our laws and flout our shared notions of decency.

These folks are in our cross-hairs, and I will just say those who are in our cross-hairs, your depravity will no longer go unchecked.

Mr. Chairman, I look forward to hearing from the distinguished witnesses who appear before the Committee today, but before we begin, I want to note the hearings that were held on this issue in June 1996 when I was Chairman. The information that we gathered during those hearings happens to be still relevant today. We certainly have not forgotten all that we learned back then about the problems of child pornography, and for that reason, I view this hearing as a very important supplemental one.

Mr. Chairman, I would ask that the complete record of those hearings be placed into the record so that all who look at what we do with the PROTECT Act today fully understand and appreciate how closely and carefully we have been studying this issue for years now. It is an issue that I feel very strongly about and on which I would like to speak for quite some time.

But so that we can turn more quickly to our distinguished panel and, of course, Senator Carnahan, as well, Mr. Chairman, I would ask that my complete statement be placed in the record at this time.

Chairman LEAHY. It will be.

[The prepared statement of Senator Hatch appears as a submission for the record.]

Chairman LEAHY. Let us, if we might on the prior hearing, because that is on file, whether that might, just logistically and also for the expense of it, whether that may be referenced with a copy.

Senator HATCH. Sure.

Chairman LEAHY. But we will work out whatever works best for you.

Senator HATCH. That would be fine.

Chairman LEAHY. Senator Carnahan, I am delighted to have you here and appreciate your coming by. I appreciate your courtesy in letting us move things around so that Congressman Pomeroy could get back to the other side of the Hill to vote. Please go ahead.

STATEMENT OF HON. JEAN CARNAHAN, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator CARNAHAN. Thank you, Mr. Chairman. I, as well, am going to have to go to the Commerce Committee following this and so I appreciate you recognizing me at this time. Thank both you and Senator Hatch for convening this hearing and for your leadership on this very important issue.

We are all here today with a common purpose of addressing a problem that threatens children across our country, child pornography. Child pornography is one of the most heinous forms of child abuse. Each year, an estimated 88,000 children fall victim to sexual abuse. Often, child pornography plays a key role in these crimes.

Law enforcement officers have worked hard to reduce the incidence of child abuse. But in the battle against child pornography, their hands are often tied because we failed to provide law enforcement agencies with the tools they need to protect our children. Computer-generated child pornography inflicts harm on our society even though actual children are not involved in its production. We know pedophiles show these materials to children. They use these

images to convince children that these practices are acceptable. They also use the images to convince themselves that their acts are not wrong.

The magnitude of our virtual child pornography problem is astonishing. The Internet has made it far too easy to engage in the widespread anonymous distribution of child pornography. In 1999, a single child pornography website recorded 256,000 hits and the download of 4.2 million images, not in one year, Mr. Chairman, not in a half-year, but in three months alone. According to an Internet management firm, in a six-month period last year, the number of child pornography sites tripled.

So a law that does not deal with the problem of virtual child pornography really is not providing children the protection they need. Unfortunately, the Supreme Court decision in the *Free Speech Coalition* case has made it far more difficult to take action against this evil.

The Court concluded that the government cannot put a pornographer in jail unless it can be proven that real children were used in the production of the pornography at issue. With modern technology, however, pornographers can digitally alter the features of real children so they cannot be identified, or they can digitally create images of children. So in some cases, the government will not be able to prove that real children have been used to produce the pornography and the pornographer will get off scot-free.

The bill I have introduced, the Child Obscenity and Pornography Protection Act, responds to the difficulties created by the *Free Speech Coalition* case. It provides that a person who distributes virtual child pornography has committed a crime unless he can prove that real children were not used to create the pornography. The affirmative defense relieves the government of the burden of proving the impossible and puts the teeth back into our criminal laws.

The bill also provides that virtual images of young children engaging in sexual conduct is obscene and, therefore, not entitled to consitutional protections.

This bill was developed by the Department of Justice and passed by the House of Representatives, as Representative Pomeroy recently mentioned, with just minor changes, by a vote of 413–8. I understand that the members of this Committee have endorsed a similar but separate bill. But the goals of both pieces of legislation are the same: To protect children from the direct and indirect dangers of virtual child pornography.

I hope that in the next few days we have remaining in this session, we can come together with the Justice Department and our colleagues in the House, combine the best elements of both bills, and send it to the President. The seriousness of this problem merits that we take prompt action, and I hope we can send a bill to the House before the recess.

I do not think we should leave our prosecutors without the tools they need in this fight against child pornography any longer. I thank you, Mr. Chairman, and I look forward to working with this Committee in the coming days.

Chairman LEAHY. Thank you very much, Senator. I know you do have a Commerce Committee meeting right now, so I appreciate you being here, unless, Senator Hatch, if you have any questions.

Senator HATCH. No, thanks. We are just happy to have you.

Chairman LEAHY. Thank you very much.

On the first panel, we will have Dan Collins, Associate Deputy Attorney General and Chief Privacy Officer at the Department of Justice, formerly Assistant U.S. Attorney in the Central District of California.

Frederick Schauer, Professor of Law at the JFK School of Government, teaches also at Harvard Law School and is a leading expert in First Amendment issues including obscenity laws. He served as Commissioner on the Meese Commission on Pornography, was a primary author of its findings, and also keeps an eye on a very nice part of Vermont during the summer, Woodstock. Am I correct on that, Professor?

Mr. SCHAUER. South Woodstock.

Chairman LEAHY. South Woodstock.

Mr. SCHAUER. I wish I could spend more of the year there, but——

Chairman LEAHY. And you have to understand, if you live in Woodstock, there is Woodstock, there is South Woodstock. It is like Westminster and Westminster West. You have to make sure you get it all right.

Professor Coughlin is a professor at the University of Virginia Law School, an expert in constitutional law and criminal law and procedure. I wanted her to be here because these are crimes we are talking about. She clerked for Judge John Newman of the U.S. Court of Appeals for the Second Circuit, U.S. Supreme Court Justice Lewis Powell, and I do not want you to think we are stacking the deck here, Senator Hatch, but she grew up in Rutland, Vermont, is a graduate of Mount St. Joseph's Academy. I have spoken there and know it well.

Ernie Allen is not going to be here. Daniel Armagh is the Director of Legal Education at the Center for Missing and Exploited Children, a center we have worked with in this Committee that has helped recover 65,000 children. He previously served as Director of the American Prosecutors' Research Institute's National Center for Prosecution of Child Abuse. He is Assistant D.A. for Lawrence County, Pennsylvania. Again, as I recall, you were involved in prosecuting crimes against children, am I correct on that, Mr. Armagh?

Mr. ARMAGH. That is correct, Mr. Chairman.

Chairman LEAHY. Thank you. So, Mr. Collins, let us begin with you, sir.

STATEMENT OF DANIEL P. COLLINS, ASSOCIATE DEPUTY ATTORNEY GENERAL, AND CHIEF PRIVACY OFFICER, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. COLLINS. Thank you, Chairman Leahy and Senator Hatch. I appreciate the opportunity to testify here today on behalf of the Department of Justice concerning this important subject.

The sexual abuse of children is an evil that no decent and civilized society can or should tolerate in any form. The harm inherent in abusive sexual conduct is bad enough. The fact that such

abuse may be photographed or videotaped only multiplies the scope of the harm inflicted on the young victims.

As the Supreme Court has recognized, because child pornography permanently records the victims' abuse, the very existence of such materials causes the child victims continuing harm by haunting the children in years to come. With the advent of the Internet, this harm has been magnified exponentially. Pedophiles can, with the click of a few keys, instantly make such materials available to literally thousands of persons. Moreover, as the Supreme Court has also stated, evidence suggests that pedophiles use child pornography to seduce other children into sexual activity. Accordingly, the Court has properly held that the First Amendment provides no protection to such materials and that the government has compelling interests that justify attempting to stamp out this vice at all levels.

Over the years, the Congress, by large bipartisan majorities, has enacted a number of statutes designed to address the serious problems presented by the manufacture, possession, and trafficking of child pornography. One such law, the Child Pornography Prevention Act of 1996, was favorably reported by this Committee, as Senator Hatch noted, and was reported by a vote of 16 to two. The Department of Justice in both the current and prior administrations vigorously defended the validity of this important law in the courts.

Unfortunately, in April of this year, a divided Supreme Court held that this legislation was, in part, facially unconstitutional. The Department was obviously disappointed by the Court's decision. But, nonetheless, we believe that the Court's decision and the Constitution leave the Congress with ample authority to enact a new, more narrowly tailored statute that will allow the government to accomplish its legitimate and compelling interests without interfering with First Amendment freedoms.

The Department is deeply grateful to the leadership shown by the Congress in moving promptly to work with us to address this important issue. A bipartisan group of Representatives and Senators joined the Attorney General on May 1 to announce a legislative proposal aimed at strengthening the child pornography laws in the wake of the Supreme Court's decision. As that bill, which was introduced in the House as H.R. 4623, moved through the House Judiciary Committee, we were pleased to work with members on both sides of the aisle in further revising the bill so as to ensure that it would provide maximum protection to our nation's children while complying with the Supreme Court's decision and the Constitution.

Likewise, I have been pleased to meet with members of the staff of this Committee on both the majority and minority side in connection with the drafting of S. 2520, and in particular, the Department is deeply grateful to the leadership shown by Senator Hatch in introducing that legislation and in promptly moving to address this important issue.

I have in my written statement detailed a number of largely technical suggestions with respect to the legislation that is before the Court—that is before the Congress, rather. There are points of difference. We can make improvements in both the House bill and in the Senate version. But the basic approach of the two bills at a conceptual level is essentially very similar.

We strongly believe that a prompt and effective legislative response is necessary. In the *Free Speech Coalition* decision, the Court held that the 1996 Act's definitions of virtual child pornography and pandering were facially unconstitutional. But by invalidating these important features of the 1996 Act, the Court's decision leaves the government in an unsatisfactory position. Already, defendants often contend that there is reasonable doubt as to whether a given computer image—and it should be noted that most prosecutions involve materials stored and exchanged on computers—whether it was produced with an actual child or by some other process. There are experts who are willing to testify to the same effect on defendants' behalf. Moreover, as computer technology continues its rapid evolution, this problem will only grow increasingly worse. Trials will increasingly devolve into jury-confusing battles of experts.

We believe that the Congress has a strong basis for action and for taking additional measures in response to the Court's decision. We look forward to working with the Committee to resolve the remaining issues and to get a bipartisan piece of legislation that can be presented promptly to the President.

Chairman LEAHY. Thank you very much.

[The prepared statement of Mr. Collins appears as a submission for the record.]

Chairman LEAHY. Professor Schauer?

STATEMENT OF FREDERICK SCHAUER, PROFESSOR OF LAW, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY, CAMBRIDGE, MASSACHUSETTS

Mr. SCHAUER. Mr. Chairman, thank you very much for inviting me to be here. I appreciate the honor. Let me take this opportunity also to thank Senator Hatch for his support of the work of the Attorney General's Commission on Pornography 16 years ago and my participation on that commission, in particular.

As my statement indicates, I have been involved with issues of obscenity and pornography law for close to 30 years now, and in addition to other issues on which I write, I have been writing about the largely technical side as well as the larger policy side of obscenity and pornography law for decades now. Most of my comments, therefore, will be addressed to the somewhat more technical side of this question.

But let me preface those comments by observing that there are demonstrable disadvantages to enacting legislation that has a low to no probability of being upheld by the Supreme Court, not only for reasons that relate to the rule of law, not only for reasons that relate to expense and delay, but because one of the things that we are increasingly seeing from the Supreme Court, and admirably so, is a degree of deference to Congressional interpretations of the Constitution in areas in which the Congressional interpretations of the Constitution are within a plausible range of preexisting Supreme Court opinions. I would strongly urge the Committee and the Congress to encourage this degree of deference by the Supreme Court to what you do by staying within a range that will indicate a desire to cooperate with the Court and, therefore, encourage this deference.

Let me address three particular issues in S. 2520. One of the dimensions of S. 2520 is its discussion and criminalization of the pandering of child pornography. In criminalizing the pandering of child pornography and doing so in a way that I believe survives the objections of *Ashcroft* v. *Free Speech Coalition*, S. 2520 keys the crime of pandering to the fact that the material being pandered is itself unlawful, whether unlawful obscenity or unlawful child pornography.

The most significant difference in this regard between S. 2520 and H.R. 4623 is the extent to which the Senate bill, desirably, in my view, and consistent with Supreme Court views about commercial speech and commercial advertising, makes it clear that the pandering or advertising of illegal materials is not constitutionally protected, not protected by the First Amendment. Once we loose the moorings in otherwise illegal material by virtue of either its obscenity or child pornography dimensions, the pandering crime becomes somewhat to much more debatable, and in that reason, it is a much safer course to proceed as S. 2520 does.

Second, in defining child pornography, S. 2520 admirably comes reasonably close to but not identical with the definitions of obscenity that we see in a number of previous Supreme Court obscenity decisions. That is, in 2256(8)(d), the provisions by requiring the prosecution to show, as Senator Hatch mentioned in his opening statement, the lack of serious literary, artistic, political, or scientific value comes close enough to the Supreme Court's definition of obscenity that I believe that the differences, which may be desirably differences on the dimension of both patent defensiveness and appeal to the prurient interest, are ones that are likely to encourage the Supreme Court to defer to the Congressional definition of obscenity and to defer to the Senate's view that at least in this context, the materials encompassed by 2256(8)(d) represent a Senatorial or Congressional specification of what obscenity means in the child pornography context.

Finally, on the question of the affirmative defense, although Justice Kennedy in the Supreme Court opinion expressed some skepticism about whether an affirmative defense is an appropriate vehicle for carrying First Amendment values, as my written statement indicates, I believe he was mistaken in this regard and the tentativeness of those statements in the opinion lead me to believe that there is still some room for an affirmative defense in this area precisely to deal with exactly the problem of proof that Mr. Collins and others have mentioned.

By dealing with the two specific issues raised by Justice Kennedy and by a number of other modifications that one finds in S. 2520, I believe that the idea of an affirmative defense is carrying the First Amendment burden rather than requiring the prosecution to negate the idea of the First Amendment is an important and desirable vehicle in accommodating to the Supreme Court opinion while not withdrawing what is perhaps the most important dimension of the prosecutor's tool box in this area. I thank you.

Chairman LEAHY. Thank you very much.

[The prepared statement of Mr. Schauer appears as a submission for the record.]

Chairman LEAHY. Professor Coughlin?

STATEMENT OF ANNE M. COUGHLIN, PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VIRGINIA

Ms. COUGHLIN. Thank you, Mr. Chairman. I want to start, as well, by thanking you very much for the invitation to appear and testify today. It is a special honor for me to be here because, as you say, I do hail from the great State of Vermont, and I want to just snatch one second from my time to mention how thrilled my dad will be to hear that I was able to greet you in person and to thank you for your public service on behalf of the State and the whole nation.

Chairman LEAHY. Be sure you take that back to him. Thank you very much.

[Laughter.]

Ms. COUGHLIN. Like the other witnesses here today, I have submitted to the Committee written testimony, which I am going to just briefly outline and amplify slightly and on which I am happy, of course, to take questions.

As you mentioned, Mr. Chairman, my areas of expertise are criminal law, criminal procedure, and I also teach and research in the area of sex discrimination law. Like Professor Schauer, I have done my best to evaluate the constitutionality of these bills, the extent to which they measure up to the First Amendment guarantees. I do want to emphasize that Professor Schauer's best may be better than mine because he is a First Amendment expert and I am not. I can, however, offer some advice on the First Amendment questions and I also want to focus particularly on criminal law matters and the way in which the criminal law approaches some of the problems you are considering here today.

One thing that I want to highlight now is the way in which we are talking about thinking about the core or primary harms that the child porn laws aim to eliminate. We talk, of course, about the use of actual children in the production of child pornography, and what I want to say very clearly on the record is when that occurs, when actual children are used in the production of child pornography, that core or primary harm is one that the criminal law calls rape. We have been using language here like abuse, exploitation, seduction. The criminal law calls sex with a minor rape. So the people who are using actual children to make child pornography are, in the eyes of the criminal law, at least, arranging to have these children raped so that the pornographers can record the rapes and then sell those recordings to others. These are among the most serious harms that the criminal law knows, aims to punish and deter.

Under the Supreme Court precedents, as our testimony has outlined, namely the Ferber case, of course, the government is free to prohibit and punish the production of porn made with actual children. I suppose it should go without saying that this type of pornography falls well outside the protections of the First Amendment.

But here is the problem, of course, and it is one that has been alluded to in the record. The problem is that if the definition of regulable child pornography is limited to that definition, the one set forth in *Ferber*, the government's efforts to deter and punish child pornographers look likely to be seriously eroded. The par-

ticular problems the Committee has had in mind are those that are created by the phenomenon of virtual child pornography. With the proliferation of virtual pornography, child pornographers seem to be able to escape prosecution and convictions, convictions that we think, or certainly that I believe, firmly are just convictions.

As I see it, there are two different arguments that the criminal law would allow of child pornographers to make in these cases. One has been alluded to here. The first argument is that the defendant may claim that the government cannot prove that the porn used actual child pornography as opposed to virtual ones. We are hearing that the computer technology is so sophisticated that it is literally impossible, at least very, very difficult for the government to separate the virtual image from the real one, and in such a case, I take it we might have a reasonable doubt as to guilt.

The other argument that I wanted to mention, one that I expect will be raised in these cases, is a different one. This is a mental state argument. The defendant might argue that the prosecution cannot prove that he possessed guilty knowledge. That is, the prosecution cannot prove that he knew that the images were made with actual children rather than with virtual ones. If it is true that it is so difficult for the government to distinguish the virtual from the real in this context, well, then the defendant plausibly can claim that he did not think any real kids were involved. Who can tell? Virtual kids, real kids, you cannot tell the difference. Therefore, he lacks guilty knowledge.

In my judgment, both of these types of arguments should be shut down and the Senate bill, S. 2520, makes a responsible and, I think, very good faith effort to doing just that. The key question before the Committee is whether, and if so, precisely how to craft a provision that forecloses these defense claims. As you know, the CPPA was designed to shut these claims down, but the Supreme Court found that the CPPA cut too broadly.

What the Senate bill does, and Professor Schauer has outlined how this provision works, is that it provides a new definition of illegal child pornography that is somewhat broader than *Ferber*, broad enough to outlaw the kinds of illegitimate arguments, defense arguments, I just mentioned, but yet that definition is narrower than the CPPA provisions that the Supreme Court rejected in *Free Speech Coalition* and it also appears to respond exactly to the kinds of concerns that the *Free Speech Coalition* case raised.

I fear that the House bill, that is H.R. 4623, is not as carefully calibrated and is not likely to withstand a constitutional challenge.

I also want to mention—I realize my time is up—that the Senate bill contains a number of very important and, by now in the criminal law, traditional protections for victims in this area. It enacts victim shield protections. It enacts, or would enact, new prohibitions to punish and deter the distribution of child pornography to children, and also contains important directives to the Sentencing Commission to correct some of these strange anomalies in the level of punishment that we allow in these cases. Thank you.

Chairman LEAHY. Thank you very much, Professor.

[The prepared statement of Ms. Coughlin appears as a submission for the record.]

Chairman LEAHY. Mr. Armagh?

STATEMENT OF DANIEL S. ARMAGH, DIRECTOR, LEGAL RESOURCE DIVISION, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, ALEXANDRIA, VIRGINIA

Mr. ARMAGH. Thank you, Mr. Chairman. Mr. Allen asked me to convey his regrets about his inability to attend.

Chairman LEAHY. Thank you.

Mr. ARMAGH. Mr. Chairman and distinguished members of the Committee, I am here today to talk about the pragmatic implications for law enforcement and prosecutors. At the National Center for Missing and Exploited Children, pursuant to Congressional mandate and the support of the members of this Committee, historically—Senator Hatch has been active since the 1996 legislation initiative, and I think Senator Hatch's point that this is a supplemental hearing to the legislative record is critical. I think that is something that we have to understand. The long-term fix for this is a constitutional statute. That has been reiterated time and time again.

There was a time in this country, from a prosecutor's perspective, where the child pornography problem was contained. It was certainly much more controlled than it is today, and that is in large part, of course, to the Internet and the World Wide Web and people having computers in their homes.

The issue of whether or not the existing child pornography statutes were created to protect only those children who are depicted in child pornography was addressed by the Court, and I think we have to craft the statute, and I think the present statute, S. 2520, goes a long way in doing this, in terms of protecting children. There has to be a history and findings that supplement the findings in the 1996 bill that makes the nexus a strong and direct connection, that people who possess child pornography or child pornography that is virtually indistinguishable from child pornography that is using actual children, use those visual depictions to groom, coerce, seduce actual children into sexually exploitive relationships or, as one colleague has just said, they rape the children by using this kind of material.

This decision in *Ashcroft* has had a chilling effect on law enforcement. The National Center for Missing and Exploited Children is the 911 of the Internet, and we get complaints from the public as well as reports from Internet service providers on a daily basis. We have just received our 90,000th report of child pornography being on the Internet. Law enforcement post–*Free Speech* does not know what to do in terms of if they are investigating a site and it is a webstream or web cam and it is showing a child being abused. They tell me that they do not know whether they should get a search warrant, exigent circumstances, or is this protected speech. and what happens if we go out and break down the door and seize what we thought was a child being sexually exploited, only to discover that this was, in fact, virtual child pornography? So that has a chilling effect on law enforcement's efforts to effect and implement the child pornography statutes.

One other concern that a prosecutor recently raised was a threat from a defense lawyer who said, if you do not drop these charges against my client, we are going to take civil action against you under the Privacy Protection Act because these visual depictions

were something that we intended to publish. They are documentary materials. We intend to publish them. Your seizure of these materials violated my client's rights under the Privacy Protection Act. That is a concern. And obviously, the concern of identifying children for prosecutors in these cases has already been addressed.

We live in a society now, Mr. Chairman, where the pedophile community, the situational preferential offenders can now go to the Internet and get support, advice, they get encouragement for a lifestyle that praises preying on children, adult-child relationships. This was not so before the Internet. They were somewhat ostracized by the society.

So when the prosecutors call me and say, what can I do, because I am looking at motions to dismiss or motions to suppress, there is some good news. But let me reiterate that a long-term fix would be a constitutional statute with teeth.

Some of the things that we are facing as prosecutors are jury instructions by the court that instructs the jury to say, if you do not find beyond a reasonable doubt that the visual depictions in the government's case are of actual children, then you must find for the defendant.

Another problem that was related to earlier was we have a case down in Florida where the defendant is saying, I did not know this was actual children. In fact, the guy that I purchased these DVDs from that contains visual depictions of child pornography, he told me they were virtual child pornography, that no real children were being used. And the evidence that the prosecutor used was, well, in order to make these visual depictions, you have to have a lot of money. You have to have a lot of money to make visual depictions that really are virtually indistinguishable from actual children, and so that defense failed because the defendant said, well, I did not make these. I just bought them for $100 from the guy who said they were virtual children.

So that defense is there, and we are dealing with an adult child pornography industry that made over $1 billion last year, and the experts in that industry anticipate in the next five years, they will have $5 to $7 billion in profit, Mr. Chairman, and I submit to this Committee that that is ample resources to make virtually indistinguishable visual depictions of child pornography.

I see my time is up, and I want the chair and the members of the Committee to know that the National Center stands as a resource for you on this issue.

Chairman LEAHY. I thank you, Mr. Armagh. As you know from your own experience in prosection, I think it is safe to say, and I do not think there is any prosecutor who would disagree with me, one of the most troubling and disturbing and disheartening things is to have a case that involved a child that had been molested for whatever the motivation. I think I still have nightmares of some of the cases I saw, and I know you must, too. I appreciate you being here.

Mr. ARMAGH. Thank you, Mr. Chairman.

[The prepared statement of Mr. Armagh appears as a submission for the record.]

Chairman LEAHY. Mr. Collins, the Carnahan bill, S. 2511, is very similar to the administration's original legislative proposal and to

the House bill about which we just heard Mr. Pomeroy testify and which you support. So am I correct that the Department of Justice supports the bill that Senator Kay Bailey Hutchison and Senator Carnahan introduced in the Senate? You mentioned only the House bill, and they seem similar bills.

Mr. COLLINS. My understanding is that the Carnahan–Hutchison bill is identical to the originally introduced form of the administration bill, H.R. 4623. As I have noted in my written statement, the House legislation went through quite a bit of markup as it worked its way through subCommittee, Committee, and then through the floor. We believe that a number of those changes, actually on further consideration, strengthen the bill, strengthen its defensibility from a constitutional perspective and some of the more technical comments that we have made in our written statement would have applied equally to the original bill and reflect some of the——

Chairman LEAHY. Did you support the bill?

Mr. COLLINS. We would support the bill with the modifications made by the House.

Chairman LEAHY. Would you support the House bill?

Mr. COLLINS. Yes. I think that all of these bills are very close to one another conceptually. Even where the language is different, the conceptual approach is very similar, and I think it is very easy to look at the issues, identify them, and then say we can take the best of both and come up with a compromise bill that will accomplish what needs to be done.

Chairman LEAHY. I was thinking about what Mr. Armagh was saying about the amounts of money, and let me make sure I have got this correct. You are talking about, today, a $1 billion industry, and——

Mr. ARMAGH. That is correct, Mr. Chairman.

Chairman LEAHY.—in a very short time, a $5 billion industry.

Mr. ARMAGH. In five years, it will be $5 to $7 billion.

Chairman LEAHY. The reason I mention that, I would think one way to go after these people is to hit them very heavily in the pocketbook. Senator Hatch and I included a private cause of action allowing the victims of child pornography to sue producers in S. 2520. It has got punitive damages on top of just damages, punitive damages, the idea that you get compensation to the victim, but you can also go deep into the pocketbooks of those doing it.

Mr. Collins, the administration did not include such a provision in its proposal. Do you support the provision of the Hatch–Leahy bill?

Mr. COLLINS. Yes, we do. We do support the inclusion of that. We do not have a monopoly on wisdom and we very much——

Chairman LEAHY. No, I just noticed it was not in your bill, so I just wanted to make sure. But you do support that?

Mr. COLLINS. We do, and my written statement makes clear that we strongly endorse it, believe it should be part of the final package.

Chairman LEAHY. Mr. Armagh, what do you think?

Mr. ARMAGH. We absolutely support that clause, Mr. Chairman.

Chairman LEAHY. I kind of thought you would.

Professor Coughlin, you have looked at these crimes from the perspective of the victims. I know you share my dismay of what

happens to these victims. What do you think of this kind of proposal? Is this something workable?

Ms. COUGHLIN. The private cause of action?

Chairman LEAHY. Going after the private cause of action, the punitive damages, and all that.

Ms. COUGHLIN. The provision seems to me to be more than appropriate. It seems to be the kind of context that cries out for a private cause of action. As I mentioned in my written testimony, what you see here is a perpetrator, in effect, making a commodity out of a victim's suffering and pain and it is the kind of case that seems perfectly designed for civil remedies. We have similar civil remedies available to other crime victims, and I see no reason why you would not want to extend it to this case, as well.

Chairman LEAHY. Thank you. Also in the Hatch–Leahy bill, we have provisions protecting the identity of children. I had mentioned earlier, and I am sure Mr. Armagh had the same experience in his prosecution, prosecutor's experience, one of the things you want to do is protect these children from being victimized a second time. Sometimes it is very difficult sometimes even to make the decision whether to prosecute because you have got to put the child through the whole thing all over again.

The shield law that we have in the Hatch–Leahy bill, Mr. Collins, have you had a chance to look at that?

Mr. COLLINS. Yes, I have.

Chairman LEAHY. Does the Department support that?

Mr. COLLINS. It raises a technical issue. There is a privacy protection provision already in the existing criminal code that would allow the names to be redacted. There is a practical concern that now that there is a heightened importance on proving that a child who is depicted is an actual child, that there may be circumstances in which that may be—there may be some necessity to some degree to go into identifying information, but that the existing provisions might be sufficient to allow any necessary redaction.

We think it is important to look at whether that needs to be strengthened, but the per se approach of always shielding that category of information may raise some practical concerns, so——

Chairman LEAHY. Could I ask you to do this. Could I ask you to have your office look carefully at this and then submit for Senator Hatch and myself your specific reference to the Hatch–Leahy shield law, tell us what parts you agree with, what parts you do not agree with, where you think improvements might be made with some specificity? Could you do that, please?

Mr. COLLINS. Yes. We would be happy to work with you on that.

Chairman LEAHY. Thank you. Mr. Armagh, what about you? Have you had a chance to look at the shield law?

Mr. ARMAGH. I have, Mr. Chairman, and I understand the concerns voiced in the legislation. I share Mr. Collins's concern in terms of it is kind of a circular problem in that in order to prove the identity of victims at trial, we are going to have to set up these victim databases, if you will, which there is some question as under Title 18, 3509, if Federal agencies can even house that kind of information. And so as long as we can determine a way to fit that into that new problem under the virtual child pornography challenges via *Ashcroft*, I think it is an excellent idea.

Chairman LEAHY. I think we all know what we want to do, but we also want to do it in a way that does not hinder law enforcement, helps law enforcement, protects the victim, keeps constitutional. Again, I would ask each of you on the shield law, if you have ideas, pass them on to us. I know that we are—some of these areas, with the *Ashcroft* v. *Free Speech* case, we are having to feel our way around, so help us out in any way you can.

I know, Professor Schauer, you testified in 1996 that the specific provisions of the CPPA would be struck down. You were quite prescient. They were. You are absolutely right. You stated in your testimony you have similar concerns with respect to the House bill.

I looked at the administration's bill, and while I do not pretend to have the expertise you do, I thought it may be designed to address Justice O'Connor's concerns, but she was not the deciding vote in this case. What areas of the administration bill cause you concern about the constitutional aspects and why?

Mr. SCHAUER. I think there are primarily two. One is defining the crime of pandering in a way that is not keyed to existing post–*Free Speech Coalition* definitions of child pornography or not keyed to obscenity. By going beyond that, it seems to butt directly against Justice Kennedy's discussion of the pandering issue. Justice Kennedy made it clear that pandering could not, in the normal circumstances, be considered an independent crime but was only evidence of the crime of obscenity or child pornography. Once you keep pandering to an otherwise illegal act, you can support it under existing commercial speech doctrine, as I explain in my statements, but without doing that, it will suffer the same fate as the pandering provision of the CPPA.

The other is that in 2256(8)(d), by not including the element of serious literary, artistic, political, or scientific value and by staying so far away from anything that looks like obscenity, the House bill, H.R. 4623, looks remarkably similar to what it was that the Supreme Court struck down. The differences are real, but they are not the differences that were important to Justice Kennedy and important to six of his colleagues. Even if you exclude Justice O'Connor, they are not the differences that were important to Justice Kennedy and five other of his colleagues, leaving six Justices to once again strike it down, once again delaying by as much as six years the ability to use the most effective tool we have to go after child pornographers.

We do not effectively deal with child pornography when prosecutors are in appellate courts, when prosecutors are writing briefs and when prosecutors are doing something other than prosecuting cases under constitutionally impeccable or at least constitutionally plausible laws rather than having their attention, their time, and scarce prosecutorial resources diverted by legislation that may at times be more symbolic than real.

Chairman LEAHY. It is the symbolic and real part that bothers me. I mean, we are all against child pornographers. We all want to protect children. But I am enough of a constitutional realist to know if we are going to do it, let us do it in a way that actually does protect them, not just something so we can say, hey, look, we are against them. I mean, I think we can accept the fact that all

535 members of the House and Senate are against it, as is everybody in this room. Now let us do it in a way that works.

Senator Hatch and I pointed out that there is a lower penalty for sexual predators who travel across State lines to have sex with a minor, the *Traveler* case, than for individuals convicted on child pornography charges. I think that to change that disparity, the bill encourages the Sentencing Commission to correct this, get these predators off the streets.

Mr. Collins, would it be safe to assume that the Department of Justice would support us in that regard?

Mr. COLLINS. Yes. We are actually studying that specific issue, that there really is a seemingly irrational disparity, that if you have one Federal jurisdictional predicate, there is one structure of penalties. If you have another for essentially the same conduct, there is a different structure. They should be evened across. Also, Senator Hatch's child protection legislation also addresses that same issue.

Chairman LEAHY. Can you let us know whether you support the provision we put in here to correct the disparity?

Mr. COLLINS. In here, yes. The directive to the Sentencing Commission that is in Section 11, we did support that.

Chairman LEAHY. That is what I wanted to make sure, and I assume, Mr. Armagh, you do, too.

Mr. ARMAGH. Yes, Mr. Chairman.

Chairman LEAHY. I have impinged on my friend from Utah's time and I apologize, but I wanted to make sure we put down the fact that these provisions that the two of us have in here are supported.

Senator HATCH. You covered it well, and I am very appreciative that the distinguished Senator from Vermont and I are working hand-in-hand together on these matters because I think we all want to do what is right here and we all want to solve these problems.

Let me start with you, Professor Schauer. I have heard some argue that the PROTECT Act may chill legitimate speech protected by the First Amendment. A bit of history might help us to better frame this issue. From 1996 until the Supreme Court's decision earlier this year, the Child Pornography Prevention Act, which swept far more broadly than the PROTECT Act does, was the law of the land and no one has pointed to any depletion in protected speech during that whole period of time. Indeed, as my distinguished colleague has said, movies like "Traffic" and "American Beauty" were produced and disseminated long after the CPPA was passed.

So I find it somewhat ironic that the Supreme Court in *Free Speech Coalition* pointed to these movies as proof that the CPPA might deter the protection of such works. The Court also warned that the CPPA might criminalize performances of "Romeo and Juliet," which as far as I have been able to obtain, those performances have continued unabated for the past six years.

Moreover, several States, including Arizona, Delaware, Minnesota, and Missouri, have statutes that prohibit sexually explicit depictions of real or apparent minors. We should also remember that two major countries, Canada and England, likewise have

amended their child pornography laws to ban such depictions of apparent minors. I have not seen any evidence to suggest that these laws have stymied free expression of ideas in those robust democratic societies. On the other hand, I find it difficult to stomach the fact that we provide less protection for kids in our country than received by the children of both England and Canada.

Professor Schauer, what thoughts do you have on the issue of the PROTECT Act's possible effect on chilling protected speech?

Mr. SCHAUER. I think it would be extraordinarily unlikely. All too often, people who talk about a chilling effect do not spend enough time out in the cold with the thermometer, that often the discussion of chilling, as you suggest, is metaphorical or sloganeering without there being any actual evidence of chilling.

Moreover, the existing definitions of obscenity and the existing definitions of child pornography, from *Miller*, from *Ferber*, from all of the other cases, already build in a very large, what is known in the field as a buffer zone. That is, they already take account of the chilling phenomenon and, therefore, as long as the requirements of *Ferber*, of *Ashcroft*, of *Miller* and all of these other cases are satisfied, that already builds in protection against chilling. The likelihood that there will be chilling from this Act seems to me somewhere between infinitesimal and nonexistent.

Senator HATCH. I like that comment.

[Laughter.]

Senator HATCH. Let me ask you this, Mr. Collins. You have spent some time pointing out some of the technical errors that exist in the version of the PROTECT Act as introduced. Let me assure you that we have been working on correcting all of those typos and ambiguities. In fact, several months ago, my staff shared with you and with other persons in the Department of Justice a more polished version of the bill that addresses virtually all of the concerns, I think, you have raised in your testimony.

Our bill, Senator Leahy and I have worked hard. This bill has evolved, as all bills do before final passage. The version that we intend to offer, or at least as I understand it, at the time the full Judiciary Committee considers S. 2520 will be even more polished in light of the thoughtful comments that you and others on this panel have provided for us.

Now to my question. I think that I understand the legal impact that the *Free Speech Coalition* decision has on the Department of Justice's ability to enforce the child pornography laws, but can you explain to the Committee what the practical effects of that decision have been? Absent any legislative action, do you see these problems becoming better or worse in the future?

Mr. COLLINS. Senator Hatch, first, I would indicate the number of technical comments we made, most of them would apply to our bill, as well, and we had the benefit of that bill going through the process in the House and the markup and so, basically, I was just sharing in the written comments some of the technical things that we had learned in that process and appreciate the efforts that you have made on this.

The practical impact of it is clearly considerable and it is not necessarily the case that it is in reduction of absolute numbers, because as the Chairman indicated, we are still quite aggressively

pursuing these cases. But it is having an impact on certain classes of cases in particular and on the allocation of resources.

First, any cases that involve computer images, digital images, present difficulties that we do not encounter in cases that involve older images on film or in which there is a sting operation where we may have more control over the nature of the material in question. In cases that call for expert testimony, which is a large number, the pool of experts who are available is not terribly large and the reports I have been given indicate that they have been deluged with requests for analysis, and they have to do a lengthy analysis even before the case can even be charged up in order to assess whether or not the case is viable. You have the prospect of the jury confusion with respect to a battle of experts analyzing things at a very technical level, threatening the basic ability to enforce the child pornography laws.

And then you also have—I think Professor Coughlin's comment was quite an insightful one. We have received reports that this issue is cropping up as a problem with scienter. We have had district judges who have expressed reluctance to accept guilty pleas on the basis that they do not think there is a sufficient showing of scienter that this person actually knew that it really was a child. We can expect fully that that kind of argument will also be exploited; in addition to the expert testimony over the underlying image, they'll make the scienter argument, as well.

So the current state of affairs is clearly one that is going to lead to increasing enforcement problems here. It is going to signal to pornographers that there are certain ways in which to carry on this trade that are harder for us to get at, and we can be sure that that is where that market is going to move. So inaction is unacceptable. We really do need to strengthen the tools that we have.

Senator HATCH. Thank you. Let me turn to you, Mr. Armagh. We appreciate the testimony of all of you here today. It has been very helpful to me and, I am sure, to Senator Leahy and Senator Grassley, as well.

But the National Center for Missing and Exploited Children recently published a newsletter indicating that it had received dozens of calls from prosecutors and law enforcement officials asking for the Center's help in identifying the actual identity of children portrayed in confiscated pornography. Now, these law enforcement officials have told your organization that if you could not identify the children, they would drop their cases.

I understand that it is extremely difficult, if not impossible, to determine the real identity of the children depicted in child pornography. Can you explain why that is and can you elaborate on what problems this causes in the real world of prosecutions?

Mr. ARMAGH. Senator Hatch, there is hardly a week goes by that we do not get a call from prosecutors and law enforcement officers asking us if we can help them identify the victims that are visually depicted in their evidence, and part of that process is that there are a number of series of children who have been identified as victims and they are in databases at the National Center. We have cropped images. The U.S. Customs Service has these images. I believe the FBI does and perhaps the Postal Service. They bring those images to us, or crop those images and we try to make an

identification and let them know where that child has been identified and kind of act as a pointer system so that they can go and get the necessary information that would be probative as to the fact that this is an actual child.

What we are also seeing is known images of identified victims that have been manipulated or morphed. You have a Hispanic-looking child being sexually exploited. All of a sudden, his hair is blond and he has blue eyes and his features are changed a little bit, but the giraffe and the ugly green curtains are still in the background, and so we know that that is an actual child. But what this indicates is that they are getting more sophisticated. They are getting more thoughtful about manipulating these images, to the point where even identified children are going to be difficult to identify if they manipulate and change the image to the point where we cannot peel back the onion.

One of the other problems that we are having, even if we get that kind of evidence to law enforcement, is under the Fyre or Dahlberg standards that require the admission of expert testimony, there has been some concern by judges, and they have thrown several cases out already, that there is not sufficient scientific knowledge in the scientific community in terms of analyzing these images that would allow an expert to get up and testify that, beyond a reasonable doubt, these are actual children. So you find it very difficult, unless you can actually identify these children through these victim databases, to have the case go forward.

Senator HATCH. Thank you. Mr. Chairman, could I ask Professor Coughlin just one question? Professor, by creating an affirmative offense that allows anyone to escape prosecution by showing that the child pornography did not, in fact, involve real children, the PROTECT Act, we are attempting to strike a balance between the right of government to police child pornography and the right of the person to own pornography that the Supreme Court has deemed to be protected.

Now, it is settled law that Congress can define the elements of an offense, or the offense, in this case, and much like other affirmative defenses that exist in law, such as insanity and self-defense, it is my belief that this provision places the burden of proof on the party that is in the best position to gather the pertinent facts. In other words, I think that the person who creates or receives child pornography is in a better position to ascertain whether or not the child depicted is real and to keep only those items that do not involve actual children, than a prosecutor who discovers these items at the end of the day and has no idea where they originally came from.

Some might argue that this creates an unjustifiable restraint on the person's right to possess child pornography, but doesn't the government also have a right to bring successful prosecutions and don't these competing rights need to be balanced in some way?

Ms. COUGHLIN. Senator, my reading of the affirmative defense contained in the Senate bill suggests that it really does strike the right kind of a balance. I mean, clearly, we want to continue to protect the rights of criminal defendants to bring forward legitimate defenses, and I take it that the affirmative defense that you have currently proposed would do that in cases if no actual child was

used and the material possesses some kind of literary, artistic, or political value. It would be exempt and it would be protected consistent with the First Amendment as interpreted in the *Free Speech* case.

What you clearly do not want to do is to create a very broad loophole, and as the law currently stands, the loophole is there that allows defendants who are plainly in possession of illegal child pornography, graphic sexually explicit materials that are and should be illegal, to escape prosecution by claiming no one can prove the character of the materials. That seems to me to be a state of affairs that you can and should regulate, and, in fact, I think that the PROTECT Act does that and would do that in a way that both satisfies constitutional concerns, First Amendment concerns, Sixth Amendment concerns, and then also, as you say, puts the ultimate burden on the people who know how this material was produced. If there is any such information out there, you give them a last chance to come forward and show that they are innocent.

Senator HATCH. Thank you. This panel has been very interesting and a good panel. I hope we get it right this time so that we can protect our children.

I want to thank you, Mr. Chairman, once more for not only holding this hearing, but playing such a positive and affirmative role in helping us to get this done this year. I think we actually can, and I am hopeful in every way that we can and I am very appreciative of the administration for your earnest efforts in this regard, as well.

Of course, the Center for Missing Children is one of my most favorite organizations in the country. We really appreciate what you have done and are doing every day.

Mr. ARMAGH. Thank you, Senator.

Senator HATCH. I wish we could solve these problems once and for all, but what we have got to do is the best we can do and we need to get this through this year.

Thank you, Mr. Chairman. I appreciate it.

Chairman LEAHY. Thank you.

Senator Grassley?

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Mr. Chairman, I am going to use my time to make a statement. I do not have any questions. I think you two have covered it very well.

I want to start out by complimenting you as Senators and those of us that are cosponsoring this legislation because I think it is evidence that we see a responsibility and a very unique responsibility we have to pass legislation that will provide children with a safe and secure environment that is free from exploitation.

Along this line, I think we ought to give the Bush administration commendation for the high profile that they are giving to child exploitation and their efforts to protect our nation's greatest asset, because today, we are kicking off a White House Conference on Missing, Exploited, and Run Away Children. This conference, made up of experts and practitioners, will contribute much to both the Federal and State efforts to safeguard our children and they should

be praised for their work to shut down the international pedophile rings that stalk and destroy our children. They are making the job of keeping our children safe a very top priority.

I am glad to compliment Senators Hatch and Leahy for this bill and glad that I had an opportunity to join them in sponsorship because this is continuing a long history of this Committee's efforts to eliminate the scourge of child pornography. Unfortunately, child pornographers have continually found ways to sidestep our legislation.

In the Supreme Court case of *Osborne* v.*Ohio*, when that was first ruled, making or selling child pornography was not protected by the First Amendment, so Congress and many States then passed laws to prohibit these activities. As a result, child pornographers responded by going underground, forming clandestine networks to produce and trade in child pornography.

Consequently, Congress enacted legislation criminalizing the simple possession of child pornography so that law enforcement could reach into the seamy underworld of American society and catch child pornographers and pedophiles. The Supreme Court upheld this ban on the possession of child pornography because they recognize the fluid nature of the business, production, distribution all connected with it.

Additionally, commercial pornography distributors began selling videotapes of scantily-clad young people. These pornography merchants found what they believed was a loophole in the Federal child pornography laws, and for a time, the Clinton administration agreed, but many of my colleagues will remember the *Knox* case. Fortunately, Congress did intervene and the Clinton administration changed its position and the courts closed that loophole.

Computer imaging technology gave child pornographers yet another way to sidestep Federal law by creating synthetic child pornography, which is virtually indistinguishable from traditional child pornography. Pedophiles have used these technological developments to transform images into child pornography. This Committee held a hearing on the subject in the mid–1990s and issued a report supporting the bill. We heard experts in sexual pathologies testify that pedophiles crave sexually explicit depictions of children. In other words, child pornographers reinforce deviant sexual impulses and can precipitate deviant illegal sexual behavior. Surely, synthetic child pornography which the viewers believe to be real can stimulate the same anti-social responses that traditional child pornography might.

We also found that child pornography, whether real or computer-generated, is an intrinsic part of the molestation process. Pedophiles are using these morphed child pornography in commission of their crimes by enticing children into sexual activity and lowering natural inhibitions.

Because of these and other compelling reasons, we passed the Child Pornography Prevention Act of 1996. Unfortunately, the Supreme Court decided that was unconstitutional. I do not agree with the Court's determination, but their decisions are the law of the land, so we must move on.

So now we are presented with another opportunity to solve the problem of synthetic child pornography and protect our children

while being mindful of Supreme Court concerns. Today's hearing is a vital step in the passing of that legislation and comporting with the First Amendment.

I want to thank our witnesses who have been here to help us with this process because I think it is going to help improve prosecutors' ability to go after pedophiles. I think our witnesses have shed some light on the constitutionality of the proposed legislation, and obviously, like Senator Hatch, I am glad to hear from the National Center for Missing and Exploited Children.

I want to work with the two main sponsors of this bill to see if we can move this along yet this year. It is very important. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

I am told some Senators may have questions to be submitted for the record and they will be. As I have said, some of my earlier questions have asked for you to elaborate on them.

As we do in these hearings, when you look back over your notes or look back over your answers, if you think of something else you want to add to it, please feel free to do that. This is to help guide the whole Senate and we are always happy to have that.

With that, we will stand in recess.

[Whereupon, at 11:35 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

Answers to Written Questions from Senator Leahy
to Daniel P. Collins, Associate Deputy Attorney General,
As Follow-up to October 2, 2002 Senate Judiciary Committee Hearing:
"Stopping Child Pornography: Protecting Our Children and the Constitution"

Q1. The Department's legislative proposal rejects any effort to incorporate the constitutional "obscenity" standard. I have consulted with prosecutors who have actually prosecuted child porn cases. Anyone who has seen the images in question in real cases knows that they are simply abhorrent by any standard, and they clearly meet the obscenity standard. Is the Department prosecuting cases where the images involved are not, in the Department's view, "obscene?" Please identify such cases.

Answer: The Department's legislative proposal (H.R. 4623) does not "reject[] any effort to incorporate the constitutional 'obscenity' standard." As noted in my written testimony, H.R. 4623, as passed by the House of Representatives, contains two provisions that seek to strengthen the Department's ability to go after obscene depictions of children.

First, § 5 of H.R. 4623 would add a new § 1466B to title 18 that would prohibit "obscene" materials "of any kind, including a drawing, cartoon, sculpture, or painting," that "depict[] a pre-pubescent child engaging in sexually explicit conduct." This provision is similar in purpose and effect to S. 2520's proposed amendment to existing § 2256(8)(B).

Second, § 5 of H.R. 4623 would also add a new § 1466A, which would regulate a narrowly defined class of materials as proscribable obscenity *without* requiring, in every case, a case-by-case examination of all three of the elements of the *Miller v. California*, 413 U.S. 15 (1973), test for obscenity. Specifically, § 1466A would create a new obscenity offense that generally prohibits the production, distribution, or possession of visual depictions of *pre-pubescent* children engaging in hard-core sexually explicit conduct, whether real or virtual. This is similar to § 4 of S. 2520 which would require a case-by-case analysis of only *one* of the *Miller* factors (*i.e.*, whether the material "lacks serious literary, artistic, political, or scientific value") with respect to a somewhat more broadly defined class of materials that includes post-pubescent materials. Indeed, the theory of § 1466A is based on precisely the intuitive observation you make, namely that the narrow class of materials covered by that provision – *i.e.*, graphic depictions of pre-pubescents – "are simply abhorrent by any standard."

Neither H.R. 4623 nor S. 2520 seeks to limit prosecutors to going after only those materials that can be said to be "obscene" – and with good reason. Not all images produced using children under the age of 18 will qualify as "obscenity" under constitutional standards. *See Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1396 (2002) ("Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, *or perhaps even older adolescents*, would not.") (emphasis added). Indeed, the Department has, in fact, prosecuted child pornography cases in which the images may not be legally obscene within the meaning of *Miller*. In particular, we have prosecuted cases involving nude images of minors that

are suggestive, but that do not contain the sort of graphically explicit "hard-core" depictions more typically associated with obscenity; such materials are unprotected under *Ferber* regardless of whether they satisfy the *Miller* standard. It is imperative that prosecutors have multiple and alternative tools to enable them "to stamp out this vice at all levels." *Osborne v. Ohio*, 495 U.S. 103, 110 (1990).

Moreover, although the Department has strongly encouraged prosecutors to use the existing obscenity laws in cases where child pornographers might otherwise escape justice, the current code provisions on obscenity are plainly insufficient. In particular, unlike the child pornography statues, the existing obscenity statutes do not criminalize simple possession. Moreover, several AUSAs have reported that the sentences imposed on obscenity convictions involving images of children have been substantially lower than the counterparts for child pornography convictions, with the offenders often receiving a sentence of probation. While these AUSAs have argued that the Guidelines permit – and, indeed, require – that the sentence be fashioned using the child pornography guidelines, some courts have not agreed.

The Department of Justice believes that a response to *Free Speech Coalition* must include not only improvements to the obscenity laws, but also changes to the child pornography laws, in order to ensure that prosecutors have the tools necessary to investigate and prosecute these very serious crimes.

Q2. Does the Department believe that any of the provisions of S. 2520, the Hatch-Leahy bill, are unconstitutional?

Answer: As noted in my written testimony, the Department believes that certain changes should be made to S. 2520 in order better to ensure that it could survive constitutional challenge. We have been pleased to work with the Committee over the last several months to discuss the crafting of the various provisions of this important legislation.

1. *The affirmative defense*. As noted in my written testimony, in order to strengthen the constitutional case, the provision of S. 2520 that would penalize a defendant who fails to provide advance notice of an affirmative defense should be amended by inserting the word "such" after "asserting".

Moreover, although S. 2520 and H.R. 4623 both fix the deficiencies in the affirmative defense that were noted by the *Free Speech Coalition* Court, S. 2520 does not contain any of the three additional narrowing elements that H.R. 4623 would enact in order to reduce the arguable substantial overbreadth in the underlying prohibition of virtual materials: H.R. 4623 would narrow the definition of "sexually explicit conduct" insofar as it would apply to virtual materials; would specifically and narrowly define "indistinguishable"; and would only reach virtual materials that were computer-generated or that are stored in a computerized format. These additional limitations are meant to help ensure that the Government will best be able to defend the legislation as being sufficiently narrowly tailored. We do not mean to suggest that we believe

that S. 2520 would be found to be unconstitutional without these features. Our only point is that, because S. 2520's regulation of virtual materials lacks these features, we believe that, in its current form, it is more vulnerable to constitutional challenge than H.R. 4623. And because the additional narrowing that is contained in H.R. 4623 still allows us to reach (together with the other provisions in the bill) the full range of materials that we are concerned about, the safer course would be to adopt the House provision on this score in lieu of the corresponding Senate provisions.

Both Professor Schauer and Professor Coughlin stated in their written testimony that H.R. 4623 was more vulnerable to constitutional challenge on this score than S. 2520. Their analyses, however, make clear that they have misunderstood the relevant provisions of the two bills, and their conclusions on this issue are thus mistaken.

Both H.R. 4623 and S. 2520 would amend the affirmative defense contained in 18 U.S.C. § 2252A(c) so that it (1) applies to possession offenses and (2) provides a defense for materials that the defendant can show were produced without children. *See* H.R. 4623, § 3(c); S. 2520, § 2(3). This is the minimum required to distinguish the *holding* of *Free Speech Coalition*, which is that a prohibition of "virtual" child pornography that is written as broadly as § 2256(8)(B) and that does *not* permit such an affirmative defense is unconstitutional. 122 S. Ct. at 1405. But the ultimate constitutionality of any such "affirmative-defense" approach cannot properly be analyzed apart from the underlying prohibition to which the affirmative defense is attached. The *only* reason to provide an affirmative defense of this sort is if the underlying prohibition would, by itself, otherwise reach protected materials, and the constitutional analysis should therefore consider whether the affirmative defense is adequate *in light of the underlying prohibition*. It would make no sense to provide any such "affirmative defense" if the underlying prohibition itself required the prosecution to prove either that the material is "obscene" or that the material is *real* child pornography (*i.e.*, material produced with real children). If the prosecution were required to prove in its case-in-chief that the material is obscene or is real child pornography, then the material would not be constitutionally protected at all and there would be no need for an affirmative defense. As a practical matter, providing an affirmative defense with respect to whether children were used in the image only makes sense if the underlying prohibition would otherwise reach a substantial amount of protected speech.

Accordingly, in evaluating the constitutional issues here, it is important to assess the nature of the prohibitions to which those bills would apply such an affirmative defense. H.R. 4623 would apply the affirmative defense to only one type of material: a new, narrowly defined class of "virtual" materials as described in an amended § 2256(8)(B). *See* H.R. 4623, § (c) (amending § 2252A(c)). As currently written, S. 2520 would apply the affirmative defense to three types of materials: (1) real child pornography as defined in 18 U.S.C. § 2256(8)(A); (2) "morphed" materials defined in 18 U.S.C. § 2256(8)(C); and (3) a class of "virtually indistinguishable" materials defined in a new § 2256(8)(E) (when read together with an amended § 2256(9)(A)). *See* S. 2520, §§ 2(3), 4(2)(C), 4(3). The inclusion of the first of the these three categories would appear to be a drafting error: if the Government has already carried its burden

of proof under § 2256(8)(A) to show that the materials were produced using children, the affirmative defense will never come into play. The second of S. 2520's three categories is unnecessary, because the Supreme Court in *Free Speech Coalition* explicitly did *not* address the "morphing" provision of § 2256(8)(C). *See* 122 S. Ct. at 1397. **Therefore, the only material difference between the two provisions on this score is their differing coverage of "virtual" materials.** Both Professor Schauer and Professor Coughlin overlook this point, and it renders their analyses fatally flawed.

Although the underlying prohibition and the affirmative defense must be evaluated together, Professor Schauer's testimony fails to do so for either the House bill or the Senate bill. In analyzing the House bill, Professor Schauer criticizes the fact that the underlying prohibition would extend to some protected speech, but he fails to mention the affirmative defense that is attached to this provision of the House bill (or to acknowledge that the *only* situation in which one would consider providing an affirmative defense is when a substantial amount of otherwise protected speech might be reached). Instead, he asserts that, because the Supreme Court has held that only materials produced using children are subject to *Ferber*'s categorical exclusion of "child pornography" from all First Amendment protection, the prior statute "can be rehabilitated only by moving its category closer to the category of *Miller*-defined legal obscenity. . . ." This criticism is both wrong and unevenly applied. Although the criticism (if valid) would apply with full force to both H.R. 4623 and S. 2520 (neither of which pairs its affirmative defense with an obscenity-based proscription), Professor Schauer's testimony applies it only to the House bill. In any event, the criticism is unfounded. The Supreme Court in *Free Speech Coalition* specifically declined to address the question whether a more limited prohibition of a subcategory of visual depictions of underage sexual conduct could survive constitutional challenge when paired with an affirmative defense that allowed the defendant to show that no minors were used in the production of the images. 122 S. Ct. at 1405 ("We need not decide, however, whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms."). The Court's explicit reservation of this point was specifically noted by Justice Thomas in his concurring opinion: "The Court does leave open the possibility that a more complete affirmative defense could save a statute's constitutionality, implicitly accepting that some regulation of virtual child pornography might be constitutional." *Id.* at 1407 (citation omitted). The Court's opinion cannot and should not be read as having decided a question that the Court has explicitly stated it has *not* decided.

Professor Schauer's analysis of the Senate bill is equally flawed, but in exactly the opposite respect. Whereas he analyzed the House bill's prohibition without considering the applicable affirmative defense, he analyzes the Senate bill's affirmative defense without considering the prohibition to which it is attached. Professor Schauer asserts that, because S. 2520 cures the two defects in the prior affirmative defense that were identified by the Supreme Court, the provision is likely constitutional. Of course, *both* bills fully cure these two defects; the real question is whether they also adequately narrow the underlying prohibition to which the affirmative defense is attached. Professor Schauer's testimony fails to address the issue with

respect to the Senate bill. For the reasons set forth in my prior testimony, H.R. 4623's underlying prohibition is more clearly and more narrowly drawn than S. 2520, and it is therefore less constitutionally vulnerable.

Professor Coughlin's analysis of H.R. 4623 is likewise mistaken. In criticizing the House bill, Professor Coughlin essentially compares apples and oranges. She criticizes H.R. 4623's "affirmative defense" approach by unfavorably comparing the bill's underlying prohibition, not with the "virtual" pornography prohibition to which S. 2520 applies an affirmative defense, but with S. 2520's *obscenity* provisions (to which no affirmative defense applies). Although, as the Department has noted, H.R. 4623 makes no less than *five* changes to the prior statute's implementation of the affirmative-defense approach, Professor Coughlin mentions only one of them (the new definition of "indistinguishable"), asserts that it is not a difference, and concludes that "the House bill seems to embody a decision merely to reenact the [prior statute] all over again." This argument is wrong. The prior law used the term "appears to be," which the Court noted literally included "a Renaissance painting depicting a scene from classical mythology." 112 S. Ct. at 1397. Although the Government had argued that this phrase should be narrowly construed to include only "virtually indistinguishable" materials, the Court's holding invalidating the provision was based, not on any presumed inadequacy in this narrowing construction, but rather on two deficiencies *in the affirmative defense that was attached to this provision. Id.* at 1405. H.R. 4623 fixes those two defects in the affirmative defense, explicitly codifies a narrow construction of "indistinguishable," and makes two *additional* changes that significantly further narrow the sweep of the underlying prohibition (*i.e.*, narrowing the definition of "sexual explicit conduct" and limiting the prohibition to certain media (computer or computer-generated images)). To say that "the House bill seems designed to reenact the very definition of child pornography that the Supreme Court so recently struck down" is inaccurate.

Professor Coughlin is likewise mistaken in arguing that the House bill's affirmative defense is so broad it would allow peddlers of obscene materials "to escape prosecution on the ground that the materials were made without using an actual minor." As I have explained in my prior testimony, H.R. 4623 contains two *additional and separate* provisions proscribing categories of obscene depictions involving minors; neither of those provisions provides an affirmative defense based on the absence of children in their production. The only reason why S. 2520's affirmative defense has an explicit exception for "obscene" depictions, is because, unlike H.R. 4623, S. 2520 places the obscenity prohibition and the virtual child pornography prohibition *in the same section.* In my written testimony, I explained why the use of separate sections is preferable as a technical matter. But Professor Coughlin errs by mistaking a wholly technical drafting difference for a substantive distinction.

2. <u>*Pandering provisions*</u>. Section 2 of S. 2520 would treat as illegal "pandering" the act of "describing" any material as child pornography. To avoid constitutional difficulties, the word "describes" should be deleted.

Professor Schauer criticizes H.R. 4623's "pandering" provision on the ground that "the Supreme Court has never indicated that pandering can be an independent offense," and yet H.R. 4623 "treats pandering as an independent offense without the necessity of a showing that the material pandered is in fact legally obscene or is in fact child pornography made with the use of a real child." Professor Schauer concludes, in effect, that H.R. 4623 operates "as a prohibition on the advertising of an immoral or unhealthy but lawful product, [which is] plainly protected by the First Amendment under recent court rulings." In his oral remarks, Professor Schauer went even further, asserting that the Court in *Free Speech Coalition* "made it clear that pandering could not, in the normal circumstances, be considered an independent crime, but was only evidence of the crime of obscenity or child pornography." These criticisms appear to misapprehend H.R. 4623's pandering provision.

Contrary to Professor Schauer's assertion, H.R. 4623 does in fact define pandering in a manner that is tied to an unlawful product. The bill reaches all offers to provide materials that are intentionally advertised in a manner designed to cause recipients to believe that the material is child pornography. Such offers may constitutionally be proscribed, regardless of whether the materials are actually child pornography. If the materials are, in fact, child pornography, then the offer may unquestionably be proscribed (as Professor Schauer admits). On the other hand, if the materials were not child pornography, but had been advertised intentionally as if they were, then the offeror is, in effect, engaged in a species of false advertising, one that preys upon the basest of motives. There is little doubt that such false advertising purporting to offer an illegal product is not constitutionally protected. Thus, because the First Amendment allows the prohibition of both truthful advertising of an illegal product and false advertising of any product, it cannot be unconstitutional to prohibit all advertising that offers an illegal product, regardless of whether the purveyor can actually make good on the promise. This is no different than prohibiting all offers to sell unlawful drugs, without providing an exception for those who might claim they intended to pass off sugar instead of real drugs.

Moreover, nothing in *Free Speech Coalition* supports Professor Schauer's assertion that "pandering could not, in the normal circumstances, be considered an independent crime, but was only evidence of the crime of obscenity or child pornography." The problem with the pandering provision at issue in *Free Speech Coalition* was that the *materials* were criminalized for all purposes based on how they were pandered; the decision had no occasion to address whether the act of pandering itself could be reached. *See* 122 S. Ct. at 1406.

3. <u>*Criminalization of simple possession*</u>. The obscenity provisions of both bills would extend their prohibitions to simple possession of the obscene materials at issue. We strongly endorse this feature of both H.R. 4623 and S. 2520. In our prior statements the Department has explained why we believe that these provisions would be constitutional, notwithstanding the Supreme Court's 1969 decision in *Stanley v. Georgia*, 394 U.S. 557, which held that a State could not constitutionally criminalize the simple possession of obscenity in the privacy of a person's residence. Likewise, neither Professor Schauer nor Professor Coughlin expressed any reservation on this score.

Because of the potential for challenges to these provisions, we recommend, as a technical matter that, as in the House bill, the simple possession provisions be contained in wholly separate subsections. *See* H.R. 4623, § 5 (proposed § 1466A(b), § 1466B(b)). This would provide added assurance (in addition to the general severability provision in both bills) that any issue as to the validity of these provisions would not affect the remainder of the obscenity provisions of the bill.

Q3. Press releases posted on the FBI and DOJ web sites since the Free Speech case was decided indicate that the Department has been able to continue to prosecute child porn cases, including cases involving computer images. For instance, "Operation Candyman," a nationwide internet child porn investigation, continues to produce arrests, indictments and guilty pleas. There have been recent prosecutions in Chicago, Nashville and Maryland, where the FBI's Innocent images Task Force is still up and running. Have there been any cases since the Free Speech decision where a defendant was acquitted by a jury or a judge dismissed a case based upon a "virtual porn" defense?

Answer: As the Attorney General reiterated in May 2002, "[t]he Department of Justice remains rock solid in its commitment to identify, investigate, and prosecute those who sexually exploit children, regardless of the difficulty involved in the prosecuting effort." Federal prosecutors and agents who regularly prosecute and investigate child pornography and child exploitation cases are some of the most tenacious and committed prosecutors and agents one can find. Prosecutions continue, in large part, due to the extraordinary commitment of agents and prosecutors who pursue these cases. That being said, the number of investigations and prosecutions being brought has been significantly impacted as the resources required to be dedicated to each child pornography case now are significantly higher than ever before. The delays in prosecutions, both pre- and post-indictment have likewise increased significantly as a result of the *Free Speech Coalition* decision. The sentences meted out are now oftentimes lower as a result of the decision.

Prosecution issues

The resources required to prosecute a child pornography case today are significantly more than what was required prior to the decision. Faced with overwhelming evidence, prior to the *Free Speech Coalition* decision, many defendants chose to plead guilty and benefit from sentencing adjustments for acceptance of responsibility. Since the decision, more defendants are opting to challenge prosecutions based upon the "virtual porn" defense. Indeed, certain judges take the position that the government must have concrete proof that a real child is involved even where there has been no specific claim by the defense of computer generation. It is clear that many judges will not permit the prosecution to prove that the image is real simply by relying on the image alone, without more. *See, e.g.*, *United States v. Sims*, ___ F. Supp. 2d ___, 2002 WL 31013004 (D.N.M. 2002) (after the decision in *Free Speech Coalition*, court entertained motion to reconsider previously denied motion for judgment of acquittal; judgment of acquittal was granted with respect to one set of images as to which the government had no evidence other than the images themselves).

Moreover, one judge has recently held that, in light of the *Free Speech Coalition* decision, the government must also prove, beyond a reasonable doubt, that the defendant actually *knew* that the image depicts real children and was not created through virtual imaging. *See United States v. Reilly*, 01 Cr. 1114 (RPP), 2002 WL 31307170 (S.D.N.Y. Oct. 15, 2002).

Faced with a "virtual porn" challenge, prosecutors have several potential avenues (short of relying on the image itself alone) for proving that a child depicted in a child pornography image is real. First, prosecutors might know the identity of a particular child depicted in an image from another child sex abuse investigation. Second, prosecutors might be able to establish that a given image predates the technology at issue. Finally, prosecutors might be able to present expert testimony that a given image likely depicts a real child. However, none of these avenues is without limitations – sometimes significant limitations – and the work and time involved is quite substantial.

Establishing the Identity of a Child in a Child Pornography Image

Some child abuse investigations, here and abroad, have led to the discovery that the offender photographed the abuse and posted the photographs on the Internet. In the aftermath of *Free Speech Coalition*, law enforcement can scour the photographs seized from child pornographers to determine if one of those images (by definition of a known child) is in their collection. This approach has met with some success. However, even when investigators make a "match," the process involved in doing so is labor and time-intensive. In addition, the Federal Rules of Evidence, barring hearsay, leave prosecutors with a very small number of witnesses who are competent to establish that the child is real. Some of these problems, encountered on a regular basis by prosecutors in the aftermath of *Free Speech Coalition*, are presented in more detail below.

Federal agents and forensic examiners are spending an inordinate amount of time on each case attempting to discern whether a known victim might be among the hundreds, thousands, tens of thousands, or even hundreds of thousands of images recovered from a single offender. Given that there is no central database of known victims, this process of identification is slow, burdensome, and only sometimes successful.

Even where agents are successful at identifying one or more known victims from an offender's collection, proving that fact without hearsay is very challenging. The few known victims have been identified through other sex abuse investigations – many of which occurred outside the United States. The non-hearsay, fact witnesses who are competent to testify that the child is real are usually limited to the law enforcement officers, the child victim, and the child victim's family. As the Committee likely will appreciate, asking for the child victim's testimony, or that of her family, must be avoided at all costs because to do so would perpetuate the child's victimization. That leaves the law enforcement officers who investigated the cases. Those investigators, many of whom are outside the subpoena power of the United States, have lamented that they have been positively *deluged* with requests for their testimony from desperate U.S.

prosecutors.

Many of these necessary law enforcement witnesses travel from U.S. city to U.S. city, offering their testimony. Yet, they have advised us that they are unable to satisfy all the requests they receive for their testimony. On occasion, their extraordinary efforts are wasted, arriving at a U.S. courthouse on a designated date to find that the trial has been continued at the last minute. Thus, even when these necessary fact witnesses are available and willing to testify, the resources expended in the effort are quite significant.

For example, one AUSA whose prosecution was successful said this about the law enforcement witness he secured to testify about the child's identity: the witness "is traveling almost continuously around the country to testify in various child porn cases, and is extremely unhappy with being forced to do so." Another AUSA related that the government secured the appearance of five fact witnesses to establish the identity of the child victims depicted in the pornography at trial. After the witnesses arrived, some from abroad, the trial was continued at the eleventh hour.

Even defendants who are willing to plead guilty, often condition such a plea on proof by the government that the image depicts a real minor. Thus, even when the government knows that a child in an image was identified through a separate sexual abuse investigation, the defendants – unwilling to rely on hearsay – require the government to produce the law enforcement witness who can personally identify the victim, before offering their plea. For example, in one case, an AUSA had to produce two witnesses – from Germany and the UK – before the defendant would plead guilty. Even in the cases where defendants are willing to plead guilty without imposing this burden on the government and the few fact witnesses, some judges have expressed a reluctance to accept a plea in the absence of evidence that either the images depict real minors, or evidence that the defendant *knew* the images depicted real minors and, in at least one disturbing example, requiring proof of both.

Establishing that the Images Predate the Technology at Issue

In the absence of known victims, or in lieu of such evidence, prosecutors might prove that an image depicts a real child if they can establish that the image was in circulation prior to the time the technology for computer generation came into being. This mechanism of proof is only sometimes successful and also requires a significant commitment of time and resources. First, prosecutors will typically need to secure expert testimony regarding the date this technology was available. Experts do not always agree on a date nor on the meaning of "available." Putting that issue aside, there is currently no easily searchable database of such images. The United States Customs Service has the most extensive collection of print magazines of child pornography (obtained through seizures). Yet, many of the magazines are undated and prosecutors are left trying to find a fact witness who can establish that a particular magazine (and therefore the images displayed therein) predate a certain time period. Identifying such witnesses is difficult and not always a successful proposition. Moreover, the few people who might be competent

witnesses will eventually, with the passage of time, become unavailable completely.

Establishing a Real Child Through Expert Testimony

A third mechanism for establishing that a real child is depicted in an image of child pornography relies on the use of one or more experts. Unfortunately, this is not a simple or easy process. This avenue of proof is time-consuming for law enforcement and the experts, as well as costly. The experts on the state of technology and its availability are very few and have busy and lucrative careers. While many of these experts have gladly testified in a few trials, they do not have the time or ability to participate in more than a couple of such cases a year.

Forensic experts – those who examine a photograph and, based upon characteristics that are present or absent, opine on the likelihood of computer alteration – can span several disciplines. The disciplines involved could include computer graphics, including computer animation; graphic art; and photography. Additionally, it is not uncommon for an offender to have many hundreds or thousands of images. The cost involved in hiring experts to review and opine on large numbers of images can become prohibitive.

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The vastly increased resources required to prosecute child pornography cases in the aftermath of *Free Speech Coalition* do not end with a conviction. Sentencing hearings have turned into drawn out battles – some of them as involved as trials. While the government's burden of proof at sentencing is lower than at trial and the government should be able to meet its burden by relying on the photograph alone, that assumes that the defendant does not present expert testimony suggesting computer alteration. The difficulty for prosecutors lies in the fact that child pornography images are typically circulated through the Internet. The fact that the photographs are scanned, zipped, unzipped, cropped, and otherwise "altered," necessarily produces the opportunity for defense expert testimony suggesting some type of computer "alteration." Given such a challenge, the government cannot always safely rely on the photograph alone to meet its burden, even at sentencing, that the image depicts a real child.

Sentencing enhancements that easily applied before – for distribution, depictions involving sadistic or masochistic abuse, and others – are now challenged, with defendants arguing that the government must establish that a real child was depicted in the image upon which the sentencing enhancement is based. Upward departures for high volumes of child pornography are likewise hotly contested, with the defendants arguing that any upward departure for the number of images must take into account only those images where the child is identified or otherwise proved to be real. In the District of Connecticut, where a Yale Professor who had video-taped his abuse of an inner city boy he was "mentoring" received an upward departure for having possessed over 150,000 images of child pornography, the prosecutor has expended significant resources responding to a challenge to the application of the upward departure because the government allegedly did not prove that a real minor was depicted in each and every

one of the over 150,000 images. While we are quite hopeful that we will ultimately succeed in safeguarding the sentence, the time expended in doing so has been substantial and likely at the expense of other child pornography investigations and potential prosecutions.

This "resource drain" comes at a particularly bad time – a time when the nation's law enforcement resources are stretched thin in light of terrorist threats to our national security. Moreover, the U.S. Customs Service has relayed to us that, as a result of *Free Speech Coalition*, "[r]esources are being diverted from investigative activities to analysis of images." The FBI and other law enforcement agencies have echoed those remarks.

Prosecutorial resources are similarly strained. For example, one AUSA recounted the "inordinate amount of time and effort" devoted to a single case where the offender was a self-admitted pedophile who had entered a guilty plea and was awaiting sentencing at the time the *Free Speech Coalition* case was decided by the Supreme Court. Since then, he was allowed to withdraw his plea, and the government has reviewed thousands of images to identify a small number of images. The prosecutor and agents spent considerable time tracking down necessary "identity" witnesses in Brazil, the UK, Texas and Oklahoma.

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One AUSA who has prosecuted child exploitation cases for many years and with great dedication, summarized the situation as follows:

> After talking to AUSAs in several other districts, I believe that if all the federal prosecutors had sufficient time to respond, the unanimous opinion would be that the decision in *Free Speech* has had a significant adverse impact on federal prosecutions. It has made it more difficult to charge violations and consequently disheartened many dedicated agents and prosecutors. I believe that we are just beginning to see the true impact of the opinion. This is so because the lag time between the seizure of computer systems and the analysis of evidence by the prosecutors after completion of forensics examinations has meant that systems

seized before the *Free Speech* opinion are still awaiting analysis in many cases. Pre 9/11, a five or six month delay while awaiting forensics was common. Now, forensics completed in five months are "expedited." In addition, as time passes, more prosecutors and agents are beginning to appreciate the implications of the opinion.

It is beyond dispute that the current situation is simply intolerable. Enforcement of the child pornography laws is becoming substantially more difficult, which threatens to reinvigorate this pernicious traffic and to harm more and more children. Further delay and inaction is unacceptable. The Senate should act promptly to pass this important and bipartisan legislation.

Q4. There is a section of the Hatch-Leahy bill that would allow increased information sharing based on data gathered by tip line of the Center of Missing and Exploited Children. The goal of this section is to help ensure that tips from private citizens get to law enforcement. I want to make sure that we do not accidentally create a loophole for agents to circumvent privacy protection by "tickling" the tip line *themselves*, then sitting back and getting the information from an internet service provider based on their own report. What is your opinion of language clarifying 42 U.S.C. 13032 so that only true "tips" from "non-governmental sources" could start the information flow to investigators?

Answer: The provision of S. 2520 to which you refer (§ 7) is essentially identical to a provision of the Administration's bill, H.R. 4623 (§ 9(b)). This provision would clarify existing law so as to ensure that when ISPs find suspected child pornography on their systems, they may make a sufficient report of that activity, as originally envisioned by 42 U.S.C. § 13032.

The Department does not believe that there is any realistic concern over "tickling" the tip line. Section 13032 merely provides for an ISP to make a report on the Cyber Tip Line when *the ISP* becomes aware of child pornography. Neither § 13032, nor the amendments in H.R. 4623 or S. 2520, provides that an ISP must automatically file a report based solely on someone else's tip to the Tip Line.

Q5. The Hatch-Leahy bill contains a new affirmative defense. What is your opinion as to its constitutionality? Does it respond to the Supreme Court's concerns?

Answer: See the response to Q2, *supra*.

Q6. Under the Federal Sentencing Guidelines, there is currently a lower penalty for sexual predators who travel across state lines to have sex with a minor ("traveler cases") than for individuals convicted on child pornography charges. The bill that Senator Hatch and I introduced encourages the Sentencing Commission to correct this disturbing disparity and to get these predators off the street. Does the Department of Justice support correcting this disparity?

Answer: The Department of Justice fully supports Sec. 11 of S. 2520 which directs the Sentencing Commission to review and, as appropriate, amend the Guidelines to ensure that Guideline sentences for "travelers" adequately reflect the seriousness of the offense.

Q7. Do you support extending the term of authorized supervised release in federal cases involving the exploitation of minors to allow federal judges the option of ensuring that such individuals do not victimize children in the future? Is there evidence that certain categories of child sex offenders are more like[ly] to be repeat offenders if not properly supervised than in other criminal cases?

Answer: The Department of Justice fully supports vesting judges with the authority to impose any term of supervised release, up to a lifetime of supervised release, based upon the facts of each individual case. *See* Letter of Assistant Attorney General Daniel J. Bryant to Honorable Richard B. Cheney, President, United States Senate (October 4, 2002), transmitting the proposed Child Abduction and Sexual Abuse Prevention Act of 2002 (authorization of extended supervision periods in § 101(a)); Statement of Daniel P. Collins, Associate Deputy Attorney General, before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security concerning H.R. 5422 – The Child Abduction Prevention Act, at 3-7 (October 1, 2002); *see also* H.R. 5422, § 101, 107th Cong., 2d Sess. (2002) (authorization of extended supervision periods in House-passed legislation); S. 2917 § 9, 107th Cong., 2d Sess. (2002) (same in Senate bill).

Where the predicate for the underlying conviction is actual or attempted sexual abuse of a child, the very nature of the crime and the demonstrated predatory characteristics of the offender justify a significant period of supervised release. The rationale for extending the period of supervised release in "traveler" cases is also fairly obvious. The offender intended to, and took substantial steps (travel) to, consummate a sexual relationship with a child. The rationale for extending the coverage of the statute to offenses involving the production of child pornography is equally compelling. In those cases the offender is directly involved in the sexual abuse of a child.

The rationale for extending the proposed legislation to the possession, receipt, and distribution of child pornography (or obscenity statutes designed or used to cover the same conduct) is similarly compelling. There is a strong and clear correlation between those classes of offenders and the actual sexual abuse of children.

First, according to data collected by the United States Postal Inspection Service in child pornography investigations they have conducted over the past several years, approximately 40 percent of the child pornography offenders in their cases had actually sexually abused children.

Second, major operations, such as Operation Candyman, suggest a correlation between those that collect child pornography and the actual sexual abuse of children. Thus far, as a result of the Operation, a handful of offenders have admitted to molesting 50 children.

Third, in November 2000, Dr. Andres E. Hernandez, PsyD., Director of the Sex Offender Treatment Program, Federal Bureau of Prisons, FCI Butner, presented the results of his study of child pornography offenders entitled, *Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders*. This study, among other things, explored the correlation between child pornography offenses and actual child molestation. Dr. Hernandez' data indicate that the majority of the persons in his study who were convicted of child pornography offenses actually molested significant numbers of children without detection by the criminal justice system. The study also indicated that "these offenders target children in Cyberspace in a similar manner as offenders who prey on children in their neighborhood or nearby park. They seek vulnerable children, gradually groom them, and eventually contact them to perpetrate sexual abuse."

Based on data collected during the course of treatment, Dr. Hernandez concluded that 76 percent of the inmates convicted of child pornography or traveler offenses that participated in his study admitted to having actually committed contact sex crimes for which they went undetected by the criminal justice system. These offenders had an average of 30.5 child sex victims each. In fact, this group of offenders admitted to having molested a combined total of 1,433 victims without ever having been detected. That is not 1,433 more offenses – it is 1,433 more victims. If you factor in the number of times they offended against each individual victim, the number would be significantly higher. In addition, while Dr. Hernandez' study lumped child pornographers and travelers in the same category, his data show that the number of undetected sex crimes was significantly higher for child pornographers than it was for travelers. In short, child pornographers, who consisted of 49 of the 62 subjects, were responsible for the vast majority of the 1,433 victims reported for that group.

We are not suggesting that every person who collects child pornography also sexually abuses children. However, there are a significant number of offenders who cross that line. Judges should be permitted to evaluate the individual risk of offenders before them and to devise a scheme of supervised release appropriate to the situation and risk.

Q8. Does the Department of Justice now support allowing the Center for Missing and Exploited Children to make reports from its tip line directly to state and local police? Why is it that the FBI has not been more adept at sharing such information with state and local law enforcement in the past?

Section 13032(f)(1)(D) of Title 42, United States Code, specifically requires a court order before the government may refer certain leads that amount to violations of state law to the appropriate States. According to the written testimony submitted by Ernie Allen of the National Center for Missing and Exploited Children (NCMEC), they have processed over 60,000 leads involving child pornography since the inception of the Tip Line in March of 1998. The number of tips and leads is staggering. They receive hundreds of tips per week. As NCMEC noted, the FBI, Customs Service, and Postal Inspection Service have "real time" access to the leads and follow up on leads, and the FBI and Customs have co-located agents at NCMEC for that purpose. The Secret Service has assigned several analysts to NCMEC who assist in the review and

prioritization of the tips.

This crisis of child pornography is one that affects all law enforcement, federal and state. Indeed it is often the case that state and local law enforcement is better suited to investigate the lead or might even have sole jurisdiction over any reported offense. The current statutory structure unjustifiably prohibits the sharing of tip information with state and local law enforcement without obtaining a court order. In our opinion, that restriction is counter-productive to our ultimate goal of joining with our colleagues at every level to fight this problem. The Department strongly endorses a change to 42 U.S.C. § 13032 to allow for sharing of tips with state and local law enforcement, without a court order, when the tips suggest a violation of state or local law. Indeed, such a provision was proposed in the Administration's bill, H.R. 4623 (§ 9(a)(3), (5)).

Answers to Written Questions from Senator Kennedy to Daniel P. Collins, Associate Deputy Attorney General, As Follow-up to October 2, 2002 Senate Judiciary Committee Hearing: "Stopping Child Pornography: Protecting Our Children and the Constitution"

A. Frequency and Efficacy of the Computer-Generated Images Defense: Your testimony correctly pointed out the threat that defendants facing prosecution under the present bills might argue that the computer images for which they are being prosecuted were not created with actual children. Indeed, Justice Thomas, in his concurring opinion in *Ashcroft v. Free Speech Coalition*, mentioned that "technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children." 122 S. Ct. 1389, 1406 (2002) (Thomas, J., concurring). However, Justice Thomas seemed to be under the impression that the government had pointed to "no case in which a defendant has been acquitted based on a 'computer-generated images' defense." *Id.* With respect to this troubling issue I have a number of questions.

Question #1: How often has the so-called "computer-generated images" defense been raised in child pornography cases?

We do not have specific statistics as to how many times the defense has been raised. The defense of computer-generation of the images of child pornography has been raised, albeit unsuccessfully, as early as 1987, in *United States v. Nolan*, 818 F.2d 1015, 1017 (1st Cir. 1987). Although the challenge was unsuccessful, *Nolan* was rendered at a time when computer imaging technology was relatively new and not widely available. In *United States v. Vig*, 167 F.3d 443, 450-51 (8th Cir. 1999) – a more recent case that involved 18 U.S.C. § 2252(a), a statute different from the one at issue in *Free Speech Coalition* – the computer-generation challenge was raised, but the court found that the jury was competent to view the images and draw its own conclusions on the issue of computer-generation without the need for the government to present expert testimony on the issue. This case likewise preceded the *Free Speech Coalition* decision, and defendants will likely seek to argue that its precedential value has been vitiated, both by the issuance of the Supreme Court's decision and by the continuing advancement of the relevant technology. Moreover, in at least one pre-*Free Speech Coalition* case in which the defendant did not affirmatively claim that the materials were virtual, the issue was nonetheless specifically explored at trial. *See United States v. Fox*, 248 F.3d 394, 403 (5th Cir. 2001) ("During the trial in the instant case, for example, Special Agent Barkhausen, the government's computer expert, was forced to concede under cross-examination that "there's no way of actually knowing that the individual depicted [in the images] ... even exists[.]") The Supreme Court subsequently vacated the Fifth Circuit's decision in *Fox* and remanded the case for reconsideration in light of *Free Speech Coalition*. *See* 122 S. Ct. 1602 (2002).

Since the original *Free Speech Coalition* decision in the Ninth Circuit, prosecutors in that Circuit have not brought cases where they are unable to prove that the children depicted in the images are real, and that is now the case throughout the country since the Supreme Court's

decision affirming the Ninth Circuit. Defendants have made it abundantly clear that they intend on holding the government to its burden, articulated by the Supreme Court in *Free Speech Coalition*. *See, e.g.*, *United States v. Sims*, 220 F. Supp. 2d 1222 (D.N.M. 2002) (after the decision in *Free Speech Coalition*, court entertained motion to reconsider previously denied motion for judgment of acquittal; judgment of acquittal was granted with respect to one set of images); *United States v. Bunnell*, 2002 WL 927765 (D. Me. 2002) (after *Free Speech Coalition*, motion to withdraw guilty plea granted); *see also United States v. Reilly*, 01 Cr. 1114 (RPP), 2002 WL 31307170 (S.D.N.Y. Oct. 15, 2002) (after *Free Speech Coalition*, motion to withdraw guilty plea granted; court held that the government must prove beyond a reasonable doubt that *the defendant knew* that the images depicted real children). We have heard of many instances where district courts scheduled hearings on pending cases in the aftermath of the Supreme Court's decision, and required prosecutors, prior to trial, to lay out their proof that the images in the indicted cases depict real children.

Question #2: How often has this defense been successful? Please list these cases.

We are aware of at least one case thus far in which, following the Supreme Court's decision in *Free Speech Coalition*, a court entered a partial judgment of acquittal based on its conclusion that the government had failed to present sufficient evidence to establish that the persons depicted in the relevant images were real children. *See United States v. Sims*, 220 F. Supp. 2d 1222 (D.N.M. 2002). But the real effect of the Supreme Court's decision cannot be measured solely in terms of acquittals. In compliance with the Supreme Court's decision, and in the absence of the legislation now before the Congress, the government cannot present cases where it cannot meet its affirmative burden of proving that the child depicted in a given image is real. The difficulties inherent in shouldering this burden, and the potential risk it creates to effective future enforcement, warrant prompt legislative action. The number of investigations and prosecutions being brought has been significantly affected as the resources required to be dedicated to each child pornography case now are significantly higher than ever before. The delays in prosecutions, both pre- and post-indictment have likewise increased significantly as a result of the *Free Speech Coalition* decision. The sentences meted out are now oftentimes lower as a result of the decision.

Prosecution issues

The resources required to prosecute a child pornography case today are significantly more than what was required prior to the decision. Faced with overwhelming evidence, prior to the *Free Speech Coalition* decision, many defendants chose to plead guilty and benefit from sentencing adjustments for acceptance of responsibility. Since the decision, more defendants are opting to challenge prosecutions based upon the "virtual porn" defense. Indeed, certain judges take the position that the government must have concrete proof that a real child is involved even where there has been no specific claim by the defense of computer generation. It is likely that a number of judges will not permit the prosecution to prove that the image is real simply by relying on the image alone, without more. *See, e.g.*, *Sims*, *supra* (after the decision in *Free Speech*

Coalition, court entertained motion to reconsider previously denied motion for judgment of acquittal; judgment of acquittal was granted with respect to one set of images as to which the government had no evidence other than the images themselves).

Moreover, one judge has recently held that, in light of the *Free Speech Coalition* decision, the government must also prove, beyond a reasonable doubt, that the defendant actually *knew* that the image depicts real children and was not created through virtual imaging. *See United States v. Reilly*, 01 Cr. 1114 (RPP), 2002 WL 31307170 (S.D.N.Y. Oct. 15, 2002).

Faced with a "virtual porn" challenge, prosecutors have several potential avenues (short of relying on the image itself alone) for proving that a child depicted in a child pornography image is real. First, prosecutors might know the identity of a particular child depicted in an image from another child sex abuse investigation. Second, prosecutors might be able to establish that a given image predates the technology at issue. Finally, prosecutors might be able to present expert testimony that a given image likely depicts a real child. However, none of these avenues is without limitations – sometimes significant limitations – and the work and time involved is quite substantial.

Establishing the Identity of a Child in a Child Pornography Image

Some child abuse investigations, here and abroad, have led to the discovery that the offender photographed the abuse and posted the photographs on the Internet. In the aftermath of *Free Speech Coalition*, law enforcement can scour the photographs seized from child pornographers to determine if one of those images (by definition of a known child) is in their collection. This approach has met with some success. However, even when investigators make a "match," the process involved in doing so is labor- and time-intensive. In addition, the Federal Rules of Evidence, barring hearsay, leave prosecutors with a very small number of witnesses who are competent to establish that the child is real. Some of these problems, encountered on a regular basis by prosecutors in the aftermath of *Free Speech Coalition*, are presented in more detail below.

Federal agents and forensic examiners are spending an inordinate amount of time on each case attempting to discern whether a known victim might be among the hundreds, thousands, tens of thousands, or even hundreds of thousands of images recovered from a single offender. Given that there is no central database of known victims, this process of identification is slow, burdensome, and only sometimes successful.

Even where agents are successful at identifying one or more known victims from an offender's collection, proving that fact without hearsay is very challenging. The few known victims have been identified through other sex abuse investigations – many of which occurred outside the United States. The non-hearsay, fact witnesses who are competent to testify that the child is real are usually limited to the law enforcement officers, the child victim, and the child victim's family. As the Committee likely will appreciate, asking for the child victim's testimony,

or that of her family, must be avoided at all costs because to do so would perpetuate the child's victimization. That leaves the law enforcement officers who investigated the cases. Those investigators, many of whom are outside the subpoena power of the United States, have lamented that they have been positively *deluged* with requests for their testimony from desperate U.S. prosecutors.

Many of these necessary law enforcement witnesses travel from U.S. city to U.S. city, offering their testimony.. Yet, they have advised us that they are unable to satisfy all the requests they receive for their testimony. On occasion, their extraordinary efforts are wasted, arriving at a U.S. courthouse on a designated date to find that the trial has been continued at the last minute. Thus, even when these necessary fact witnesses are available and willing to testify, the resources expended in the effort are quite significant.

For example, one AUSA whose prosecution was successful said this about the law enforcement witness he secured to testify about the child's identity: the witness "is traveling almost continuously around the country to testify in various child porn cases, and is extremely unhappy with being forced to do so." Another AUSA related that the government secured the appearance of five fact witnesses to establish the identity of the child victims depicted in the pornography at trial. After the witnesses arrived, some from abroad, the trial was continued at the eleventh hour.

Even defendants who are willing to plead guilty, often condition such a plea on proof by the government that the image depicts a real minor. Thus, even when the government knows that a child in an image was identified through a separate sexual abuse investigation, the defendants – unwilling to rely on hearsay – require the government to produce the law enforcement witness who can personally identify the victim, before offering their plea. For example, in one case, an AUSA had to produce two witnesses – from Germany and the UK – before the defendant would plead guilty. Even in the cases where defendants are willing to plead guilty without imposing this burden on the government and the few fact witnesses, some judges have expressed a reluctance to accept a plea in the absence of evidence that either the images depict real minors, or evidence that the defendant *knew* the images depicted real minors and, in at least one disturbing example, requiring proof of both.

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The current situation is intolerable. Enforcement of the child pornography laws is becoming substantially more difficult, which threatens to reinvigorate this pernicious traffic and to harm more and more children.

Question #3: Is it always necessary in responding to these defenses that the government call the child victims to the witness stand in order to testify as to the creation of the pornographic materials at issue?

Prosecutors largely avoid calling child victims to address the "virtual porn" defense for the simple reason that to do so would re-victimize and traumatize the child. The different methods potentially available to prove that a child is real are discussed in response to question #2, above. As noted in that response, when the child depicted in the image is known, prosecutors focus on law enforcement witnesses who investigated the underlying abuse, met the victim, and saw the photographs, to testify that the child is real. However, those witnesses are few in number, are in much greater demand relative to their availability, and are often outside the subpoena power of the United States. Moreover, with the passage of time, those few non-hearsay witnesses who are competent to testify will ultimately become completely unavailable.

Question #4: Has there been any study of the harm that this continued need to testify about past sexual abuse imposes on children?

The recognition of the trauma to young victims of testifying resulted in the child victim/witness protections set forth in 18 U.S.C. § 3509. Even those protections did not envision a child victim being called to testify repeatedly, in hundreds or more cases, about the abuse, as would be required if child victims were used to prove child pornography cases.

Only a very limited number of the children depicted in child pornography images circulating on the Internet have been identified by law enforcement. The Department is working with law enforcement agencies and other organizations to devise a coordinated approach to the identification and rescue of the thousands of children whose brutal sexual abuse is vividly depicted in these images. The images depicting the small number of children who have been identified appear with some regularity in the "collections" of pedophiles. But any effort by the government to meet its burden in such cases by calling the child victim as a witness would

obviously inflict serious trauma to that child. That is not a viable alternative, and it is another reason why legislative action is so important.

Question #5: Can something be done, without running afoul of the Confrontation Clause, to alleviate the testimonial burden on these children?

As noted above, 18 U.S.C. § 3509 affords certain protections to child victims and witnesses to alleviate the burden on the children when testifying, but it does not eliminate the need for them to testify. That is why – in addition to the fact that it is conceivably available only with respect to the small number of images involving an identified child – the option of relying upon child-victim testimony is not a realistic solution to the current situation.

B. The Computer-Generated Images Defense as an Affirmative Defense: The computer-generated images defense is related to the question whether the bills we are considering may make that defense an affirmative defense that must be proved by the defendant, or whether it is a part of the crime that must be proved beyond a reasonable doubt by the government. As you know, Justice Kennedy stated in his majority opinion that

> **The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful . . . If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor.**

***Free Speech,* 122 S. Ct. at 1404. The Supreme Court has in the past suggested that the burden of showing that a given prosecution is unconstitutional may sometimes be placed on the defendant. *See Speiser v. Randall*, 357 U.S. 513 (1958). The Court expressed serious concern about this procedural device:**

> **There is always in litigation a margin of error representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.**

***Id.* at 525-26. However, the Court went on to say that in certain circumstances the burden of proof on certain issues may be placed on the criminal defendant, "but only after the State has 'proved enough to make it just for the defendant to be**

required to repel what has been proved with excuse or explanation, or at least that upon balancing of convenience or of opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.'" *Id.* at 524, (quoting Morrison v. People of the State of California, 291 U.S. 82, 88-89 (1934)).

Question #6: In light of this language, may the government shift the burden onto the defendant to show that the images were not created using actual children. If not, how would *Speiser* apply to the burden-shifting currently in the bill?

The Department believes that the Constitution permits the government to shift to the defendant the burden of showing that life-like, hard-core depictions of children engaged in sexually explicit conduct are not exactly what they appear to be.

The Constitution generally permits the government to shift the burden of proving facts that amount to an affirmative defense so long as the government retains the burden of proving each of the statutory elements of a charged offense. *See Speiser*, 357 U.S. at 524; *Patterson v. New York*, 432 U.S. 197, 205-07, 210-11 (1977). Federal courts have upheld statutes requiring the defendant to prove the following defenses, among others: insanity when sanity is not an element of the crime, *e.g.*, *Leland v. Oregon*, 343 U.S. 790, 799 (1952); self defense, *e.g.*, *Martin v. Ohio*, 480 U.S. 228, 235-36 (1987); duress, *e.g.*, *United States v. Bailey*, 444 U.S. 394, 410-11 (1980); irresistible impulse, *e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684, 702 n.28 (1975); voluntary intoxication, *e.g.*, *Flores v. Minnesota*, 906 F.2d 1300, 1303 (8th Cir. 1990). *See generally*, *Thirtieth Annual Review of Criminal Procedure: III. Trial: Proof Issues*, 89 Geo. L.J. 1644, 1649-50 & n.1967 (May 2001). "Due process is not violated simply because proof of an affirmative defense, on which the defendant bears the burden of proof, may tend to negate an element of the crime." *Martin v. Ohio*, 480 U.S. at 234.

The key to withstanding constitutional muster ordinarily is whether the affirmative defense shifts the burden of proof to the defendant on an element of the offense. Thus, the constitutionality of allocating the burden of proof to the defendant through an affirmative defense depends on the manner in which the legislature defines the elements of the crime. *Patterson*, 432 U.S. at 210. It is well-recognized that the legislature has very broad discretion to define the elements of a criminal offense and may do so in a manner that facilitates proof of an element. *See*, *e.g.*, *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986) ("in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive"). The legislative proposals under consideration generally prohibit life-like, hard-core images of children involved in sexual activity, regardless of whether they are "real" or "virtual." Accordingly, by allowing defendants to avoid criminal liability by showing that the materials were produced without the use of children, the proposals do not impose a burden on the defendant, through the affirmative defense, to negate a statutorily defined element of the offense; rather, they endow defendants with a true defense.

Beyond this, a statute setting forth the respective definitions of a crime and an affirmative defense does not violate "the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Patterson*, 432 U.S. at 201-02 (quoting *Speiser*, 357 U.S. at 523); *see also Montana v. Egelhoff*, 518 U.S. 37, 43, 50-51 & n.4 (1996) (plurality); *id.* at 58-59 (Ginsburg, J., concurring in the judgment). In this context, that inquiry devolves into the basic question whether the "affirmative defense" approach of these legislative proposals violates the First Amendment. For the reasons we have previously explained at length, the Department believes that the very narrowly drawn prohibition contained in H.R. 4623, coupled with the broader affirmative defense contained in that bill, is narrowly tailored to further the Government's unquestionably compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective. In particular, the narrowly drawn nature of the underlying prohibition – which extends only to life-like, extremely graphic images in particular media (computer or computer-generated images) – makes it entirely appropriate to criminalize the possession of such materials, subject only to allowing the defendant, if he is able, to prove that no children were used in the production of the material.

Viewed another way, the government may impose reasonable limitations on a particular, narrowly defined manner of expression that is virtually indistinguishable from unprotected speech, not because of the resemblance without more, but because *the lifelike resemblance itself* causes distinct and discernible harms to law enforcement efforts to identify and prosecute the unprotected speech, and because the bill's careful focus on this particular manner of "indistinguishable" expression would leave open ample alternative means of communication of any protected ideas, impressions, or illustrations.

Question #7: Relatedly, what evidence is there that the criminal defendant will be in a better position to produce facts concerning whether a particular piece of pornography was created using real children? How does this calculation change if the defendant is a possessor, rather than the producer of the pornography?

Certainly if the defendant is a producer, he will be in the best position to establish that an image does not depict a real child, when in fact the image appears to a layperson to depict a child. While a possessor, downstream from the producer, will not in all cases have that information available to him, that does *not* mean that the provision is not narrowly tailored to further the Government's compelling interest in ensuring that the laws against child pornography remain effective. The sort of narrowly drawn provision contained in H.R. 4623 is designed to reach the limited set of computerized and digitized materials that are life-like, hard core visual depictions of child sexual abuse. The only two kinds of materials that fit this definition are real depictions and, in effect, "counterfeit" depictions that are of such a quality as to pass for the real thing. Because the possibility of such counterfeits is precisely what threatens to render the child pornography laws ineffective and unenforceable, it is not unconstitutional to proscribe such images, subject only to allowing an affirmative defense in those cases in which the defendant happens to be in a position to show that a particular image does not in fact implicate the

Government's compelling interest (because it can be shown not to involve real children). Moreover, the modest burden on possessors would not be fundamentally unfair: anyone trafficking in lifelike images of child sexual abuse should not be surprised to learn that they are engaged in activity that, at best, is at the very edge of the law, and, at worst, promotes horrific abuse. Those who choose to run the risks of trafficking in such lifelike materials may properly be required to take care to ensure their full compliance with applicable law.

Question #8: If an affirmative defense is retained in the final version of this legislation, what standard of proof will the defendant have to meet, preponderance of the evidence or beyond a reasonable doubt?

The defendant's burden relative to the affirmative defense is a preponderance of the evidence.

C. The Causal Link Between Child Pornography and Child Molestation:

Question #9: In your testimony you cited "[r]ecent evidence establishing a significant causal link between possession of child pornography and molestation (or other crimes." This is indeed one of the most troubling aspects of the horrific crime of child pornography and I am very interested in this new evidence. Please provide a complete list and summary of this evidence.

There is a strong and clear correlation between child pornographers and the actual sexual abuse of children.

First, according to data collected by the United States Postal Inspection Service in child pornography investigations they have conducted over the past several years, approximately 40 percent of the child pornography offenders in their cases had actually sexually abused children.

Second, major operations, such as Operation Candyman, suggest a correlation between those that collect child pornography and the actual sexual abuse of children. Thus far, as a result of the Operation, a handful of offenders have admitted to molesting 50 children. Supervisory Special Agent Michael Heimbach of the Federal Bureau of Investigation, in his written testimony in support of H.R. 4623, discussed the insight into the issue that has come from investigating untold numbers of child pornography cases and interviewing offenders:

> The Committee has asked whether child pornography seduces child pornographers to molest children. It definitely has that effect on some of the collectors. Those who trade in child pornography participate in organized (like "Candyman") or informal (like in chat rooms, F-serves, news groups, bulletin boards, Web sites, etc.) networks of like-minded individuals. These networks act as an extensive support group for child pornography offenders. The simple fact that these individuals can easily find, identify with,

correspond with, and trade child pornography with each other, gives them comfort in the fact that they are not alone. These types of activities tend to validate this offending behavior. When child pornography offenders are able to trade with each other, they no longer feel isolated and alone. They feel they are part of a vast network of like-minded people who believe it is acceptable to engage in sexual fantasies about children, thus lowering their inhibitions about acting on their fantasies and increasing their risk of molesting children.

The best indicator of future behavior is a pattern of past behavior. The next best indicator of future behavior is what an individual wants to do. Some individuals may be sexually aroused by viewing images depicting nude children but are repulsed by seeing images depicting an adult interacting with a child sexually. Others might enjoy viewing images depicting nude children but are more excited by viewing depictions of children "playing" sexually with other children. Others still are aroused by viewing any image depicting children engaged in sexually explicit conduct, but are most aroused when viewing images depicting children engaged in sexual acts with adults.

An individual's child pornography collection is the best indicator of what he is fantasizing about. In turn, an individual's fantasies are the best indicator of what he wishes to do. Therefore, those who collect images depicting adults engaging in sexually explicit conduct with children run the highest risk of molesting children.

I am aware of no real evidence that child pornography alone induces a sexual attraction to children where the offender lacks a sexual predisposition for children. However, when used by individuals who have a predisposed sexual interest in children, child pornography can sexually arouse them, fuel their sexual fantasies about children, validate their sexual attraction to children, and help them rationalize this behavior. All of these behaviors increase the risk that these individuals will act out their fantasies by sexually molesting children.

Our practical experience confirms these findings. The FBI's Behavioral Analysis Unit has conducted interview upon interview of child sex offenders. The information obtained from the offenders themselves leaves no doubt that child pornography fuels some child pornographers to live out their fantasies on real children.

Third, in November, 2000, Dr. Andres E. Hernandez, PsyD., Director of the Sex Offender Treatment Program, Federal Bureau of Prisons, FCI Butner, presented the results of his study of child pornography offenders entitled, *Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders* (attached).[1] This study, among other things, explored the correlation between child pornography offenses and actual child molestation. Dr. Hernandez' data indicate that the majority of the persons in his study convicted of child pornography offenses actually molested significant numbers of children without detection by the criminal justice system. The study also indicated that "[t]hese offenders target children in cyberspace in a similar manner as offenders who prey on children in their neighborhood or nearby park. They seek vulnerable children, gradually groom them, and eventually contact them to perpetrate sexual abuse."

Based on data collected during the course of treatment, Dr. Hernandez concluded that 76 percent of the inmates convicted of child pornography or traveler offenses that participated in his study admitted to having actually committed contact sex crimes. These offenders had an average of 30.5 child sex victims each. In fact, this group of offenders admitted to having molested a combined total of 1,434 victims – 1,379 of them without ever having been detected by the criminal justice system. That is not 1,379 more offenses – it is 1,379 more victims. If you factor in the number of times they offended against each individual victim, the number would be significantly higher. In addition, while Dr. Hernandez' study lumped child pornographers and travelers in the same category, his data show that the number of sex crimes was significantly higher for child pornographers than it was for travelers. In short, child pornographers, who consisted of 49 of the 62 subjects, were responsible for the vast majority of the 1,434 victims reported for that group.[2]

We are not suggesting that every person who collects child pornography also sexually abuses children. However, there are a significant number of offenders who cross that line.

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[1] We note that there is a potential minor arithmetical error in Table 1 of Dr. Hernandez's report: 1434/62 = 23.13, not 23.65.

[2] Prior statements submitted to the Congress in connection with this legislation mistakenly described the total number of *undetected* victims as "1,433". The details of the study (which are attached) make clear, however, that the correct number of undetected victims in the study was 1,379, with 55 additional victims having previously been detected by the criminal justice system (for a total of 1,434 victims).

Questions for Daniel Armagh

1. The Department of Justice's legislative proposal makes no effort to incorporate the constitutional "obscenity" standard in its legislative proposal. I have consulted with prosecutors who have actually prosecuted child porn cases. Anyone who has seen the images in question in real cases knows that they are simply abhorrent by any standard, and they clearly meet the obscenity standard. What is your view on whether an obscenity approach would cover the cases that are actually prosecuted?

2. Based on your experience, are the images at issue in actual criminal cases "obscene" under anyone's Constitutional standards or are they close to the line?

3. Under the Federal Sentencing Guidelines, there is currently a lower penalty for sexual predators who travel across state lines to have sex with a minor ("traveler cases") than for individuals convicted on child pornography charges. The bill that Senator Hatch and I introduced encourages the Sentencing Commission to correct this disturbing disparity and to get these predators off the street. Does the Center for Missing and Exploited Children support this effort?

4. There is a section of the Hatch-Leahy bill that would allow increased information sharing based on data gathered by tip line of the Center of Missing and Exploited Children. The goal of this section is to help ensure that tips from private citizens get to law enforcement. I want to make sure that we do not accidentally create a loophole for agents to circumvent privacy protection by "tickling" the tip line *themselves*, then sitting back and getting the information from an internet service provider based on their own report. What is your opinion of language clarifying that only true "tips" from "non-government" sources could start the information flow to investigators? Is the Center for Missing and Exploited Children supportive of such a clarification?

5. Do you believe that the victim shield provision would be sound policy if it were limited to "non physical" evidence to address the concerns that you expressed at the hearing and if there were a judicial safety valve to allow prosecutors to seek exceptions in cases where they had good cause?

6. Do you support extending the term of authorized supervised release in federal cases involving the exploitation of minors to allow federal judges the option of ensuring that such individuals do not victimize children in the future? Is there evidence that certain categories of child sex offenders are more like to be repeat offenders if not propoerly supervised than in other criminal cases?

October 17, 2002

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C.
20510-6275

Dear Senator Leahy:

Thank you for the opportunity to express the views of the National Center for Missing and Exploited Children on these critically important issues for our nation's children. Your stewardship of the Committee's tireless efforts to craft a statute that will withstand constitutional scrutiny is wise and in the long-term best interest of the nation. The National Center for Missing and Exploited Children is grateful for your leadership on this issue.

Please find below my response to your written questions submitted on October 9, 2002 regarding the "Stopping Child Pornography: Protecting our Children and the Constitution."

1. Our view is that the vast majority (99-100%) of all child pornography would be found to be obscene by most judges and juries, even under the standard of beyond a reasonable doubt in criminal cases. Even within the reasonable person under community standards model, it is highly unlikely that any community would not find child pornography obscene.

   There is a legitimate concern that the obscenity standard does not fully recognize, and therefore punish the exceptional harm to children inherent in child pornography. This issue can be addressed by the enactment of tougher sentencing provisions if the obscenity standard is implemented in the law regarding child pornography. Moreover, mere possession of obscene materials under current law in most jurisdictions is not a criminal violation. If the obscenity standard were implemented for child pornography the legislative intent should be clear concerning punishment for possession of child obscene pornography.

In the post - Free Speech decision legal climate the prosecution of child pornography cases under an obscenity approach is a reasonable strategy and sound policy.

2. Based on my experience all the images in actual criminal cases meet the lawful definition of obscenity, irrespective of what community you litigate the case. In my experience there has never been a visual depiction of child pornography that did not meet the constitutional requirements for obscenity.

3. The National Center for Missing and Exploited Children fully supports the correction of this sentencing disparity and welcomes the provision of additional tools for federal judges to remove these predators from our communities. These types of offenders belong to a demographic that is the highest percentile in terms of recidivism than any other single offender category.

4. The National Center for Missing and Exploited Children fully supports language that allows only "non-government sources" to provide tips to the CyberTipline. The role of the CyberTipline at the National Center for Missing and Exploited Children is to provide tips received from the public and Electronic Communication Services communities and make them available to appropriate law enforcement agencies. Due in part to the overwhelming success of the system and in part to the tragedies of September 11, 2001, federal law enforcement resources cannot address all of the legitimate tips and leads received by the CyberTipline. Allowing the National Center for Missing and Exploited Children and appropriate federal agencies to forward this valuable information to state and local law enforcement while at the same time addressing legitimate privacy concerns is fully supported.

5. The victim shield provision is an excellent and timely policy initiative and one that is fully supported by the National Center for Missing and Exploited Children. This provision should allow the narrow exception to a general non-disclosure clause that anticipates the need for law enforcement and prosecutors to use the victim's photography and other relevant information for the sole purpose of verification and authentication of an actual child victim in future cases. This exception would allow the successful prosecution of other cases that may involve a particular victim and still provide the protection against the re-victimization by the criminal justice system.

6. The National Center for Missing and Exploited Children fully supports extending the terms of authorized supervised release in federal cases involving the exploitation of minors. The evidence for extended supervision in such cases is overwhelming. Without adequate treatment and continued supervision, there is a significantly higher risk for re-offending by this type of offender. Moreover, there is a significant link between those offenders who possess child pornography and those who sexually assault children. Please see the attached studies that the National Center for Missing and Exploited Children has produced on these issues.

Thank you again for the opportunity to address these important issues. Should you need further input or assistance please contact us at your convenience.

Sincerely,

Daniel Armagh
Director, Legal Resource Division
National Center for Missing and Exploited Children

SUBMISSIONS FOR THE RECORD

TESTIMONY OF

ERNEST E. ALLEN
President & Chief Executive Officer

and

DANIEL S. ARMAGH
Director
The Legal Resource Division

NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN

On

Stopping Child Pornography: Protecting Our Children and the Constitution

For the

U.S. Senate
Committee on the Judiciary

October 2, 2002

Mr. Chairman and distinguished members of the Committee, I am pleased to appear before your Committee today and express my views and those of the National Center for Missing & Exploited Children (NCMEC) regarding Stopping Child Pornography: Protecting Our Children and the Constitution. Our views are very basic and straightforward:

1. We believe that the Court's decision in *Ashcroft v. Free Speech* will result in the proliferation of child pornography in America, unlike anything we have seen in more than twenty years;

2. We believe that due to advances in imaging technology, actual child pornography and virtual child pornography have become virtually indistinguishable; and

3. We believe that as a result of the Court's decision, thousands of children will be sexually victimized, most of whom will not report the offense.

4. We believe that there is a direct and strong nexus between those individuals who collect and disseminate child pornography and those who sexually exploit children.

5. We believe that the protection of our children from the scourge of child pornography and preserving the freedoms afforded us under the Constitution are not incompatible objectives.

6. There are several steps we believe should be considered Mr. Chairman in reaching those two objectives of protecting our children and respecting the First Amendment rights of Americans.

I want to elaborate on those points, but before I do, let me first provide the Committee with some general background on NCMEC and why we are so concerned about this issue. NCMEC is a not-for-profit corporation congressionally mandated under the Missing Children's Assistance Act of 1984. NCMEC works in partnership with the U.S. Department of Justice as the official national resource center and clearinghouse on the issue of missing and exploited children. NCMEC is a true public-private partnership, funded in part by Congress and in part by the private sector. NCMEC's federal funding supports specific operational functions mandated by Congress, including a national 24-hour toll-free hotline; a photo distribution system to generate leads regarding missing children; a system of case management and technical assistance to law enforcement and

families in the search for and recovery of missing children; training programs for federal, state and local law enforcement; and much more.

While we are perhaps best known for our work in the field of missing children, NCMEC is also a leader in the battle against child sexual exploitation and has become the epicenter of the war against child pornography. How did we become such a central figure in the child pornography battle?

- The Child Porn Tipline was launched in June 1987 as a service for the U.S. Customs Service and subsequently for the U.S. Postal Inspection Service. In partnership with the U.S. Customs Service and U.S. P.I.S., NCMEC has received and processed more than 10,900 such leads.

- In 1994, months before the nation or the news media viewed online victimization as a problem, NCMEC first printed the brochure, "Child Safety on the Information Highway," a publication discussing online child safety. Subsequently, a number of children were lured away to meet adults they'd met online, and suddenly online victimization became front-page news. Because we were the only child advocacy group with solid tips on how to prevent online victimization, the news media and families turned to NCMEC for help.

- On January 31, 1997, in response to the increasing prevalence of child sexual victimization, NCMEC officially opened its Exploited Child Unit (ECU). The ECU is responsible for receipt, processing, initial analysis and referral to law enforcement of information regarding the sexual exploitation of a child.

- In 1997 the Director of the FBI and I testified before the Senate Appropriations Subcommittee on Commerce, Justice, State and the Judiciary. The committee asked how serious was the problem of Internet-based child sexual exploitation. Director Freeh and I agreed that it was a serious and growing problem that we were just beginning to recognize and address, and that much more needed to be done at the federal, state and local levels. As a result of that hearing, Congress directed NCMEC to establish an Internet-based, reporting mechanism for child pornography, online enticement of children, child molestation, child prostitution and child sex tourism. Congress also directed the Justice Department to establish multi-jurisdictional Internet Crimes Against Children Task Forces across the country.

- On March 9, 1998 NCMEC launched its new CyberTipline, www.cybertipline.com, the "911 for the Internet," to serve as the national online clearinghouse for investigative leads and tips regarding child sexual exploitation. NCMEC's CyberTipline is linked via server with the FBI, Customs Service and Postal Inspection Service. Leads are received and reviewed by NCMEC's analysts, who visit the reported sites, examine and evaluate the content, use search tools to try to identify perpetrators, and provide all lead information to the appropriate law enforcement agency and

investigator. The FBI, Customs Service and Postal Inspection Service have "real time" access to the leads. Both the FBI and Customs Service have assigned agents who work directly out of NCMEC, and review reports. The U.S. Secret Service has assigned three analysts who assist in the review and prioritization process. The results: to date, NCMEC has received and processed over 85,000 leads, 60,000 of which were reports of child pornography, resulting in hundreds of arrests and successful prosecutions.

- In December 1999, Congress passed the *Protection of Children from Sexual Predators Act*, mandating that Internet Service Providers and others report child pornography on their sites to law enforcement, with the ISPs subject to substantial fines for failure to report. Again, Congress asked NCMEC if it could handle the reports through its CyberTipline. NCMEC agreed. While the reporting mechanism is being formalized, NCMEC has entered into agreements with 85 major ISPs, including industry leaders America Online and the Microsoft Network, who are already reporting child pornography on their sites voluntarily.

Today, NCMEC is receiving hundreds of reports and tips regarding child pornography from across America and around the world each week, and it is pursuing those leads aggressively with the appropriate law enforcement agencies. Between March 1998 and April 2002, NCMEC received 93 child sex tourism leads, 789 child prostitution leads, and 2,358 non-family child sexual molestation leads.

We are proud of the progress. Following the Supreme Court's 1982 Ferber v. New York decision holding that child pornography was not protected speech, child pornography disappeared from the shelves of adult bookstores, the Customs Service launched an aggressive effort to intercept it as it entered the country, and the U.S. Postal Inspection Service cracked down on its distribution through the mails. However, child pornography did not disappear, it went underground. That lasted until the advent of the Internet, when those for whom child pornography was a way of life suddenly had a vehicle for networking, trading and communicating with like-minded individuals with virtual anonymity and little concern about apprehension. They could trade images with like-minded individuals, and in some cases even abuse children "live," while others watched via the Internet.

However, in recent years law enforcement began to catch up, and enforcement action came to the Internet. The FBI created its Innocent Images Task Force. The Customs Service expanded its activities through its CyberSmuggling Center. The Postal Inspection Service continued and enhanced its strong attack on child pornography. The Congress funded thirty Internet Crimes Against Children Task Forces at the state and local levels across the country. Child pornography prosecutions have increased an average of 10% per year in every year since 1995. We were making enormous progress.

That is why we are so concerned about the impact of the Court's decision. We fear that this decision permits those who prey upon children to legally produce, possess and distribute sexually explicit images that are virtually indistinguishable from images of actual children. Increasingly, graphics software packages and computer animation are being used to manipulate or "morph" images and to create "virtual" images indistinguishable from photographic depictions of actual human beings. Not only will this enable continued victimization of actual children and fuel the growth of the child pornography market, but it severely impairs the ability of law enforcement and prosecutors to protect children by enforcing existing laws prohibiting such crimes.

NCMEC has been the national leader in the use of imaging technology for good. Our forensic artists are "aging" photos of long-term missing children, and performing facial reconstructions from morgue photos and skeletal remains of unidentified deceased children. These techniques keep long-term cases alive, generate new leads for police, and provide hope for searching parents. It is a powerful use of technology. However, the same technology can be used for evil as well.

It is already happening. Just last week, NCMEC received a child pornography report in which the image depicted a graphic sexual act between an adult male and what appeared to be an eight or nine year old girl. One of NCMEC's CyberTipline analysts recognized the child from a photo on a nudist site. The original photo of the child did not depict any sexual activity. In the new image, the pornographer had taken the child's image, cut it off at her waist, attached her body from the waist up to another photograph, and created a new image depicting the child being violated by an adult male.

That image still qualifies as child pornography under current law since the child is identifiable and will be harmed by the distribution of her image. Thus, the pornographer's next step is simply to make the child another child so that she is no longer identifiable. Alas, that now appears to be protected speech.

Recently, in California, an individual was arrested and convicted on molestation and child pornography charges. This individual took images of high-profile U.S. gymnasts (all under the age of 18) and, using computer technology, removed their leotards. He then added in genitalia and lewd poses. These images were then used to lower the inhibitions of a twelve-year-old girl whom he later molested. Technically, this is a "morphed" child pornography case. However, it does prove the point that the existence of child pornography images are often used to exploit more children than just those seen in the image itself.

One last example I'd like to offer is from a 1995 U.S. Postal Inspection Service investigation. The defendant in this case would first convince young girls to "model" for him by showing them pictures of young girls wearing only underwear. Then, progressively, he showed the children child pornography videotapes to lure them into a sexual relationship. The videotapes were produced in the 1980's & early 1990's (prior to the known morphing technology). The defendant was convicted and is now dead.

How can a police officer or prosecutor anywhere in America ascertain the true identity of the child? For the past two years, NCMEC has worked with state and local police to identify as many of these children as possible, and we continue to build that capacity. Since the child victims are local residents somewhere, and since these images are rapidly disseminated all over the world, working closely with local law enforcement is key to our on-going process of identifying victims, enabling more prosecutions. However, it is very difficult, and clear that most children in child pornography are not identifiable. Based on the court's new standard, thousands of cases will not go forward.

Child pornography is different, not like other kinds of speech. A decade ago, FBI Special Agent Ken Lanning, now retired, author of NCMEC's major publications in this field, outlined for Congress why pedophiles collect and distribute child pornography:

1. To justify their obsession for children
2. To stimulate their sexual drive
3. To lower a child's inhibitions
4. To preserve a child's youth
5. To blackmail
6. As a medium of exchange
7. For profit

As Agent Lanning noted, molesters use child pornography to stimulate their own desires and fuel their fantasies for children as sexual partners. Viewing these images whets the appetite of the molester and serves as a precursor to his own sexual acts with children. The more frequently a molester views child pornography, the more he, like his child victims, becomes desensitized to the abnormality of his conduct. He can convince himself that his behavior is normal, and eventually he will need more and increasingly explicit child pornography to satisfy his cravings. When mere visual stimulation no longer satisfies him, he will often progress to sexually molesting live children.

Child pornography is not just an aberrant form of free expression, it is a criminal tool, used to seduce and manipulate child victims, break down a child's inhibitions, and make sex between adults and children appear "normal." Just as we charge drug dealers with the possession of drug paraphernalia and would-be burglars with the possession of "burglary tools," so must we have the ability to limit the use of child pornography, a clear, unambiguous "molestation tool" for pedophiles and child molesters.

There is compelling evidence that visual depictions of sexually explicit conduct involving children cause real physical, emotional and psychological damage not only to depicted children but also to non-depicted children. It is just as insidious, whether it is a photographic record of a child's actual victimization, or a photographic depiction used as a tool or device to subsequently victimize other children.

What will be the primary impacts of the Court's decision?

1. While the creation of purely "virtual" child pornography will increase dramatically, it now becomes more likely that predators will sexually victimize children and photograph the act. However, before distribution, they will use imaging techniques to morph and manipulate images to create a new identity for the child, thereby avoiding prosecution. We are already seeing perpetrators modify existing images to make them look more like "virtual" images.

2. Since determining the identity of children in child pornography is very difficult, oftentimes impossible, the requirement that a specific child be identified will result in thousands of prosecutions under child pornography law not happening.

3. Since advances in technology have made virtual child porn indistinguishable from actual child porn, in most cases it will be impossible for law enforcement and prosecutors to establish with certainty, which is which.

4. Thousands of kids are going to be harmed as a result.

There are several action items we recommend the Committee consider in addressing the issue of protecting children while at the same time preserving our Constitution.

- Create a record in hearings such as this one on the linkage between child pornography and the sexual molestation of children. One of the critical analysis by the Court in *Ashcroft v. Free Speech* that the majority relied on was the lack of a record demonstrating the linkage between child pornography and the sexual molestation of children.

Simply stated, child pornography is the visual depiction – whether in photographs or on film – of children being sexually assaulted. The activity of photographing and filming a child in sexual postures or acts is itself an act of molestation and sexual abuse. A more precise definition from a legal perspective would include the lascivious exhibition of the pubic area or genitalia of a child.

Uses of Child Pornography

A. Sexual Arousal and Gratification of Pedophile

Child pornography is a criminal instrument used by molesters and pedophiles to arouse their desires for children as sexual partners. While there are some collectors of child pornography who merely fantasize about the material without acting on those fantasies, viewing images of child pornography frequently serves as a precursor to the molester's own sexual acts with children. When mere visual stimulation is no longer enough, sexual molestation of actual children commences.

B. Lowering Child's Inhibitions

Child pornography then becomes a means by which the molester seduces and manipulates the child victim, breaks down the child's inhibitions by making sex between adults and children appear "normal," and gradually desensitizes the child to the reluctance or fear they logically feel upon viewing graphic depictions of sexual conduct. Molesters may even try to persuade the child victim that such conduct is enjoyable; it is for this reason that the children in the moving pictures or still images often appear to be enjoying themselves. A child can more easily believe that the activity is acceptable once he or she sees that other children involved are laughing and smiling.

II. Research Findings

While much of what we know about the correlation between child pornography and child sexual molestation comes to us by way of law enforcement experience and field work, and not through scientific analyses, research has established a link between pornography and molestation. In fact, a 1988 study found not only that 67% of child molesters admitted to using hard-core sexual materials, but more importantly that 53% of child molesters reported intentionally viewing hard-core sexual materials in preparation for molestation. Further, U.S. Postal Service statistics reveal that at least 80% of purchasers of child pornography are active abusers, and a 1984 study by the Chicago Police Department confirmed that in almost 100% of their annual child pornography arrests, detectives found photos, films, and videos of the arrested individual engaging in sex with other children. More recent studies and reports have shown a steady and direct correlation between child pornography and child sexual molestation.

A. Internet Crimes against Children Task Forces

Internet Crimes against Children (ICAC) Task Forces are innovative law enforcement units, designed specifically to operate on the frontlines of the war against child pornography and sexual exploitation of children. Consequently, the ICAC Task Forces are in the best possible position to document the correlation between child pornography and child sexual abuse. Data compiled by the ICAC Task Forces conclusively establishes that individuals involved with child pornography are likely to molest children. For example, the Pennsylvania-based ICAC Task Force has reported that 51% of offenders arrested for pornography-related offenses were definitively determined to be actively molesting a child or children or to have molested in the past. Other Task Forces reported similar results. The ICAC Task Force based in Dallas reported that 32% of offenders arrested over a 12-month period for child pornography offenses were determined to be molesting at the time of arrest or to have molested in the past.

B. Federal Bureau of Prisons

The subjects used to generate results for a 2000 study issued by the Federal Bureau of Prisons were classified according to their instant offenses and placed into one of three categories: child pornographer/traveler, contact sex offender, and other. Child pornographer crimes involved the production, distribution, receipt, and possession of child pornography; traveler crimes involved luring a child and traveling across state lines to sexually abuse a child; contact sex offender crimes involved the sexual molestation,

abuse or assault of a child or adult; and other crimes involved federal non-sexual offenses such as bank robbery, mail fraud, or drug trafficking.

Subjects in the child pornographer/traveler category revealed extensive histories involving contact sex crimes, including sexual abuse of minors. Of the 62 subjects in this group, 55 contact sex crimes were documented on their Presentence Investigation Reports, formal court documents prepared by the U.S. Probation Office. After voluntarily participating in the Sex Offender Treatment Program at the Federal Correctional Institution in Butner, North Carolina, the 62 offenders admitted to an additional 1,379 contact sex crimes that were neither formerly detected nor reported.

In sum, the results of the investigation by the Federal Bureau of Prisons revealed that 76% of offenders convicted of child pornographer/traveler crimes had, indeed, committed contact sexual crimes, including sexual abuse of children. In fact, child pornographer/traveler offenders committed contact sex crimes at a higher rate than sex offenders already convicted of contact sex crimes.

While it is necessary to distinguish mere possession of child pornography from the distinct issue of causation of sexual abuse, research and experience show that there is a significant likelihood that a person in possession of child pornography will also be involved in sexually abusing children. When they are not molesting children, child predators use child pornography to satisfy their sexual desires for children, thereby perpetuating their predatory lifestyle.

- Any hearing in support of legislation involving the issues that were presented in *Ashcroft v. Free Speech* must draw a bright line between the issue of child pornography, whether actual, morphed, manipulated or virtual and child erotica.

We believe one of the significant disappointments in the argument in the *Ashcroft v. Free Speech* before the Supreme Court was the failure of the government and the Court to realize the distinction between child pornography and child erotica. We are of the opinion that any analysis involving the constitutionality of a statute necessarily involves a close look at the legislative history of the statute to determine the intent of Congress in its enactment. There was significant testimony on the intent of Congress regarding the purpose and scope of the Child Pornography Prevention Act of 1996 that was barely examined by the Court.

The Court's inquiry about films such as *American Beauty, Traffic, and Romeo and Juliet* should have been met with the legislative history of the statute that clearly did not anticipate banning such films, which contained not scenes involving child pornography but rather scenes of child erotica or adults engaging in scenes that by definition are not child pornography. The failure to distinguish between these categories of speech allowed the Court to voice concerns in the majority opinion about things that the statute, based on the legislative history, never intended to criminalize.

- Provide Notice Authority by NCMEC to Electronic Communications Service Providers and Remote Computer Service Providers that apparent child pornography is on their systems.

NCMEC is the 911 of the Internet for receiving complaints from the public that child pornography is on a particular online system. We process those tips as described above and refer them to law enforcement when warranted. Often 3 months later exasperated parents will call back and ask why is this material still online after they have reported it. If NCMEC could send a notice to Internet Service Providers that there appears to be illegal contraband on their servers or on a system they are hosting and that such publication is a violation of federal law, this would serve notice to the ISP community that a record of notification exists and they should proceed accordingly.

- Enact legislation amending 42 U.S.C. 13032 or new legislation authorizing NCMEC to disseminate contents of reports received by the CyberTipline to state, local and Internet Crimes Against Children Task Forces (ICAC).

Mr. Chairman, this is a long standing problem resulting from a statute that effectively precludes state, local, Attorneys General and ICAC Task Forces that are federally funded from receiving leads and tips from NCMEC's CyberTipline. Presently, the only agencies designated under the statute by the Attorney General are the Federal Bureau of Investigation and the Customs Service. There are a significant number of credible leads involving child pornography and the sexual exploitation of children that are not being investigated that could be disseminated to competent state and local law enforcements agencies with proven track records in these cases that would result in hundreds of predators of children being arrested and convicted. This is not a criticism of the federal agencies. The events of September 11, 2001 have challenged resource allocation for crimes against children.

- Authorize NCMEC to maintain a victim identification program to assist law enforcement and prosecutors in the identification of victims of sexual exploitation

There are a number of evolving strategies that law enforcement and prosecutors are implementing in reaction to the *Ashcroft* decision. Prosecutors are facing Motions to dismiss around the country based on this decision. Sadly, some prosecutors are dismissing their cases because they cannot prove the images depicted in the pornography are actual children. There are several strategies evolving for prosecutors in meeting this most recent defense.

1. Arguing that the technology is not sophisticated enough to create virtual children that are virtually indistinguishable from actual children. Therefore the argument is that if the images look like actual children, they are real children. The challenge with this tactic in leaving it to a jury is whether or not the appellate courts will hold that such determinations, absent expert testimony, is an issue a lay juror can pass on.

2. Arguing that the state statute is nothing like the federal statute sections that were held unconstitutional, and therefore the elements of the crime of child pornography under state law do not require proof beyond a reasonable doubt that the images depicted are actual children. Unfortunately, irrespective of the statutory construction, many appellate courts may require under the rationale of *Ashcroft* proof that the images are of an actual child.

3. Some prosecutors are amending their charging documents to include attempt to possess, disseminate, or produce child pornography which would not necessarily require proof the images were of actual children.

4. Some prosecutors are amending the charges to include producing or disseminating obscene materials. Mere possession of obscene materials is not a violation of the criminal law. While we are of the opinion that this may be a good temporary "fix" for these cases, we are concerned that the crime of obscenity does not adequately address the violence that child pornography perpetrates against children and do not want the culture to become comfortable with this level of punishment for child pornography.

5. One of the more effective strategies is to present testimony of veteran agents or officers that places images of child pornography in existence prior to the technology that allows the creation of virtual or manipulated images. Ancillary to this tactic is a lot of pre-technology images have dates imbedded in the image that is probative that the image is an actual child.

6. Presenting expert testimony to opine on pixel analysis, artistic renderings, shadows, dust or other analytical tools has not been as successful a hopefully it will become. The general acceptance in the scientific community of a method to distinguish virtual children, manipulated children and actual children under the Frye or Daubert standard is challenging because no one can testify beyond a reasonable doubt that certain images are not actual children.

7. Victim Identification Program – many prosecutors are seeking evidence that images in their cases have been previously identified by someone as actual children, and that they can use that identification evidence to prove their cases. NCMEC has been building such a database of cropped images for several years. We receive calls almost daily from state and federal prosecutors, investigators and agents asking if we can assist in identifying children they have in their cases.

   In an effort to make the process of identification more effective by using non-cropped images, NCMEC would need legislative authority to receive, analyze, maintain and disseminate to federal, state, local and international law enforcement verification, authentication and analysis regarding the identity of actual children depicted in sexually explicit conduct for investigative and prosecutorial purposes. NCMEC has been in meetings with the FBI, Customs, Postal, the Child Exploitation and Obscenity Section at the Department of Justice, and the ICAC

Task Forces attempting to place a central data repository at NCMEC. Title 18 U.S.C. 3509 seems to prohibit federal agencies from storing victim data. Therefore NCMEC seems the logical place to provide one-stop service for law enforcement regarding this important issue. NCMEC would need in the legislation good – faith immunity for criminal or civil liability issues that may result from the operation of the Victim Identification Program.

Mr. Chairman, the most effective strategy for prosecutors is a new law that will withstand constitutional scrutiny by the Supreme Court. Working together we firmly believe that such a statute can be crafted that protects our children and our Constitution.

We are encouraged by the swift reaction from Congress. We believe that a new statute on this point is absolutely justified by the State's compelling interest in protecting children from the serious threat that child pornography, real or virtual, poses to their physical and mental health, safety and well-being.

In conclusion, let me say that we do not believe that all is gloom and doom. We are encouraged and supportive about Attorney General Ashcroft's commitment to use other statutes to aggressively prosecute these cases.

Finally, we are encouraged that today as never before, America cares. In the aftermath of the Court's decision, it is more important than ever for every citizen to be alert and report suspected child pornography to NCMEC at its CyberTipline, www.cybertipline.com or hotline, 1 (800) 843-5678. We ask your help in getting that message out to all of those who care about the safety of America's children.

Thank you so much for the opportunity to express our concerns. As always, I hope you will view NCMEC as a resource as you begin this process. We stand ready to assist in any way we possibly can.

NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN

POLICY STATEMENT ON THE LINKAGE BETWEEN CHILD PORNOGRAPHY and SEXUAL MOLESTATION OF CHILDREN

By; Daniel Armagh
Director of Legal Education

Simply stated, child pornography is the visual depiction – whether in photographs or on film – of children being sexually assaulted. The activity of photographing and filming a child in sexual postures or acts is itself an act of molestation and sexual abuse.[1] A more precise definition from a legal perspective would include the lascivious exhibition of the pubic area or genitalia of a child.

I. Uses of Child Pornography

A. Sexual Arousal and Gratification of Pedophile

Child pornography is a criminal instrument used by molesters and pedophiles to arouse their desires for children as sexual partners. While there are some collectors of child pornography who merely fantasize about the material without acting on those fantasies, viewing images of child pornography frequently serves as a precursor to the molester's own sexual acts with children.[2] When mere visual stimulation is no longer enough, sexual molestation of actual children commences.[3]

B. Lowering Child's Inhibitions

Child pornography then becomes a means by which the molester seduces and manipulates the child victim, breaks down the child's inhibitions by making sex between adults and children appear "normal," and gradually desensitizes the child to the reluctance or fear they logically feel upon viewing graphic depictions of sexual conduct.[4] Molesters may even try to persuade the child victim that such conduct is enjoyable; it is for this reason that the children in the moving

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[1] Kenneth V. Lanning, *Collectors*, *in* CHILD PORNOGRAPHY AND SEX RINGS 83 (Ann Wolbert Burgess ed., 1984) (hereinafter *Collectors*).

[2] *Virtual Child Pornography: The Impact of the Supreme Court Decision in the Case of Ashcroft v. Free Speech Coalition: Hearing before the Subcomm. on Crime of the House Comm. on the Judiciary*, 107th Cong. 6 (2002) (hereinafter *House Hearing*) (statement of Ernest E. Allen, President and Chief Executive Officer, National Center for Missing and Exploited Children); Kenneth v. Lanning, National Center for Missing and Exploited Children, Child Molesters: A Behavioral Analysis 28 (3d ed. 1992) (hereinafter *Child Molesters*); *Collectors*, *supra* note 1, at 86.

[3] *House Hearing*, *supra* note 2, at 6 (testimony of Ernest E. Allen).

[4] *Id.* at 6; *Child Pornography Prevention Act of 1995: Hearings before the Senate Comm. on the Judiciary*, 105th Cong. 36 (1996) (statement of Dr. Victor B. Cline); *Child Molesters*, *supra* note 2, at 25; June Kane, SOLD FOR SEX 17 (1998).

pictures or still images often appear to be enjoying themselves.[5] A child can more easily believe that the activity is acceptable once he or she sees that other children involved are laughing and smiling.

II. Research Findings

While much of what we know about the correlation between child pornography and child sexual molestation comes to us by way of law enforcement experience and field work, and not through scientific analyses, research has established a link between pornography and molestation. In fact, a 1988 study found not only that 67% of child molesters admitted to using hard-core sexual materials, but more importantly that 53% of child molesters reported intentionally viewing hard-core sexual materials in preparation for molestation.[6] Further, U.S. Postal Service statistics reveal that at least 80% of purchasers of child pornography are active abusers, and a 1984 study by the Chicago Police Department confirmed that in almost 100% of their annual child pornography arrests, detectives found photos, films, and videos of the arrested individual engaging in sex with other children.[7] More recent studies and reports have shown a steady and direct correlation between child pornography and child sexual molestation.

A. Internet Crimes against Children Task Forces

Internet Crimes against Children (ICAC) Task Forces are innovative law enforcement units, designed specifically to operate on the frontlines of the war against child pornography and sexual exploitation of children. Consequently, the ICAC Task Forces are in the best possible position to document the correlation between child pornography and child sexual abuse.[8] Data compiled by the ICAC Task Forces conclusively establishes that individuals involved with child pornography are likely to molest children.[9] For example, the Pennsylvania-based ICAC Task Force has reported that 51% of offenders arrested for pornography-related offenses were definitively determined to be actively molesting a child or children or to have molested in the past.[10] Other Task Forces reported similar results. The ICAC Task Force based in Dallas reported that 32% of offenders arrested over a 12-month period for child pornography offenses were determined to be molesting at the time of arrest or to have molested in the past.[11]

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[5] *Child Molesters*, *supra* note 2, at 28; *Collectors*, *supra* note 1, at 86.

[6] Lydia W. Lee, *Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. Cal. Interdis. L.J. 639, 655 (1999) (citing William L. Marshall, *Use of Sexually Explicit Stimuli by Rapists, Child Molesters, and NonOffenders*, 25 J. of Sex Res. 267, 279-80 (1988)).

[7] *Id.* (citing Tim Tate, *The Child Pornography Industry: International Trade in Child Sexual Abuse*, *in* PORNOGRAPHY: WOMEN, VIOLENCE AND CIVIL LIBERTIES 203, 207-08 (Catherine Hzin ed. 1992)).

[8] Brief of Amici Curiae National Center for Missing and Exploited Children at 21 (hereinafter *Amicus Brief*), Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002) (No. 00-795).

[9] *Id.*

[10] Internet Crimes against Children Task Force Report to the National Center for Missing and Exploited Children (March 2000).

B. Federal Bureau of Prisons

The subjects used to generate results for a 2000 study issued by the Federal Bureau of Prisons were classified according to their instant offenses and placed into one of three categories: child pornographer/traveler, contact sex offender, and other.[12] Child pornographer crimes involved the production, distribution, receipt, and possession of child pornography; traveler crimes involved luring a child and traveling across state lines to sexually abuse a child; contact sex offender crimes involved the sexual molestation, abuse or assault of a child or adult; and other crimes involved federal non-sexual offenses such as bank robbery, mail fraud, or drug trafficking.[13]

Subjects in the child pornographer/traveler category revealed extensive histories involving contact sex crimes, including sexual abuse of minors.[14] Of the 62 subjects in this group, 55 contact sex crimes were documented on their Presentence Investigation Reports, formal court documents prepared by the U.S. Probation Office.[15] After voluntarily participating in the Sex Offender Treatment Program at the Federal Correctional Institution in Butner, North Carolina, the 62 offenders admitted to an additional 1,379 contact sex crimes that were neither formerly detected nor reported.[16]

In sum, the results of the investigation by the Federal Bureau of Prisons revealed that 76% of offenders convicted of child pornographer/traveler crimes had, indeed, committed contact sexual crimes, including sexual abuse of children.[17] In fact, child pornographer/traveler offenders committed contact sex crimes at a higher rate than sex offenders already convicted of contact sex crimes.[18]

III. Conclusion

While it is necessary to distinguish mere possession of child pornography from the distinct issue of causation of sexual abuse, research and experience show that there is a significant likelihood that a person in possession of child pornography will also be involved in sexually abusing

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[11] *Id.*

[12] Andres E. Hernandez, Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders 3 (Nov. 2000) (paper presented at the 19th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, on file with the National Center for Missing and Exploited Children).

[13] *Id.*

[14] *Id.*

[15] *Id.* at 4

[16] Of the 62 subjects, 36 had no documented history of contact sexual crimes and during the course of treatment, 15 of the 36 divulged no additional contact sexual crimes. *Id.*

[17] *Id.* at 6.

[18] 30.5 victims per offender for the child pornographer/traveler category; 9.6 victims per offender for the contact sex offender category. *Id.*

children. When they are not molesting children, child predators use child pornography to satisfy their sexual desires for children, thereby perpetuating their predatory lifestyle.[19]

For more information on the link between child pornography and child sexual molestation, please consult the following:

- Carter, Daniel Lee et al., Use of Pornography in the Criminal and Developmental Histories of Sexual Offenders, 2 J. Interpersonal Violence 196-211 (1987)
- Hernandez, Andres E., Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders (2000)
- Lang, Reuben A. & Frenzel, Roy R., How Sex Offenders Lure Children, 1 Annals Sex Res. 303 (1988)
- Marshall, William L., Use of Sexually Explicit Stimuli by Rapists, Child Molesters, and NonOffenders, 25 J. of Sex Res. 267 (1988)

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[19] *Amicus Brief*, *supra* note 6, at 26.

Sex Offender Recidivism

I. Introduction:

Recidivism is defined as being charged with the commission of a new offense. In the case of sex offenders, the public is most concerned with sexual recidivism, which is the commission of a new sexual offense. 1 Canadian research on the issue of what triggers recidivism among sex offenders revealed that recidivists were usually described to have the following characteristics: i) poor social supports, (ii) sexual pre-occupations, (iii) attitudes tolerant of sexual assault, (iv) antisocial lifestyles, (v) poor self-management strategies and difficulties cooperating with community supervision. 2 Both research conclusions and the reports of clinicians confirm that child molesters believe children can feely agree to sexual relations with adults, and that many actually ask for such sexual behaviors. Further, pedophiles generally believe that engaging in sexual activity early in life is a healthy part of a child's development. As such, treatment experts believe that if these distorted beliefs continue to remain undefeated, such attitudes serve as an indication that the child molester will likely re-offend. 3

Child molesters attain deviancy in multiple ways, and engage in many different sexual and nonsexual acting-out behaviors. The sexual focus of child molesters can be separated in to two factors. The first element includes the extent in which sex offenders are obsessed or fixated on children as sexual objects; and the second component involves the exclusivity of the offender's fondness of children used as sexual objects. The second aspect regarding exclusivity is inversely associated to the offender's social skills, which is measured both by the amount and intensity of adult social and sexual relationships. The second aspect, however, is not connected to the intensity of pedophilic interest.

Persons who sexually exploit children are very different with respect to personal characteristics, life experiences and criminal backgrounds. No single molester profile exists. As such, just as childhood occurrences, adult competencies and criminal backgrounds of child molesters vary considerably, so do the reasons and motives that initiates such behaviors, which typify their sexual abuse of children.

The purpose of diagnosis is to therefore reduce such differences by placing the offender with a group of persons who exhibit similar characteristics. A reliable classification scheme of sex offenders can enhance the accuracy of results in the following areas: (i) the criminal justice system, where the level of danger and risk of re-offense are considered, and resources allocated, (ii) in the clinical arena, where a more informed understanding of particular classes of sex offenders can be utilized to maximize treatment strategies, and (iii) in the creation of more efficient primary prevention strategies. 4

II. **Risk Predictors of Sexual Offense Recidivism**

Child molesters are at risk for re-offending for many years (Soothill & Gibbens, 1978). Although the greatest risk period appears to be the first 5 to 10 years, child molesters seem to be at significant risk to recidivate throughout their life span. 5 However, it is important to understand that not all child molesters are deemed to be at great risk to re-offend. Therefore, a variety of information is needed in order to identify those child molesters who are truly at high risk. A record of a single conviction for child molestation is insufficient for identifying the high-risk offenders. 6

Certain characteristics do increase the likelihood that a sex offender will carry out further sexual offenses. According to the Hanson and Bussiere study (1996), the identification of certain risk factors of recidivism is important for reducing re-offense rates of sexual offenders. These identified risk factors that may be associated to recidivism of sex offenses are instrumental in creating management strategies and therapeutic approaches that are the best in reducing the likelihood of re-offense. 7 Follow-up studies are useful in enabling researchers to identify particular risk factors that may be connected to sexual recidivism. Follow-up studies assess various characteristics of a group of sex offenders, such as age and prior criminal history. The offenders are observed and supervised for a number of years after they are released. Researchers then look for any initial characteristics that distinguish subsequent recidivists from non-recidivists. 8

However, it is important to understand that there exists no absolutes when it comes to recognizing risk factors. This procedure involves sorting out risk factors that are likely to be associated with specific behaviors. Because this process is based on mere probabilities, it does not indicate that all persons who have certain characteristics will behave a particular way. Some sex offenders will unavoidably commit additional sex crimes, despite initiatives in identifying risk factors, and in establishing management and treatment procedures geared towards reducing these conditions. Similarly, not all sex offenders who possess re-offense risk qualities will recidivate. 9

The evaluation of risks associated to sexual recidivism should reflect upon factors that are mainly linked to sexual offense (i.e. sexual deviance, victim type). In a study conducted by Hanson, Steffy, & Gauthier (1992), the study confirmed several risk indicators that have long been identified as important for child molesters. These risk indicators include the following: 10 (i) previous sexual offenses; (ii) never being married; and (iii) victim type.

Further, in a study by Hanson & Bussiere (1998), the following determinations were made with respect to predictors of sexual offense recidivism: 11

< Of the demographic variables, **only age (young) and marital status (single) were related to the sexual offense recidivism**;

< **Criminal lifestyle** variables seemed to be consistent, although modest, predictors of sexual offense recidivism;

< Many of the **sexual criminal history** variables indicated small to moderate connections with recidivism. The risk for sexual offense recidivism was increased for those who had prior sexual offenses, had victimized strangers, had an extra-familial victim, began offending sexually at an early age, had selected male victims, or had engaged in diverse sexual crimes. Neither the degree of sexual contact, or force used, nor injury to victims were significant predictors of sexual offense recidivism.

< The **strongest predictors of sexual offense recidivism were measures of sexual deviancy.** Sexual interest in children as measured by phallometric assessment was the single strongest predictor found in the meta-analysis. Related predictors included phallometric assessment of sexual interest in boys.

< The only development history variable linked to sexual offense recidivism was a **negative relationship with mother**. Also, being sexually abused as a child was not associated with increased risk.

< Moreover, **few psychological maladjustment variables were connected to sexual recidivism**. However, **neither general psychological problems nor alcoholic abuse** were related to sexual offense recidivism.

Based on the Hanson and Bussiere study entitled *Predictors of Sexual Offender Recidivism: A Meta-Analysis* (1996), researchers have made a key distinction between two types of risk predictors: Static and Dynamic risk factors. Even though static factors such as age and history of offenses predict recidivism, such factors cannot typically be changed. However, such factors are important in measuring an offender's general risk level. In contrast, dynamic factors can be altered. Unlike static risk factors, a crucial characteristic of dynamic risk predictors is that the decline of dynamic factors are linked with lower rates of recidivism. Understanding dynamic factors is necessary for purposes of (i) identifying the goals for treatment intervention, (ii) evaluating variations in risk, i.e. benefits from treatment, and (iii) in anticipating the timing of re-offenses. The study also determined that the dynamic risk factor that was most changeable was a sex offender's enthusiasm and drive for treatment. For instance, offenders who refused treatment are deemed to be at higher risk for re-offending; however, it is possible that such offenders may lower their risk as a result of re-cooperating with treatment intervention programs.

III. **Treatment of Sex Offenders**

The objective of sex offender treatment is the reduction of sexual re-offenses, which can be achieved as a result of identifying and changing factors that are known to contribute to recidivism. 12 The kind of sex offender we are dealing with plays a crucial role in deciding the place and type of treatment that is needed. Pedophiles need the most rigorous treatment, mainly with respect to sexual arousal management. They also need the most comprehensive training in terms of various adaptive skills and attitude

reformation. With respect to psychosexual testing, these types of offenders have a propensity to show considerable arousal towards children. Normally, they are not capable of voluntarily holding back their deviant sexual arousal; therefore, it is required that they are explicitly taught self-control. Thus, the assessment and management of such sexual preferences and desires is a vital factor of treatment for pedophiles. Incest offenders, however, normally present the smallest amount of risk to re-offend, both sexually and non-sexually, and therefore may be considered to receive little priority for limited treatment resources. 13

Treatment can take place in various locations and at different phases in the criminal justice system. For instance, some states maintain sentencing alternatives, where it combines a probation sentence that may or may not consist of imprisonment, with community-based outpatient treatment. In this type of situation, the offender is managed by corrections' personnel during the duration of authorized treatment; but, if the offender fails to make adequate improvement, or fails to adhere to the treatment program, the case might be sent back to court, reconsidered by the judge and a prison sentence enforced. Therefore, treatment is provided to the offender, and if adequate progress is not made, confinement is an alternative. In some states, however, treatment plans are provided to offenders while in prison. After the expiration of the offenders prison term, a correctional personnel manages and scrutinizes the individual once released into the community. This process of post-prison supervision is a crucial component of the whole treatment program. 14

Generally speaking, sex offender treatment programs utilize four methods, which are not mutually exclusive. The ideal protocol treatment would employ a combination of all four methods: 15

< **Evocative therapy**: concentrates on helping sex offenders to understand what causes sexual deviant behavior; it also focuses on increasing the level of sympathy for victims of sexual assault.

< **Psycho-education groups or classes**: the objective of this program is to cure the sex offender's lack of social and interpersonal skills. Topics include anger management methods, relapse prevention principles, human sexuality and dating and communication skills.

< **Pharmacological treatment**: the objective focuses on lowering sexual arousal and reducing the occurrence of sexual deviant fantasies through the use of medications such as antiandrogen and antidepressants. Chemical or surgical castrations are other forms of medical treatment that may be considered to reduce the rate of recidivism among sex offenders.

With respect to medical treatments, testosterone-lowering treatments--either physical castration or various medications--have also been utilized by a number of clinicians in an effort to lower recidivism rates. According to Fred Berlin, a leading authority on the subject of pedophilia, by using medications to reduce testosterone levels, we can provide the equivalent of a sexual appetite suppressant. Those struggling with pedophilic cravings must have access to this type of treatment plan. Results so far appear to be promising.

There are two types of castration treatments: chemical and surgical castration. With chemical castration, sex offenders are provided drugs for purposes of decreasing the quantity of the male hormone testosterone. In several states, Depo-Provera, is deemed the legally mandated drug of preference for the chemical castration of certain sex offenders. [16] With surgical castration, the testicles of sex offenders are removed. According to studies referred to in Robert Prentky's (1997) paper, populations of sex offenders subjected to surgical castration revealed recidivism rates of between 1.1% and 7.4% as opposed to expected recidivism rates of 50% to 76.8%. Further, in a report by Meyer & Cole (1997), they concluded that reported recidivism figures for surgical castration are much better than those subjected to chemical castration. [17] European studies have determined that child molesters who experienced surgical castration have a small rate of recidivism--around 2 to 3%. [18]

< **Cognitive-behavior therapy**: this treatment focuses on the following areas: (i) sexual assault cycles and methods that disrupt those cycles; (ii) changing the attitudes, fantasies and rationalizations that excuse or facilitates sexually aggressive behavior; (iii) and controlling the level of anger and rage among sex offenders. Reports on relapse prevention, which is the most frequently utilized cognitive-behavioral model, indicate

that for child molesters the most commonly recognized experiences before offenders commit an offense include preparing for the offense and little sympathy for the victim.

Although the best treatment program has yet to be recognized, the most effective method to date--cognitive behavior therapy, and, when appropriate, antidepressant and antiandrogen medication—has lowered re-offense rates among child molesters. [19] According to a study by Annon (1989), it indicated an 85% to 95% success rate, using an individualized treatment approach that utilizes behavioral/cognitive techniques. [20]

Effect of Treatment Intervention Programs on Recidivism Rates of Sex Offenders

Despite more than 35 review papers since 1990, a report conducted by Hanson, Gordon, Harris, Marques, Murphy, Quinsey, and Seto (2002), states that researchers and policy makers have yet to agree on the issue of whether treatment effectively lowers the rate of sexual recidivism. Even though many researchers have concluded that treatment is important in reducing the recurrence of sexual anger and hostility, other researchers hold the view that such treatment programs do not help sex offenders. Since the Furby analysis (1989), which stated that there was no proof that confirmed that treatment intervention was effective in lowering recidivism rates of sex offenders, there has been a steady increase of evidence on the efficacy of treatment. The problem with the Furby review, however, was that a lot of the programs evaluated by Furby were of weak quality, and were frequently based on principles now known not to be useful. [21]

Based on a 1991 review conducted by Marshall, Jones, Ward, Johnston, and Barbaree, they found some proof that indicated that treatment programs lowered re-offense rates of child molesters. [22] Further, according to Fred Berlin in an article entitled *Clergy Crisis*, we've learned that you can effectively treat persons suffering from pedophilia, but you cannot cure them. Pedophilia is a craving disorder, similar to alcohol or drug addiction. When asked what treatment works, Berlin indicated that we have learned that group therapy helps since it involves patients to deal with denial and stop deceiving themselves about the dangers of their behavior. Berlin also considers methods of preventing relapses.

Additional evidence that supports treatment efficacy includes a meta-analyses on the effectiveness of sex offender treatment; the review concluded that nine out of ten studies,

which examined as many as eighty-seven programs revealed positive proof for treatment of sex offenders. (McGrath, 1994); the one study that maintained the negative view was carried out by Furby. 23 Moreover, consistent findings have concluded that the offender's failure to complete treatment programs is a reliable and strong predictor of recidivism. Dropouts are deemed to be at increased risk to re-offend for various reasons; it is more probable that they have pre-existing characteristics that are related to risks of recidivism (i.e. youth, impulsivity, etc.) 24 However, according to a review conducted by Hanson, Gordon, Harris, Marques, Murphy, Quinsey, and Seto, offenders who rejected treatment were not deemed to be at a greater risk for sexual re-offending than offenders who started treatment. Although, those who refused treatment were considered to be somewhat at a high risk for general recidivism. 25

Review of Studies

Some of the studies conducted include meta-analysis studies by researchers such as Alexander (1999) and Hall (1995). Unlike individual studies, meta-analysis reviews provide enhanced satisfactory results because it involves aggregating the findings of various individual reports, thereby enabling researchers to increase the statistical power of such studies; as a result of combining the results of various individual reports, the remaining sample sizes of meta-analysis studies can be sufficient for purposes of identifying even small effects in recidivism rates.

< **Alexander (1999).** Alexander conducted a meta-analysis of 79 sex offender treatment outcome studies covering approximately 11,000 treated and untreated sex offenders. Some of her findings included the following: overall, treated sex offenders committed re-offenses at a lower rate than did untreated sex offenders—13% versus 18%. This was also the case for different subgroups of sex offenders, including both treated and untreated child molesters as a whole (14.4% versus 25.8%), child molesters with male victims (18.2% versus 34.1%). However, there were no distinctions between treated and untreated child molesters with female victims (15.6% versus 15.7%) The study also determined that re-offense rates was lowered to a larger extent when treatment was given

to child molesters who experienced treatment on an out-patient basis compared to prison settings.

< **Hall (1995).** Hall conducted a meta-analysis of 12 sex offender treatment studies, including approximately 1300 offenders. Recidivism was roughly defined as subsequent sexually aggressive behavior that led to criminal charges. The findings of this report indicated a small, but important treatment effect on the recidivism rates of sex offenders. It was determined that treatment seemed to lower the rate of recidivism by approximately a third; the overall rate of recidivism for untreated sex offenders was 27%; whereas, for treated offenders, the rate of recidivism was 19%--an obvious treatment effect of 8%. The extent of treatment outcomes differed significantly among the studies, with studies that had longer follow-up periods. Consequently, Hall's findings proposed that treatment can lower child molester recidivism.

< A meta-analytic review was conducted, which examined the effectiveness of psychological treatment for sex offenders by summarizing data from 43 studies (9,454). Averaged across all studies, the sexual offense recidivism rate was lower for the treatment groups (12.3%) than the comparison groups (16.8%, 38 studies). Current treatments, (cognitive-behavioral and systemic) were associated with reductions in both sexual recidivism (from 17.4 to 9.9%) and general recidivism (from 51 to 30%) [26]

< **Marques (1994).** The results of this study indicated that the recidivism rate of sexual aggressors (7 child molesters, 1 rapist) who dropped out (28.6%) was statistically considerably higher than the rate of those participants who finished the cognitive-behavioral treatment program (7.9%) [27]

< **Barbaree & Marshall (1988).** This study examined 126 child molesters who had finished a pre-treatment evaluation between 1975 and 1985 in Ontario Canada. All of the offenders had confessed to their problem and articulated a need to be treated. Out of the 126 participants, 68 offenders finished the comprehensive cognitive-behavioral treatment program. The duration of the follow-up period was 1 to 11 years, and recidivism was

measured based on unofficial estimations provided by social agencies and participants' self reports, coupled with official records of re-arrests and reconvictions. The outcome of the study indicated that the re-offense rate for sex offenses was 13% for the treatment group and 35% for the non-treated group. The rate of recidivism for incest offenders was less (8% for the treated group and 22% for the non-treated group) than compared to non-familial child molesters (18% for those treated and 43 % for those non-treated). 28

< **Pithers & Cumming (1989).** This study concluded a 3% re-offense rate among 137 child molesters, with a follow-up period of 6years. This study of imprisoned sex offenders consisted of those who had underwent a relapse prevention plan and a very coordinated and rigorous aftercare program. 29

< **Maletzky & McGovern (Sexual Abuse Clinic of Portland Oregon).** These researchers followed approximately 5000 offenders who received treatment in their clinic and similar clinics between the years of 1973 and 1990, utilizing behavior-oriented treatment methods. About 3700 of these offenders consisted of pedophiles, 770 were exhibitionists and the remaining offenders were referred for various paraphilias. Measures for success included the following factors:

- No re-arrest;
- Self report of no maladaptive sexual behaviors;
- Reduced deviant arousal continued post-treatment verified through the use of penile plethysmograph;
- And significant other ratings of patient behavior

Using these rigorous measures as a basis to follow some men for as long as 17 years after treatment, it was determined that the **success rate was achieved with 94.7% of heterosexual pedophiles and 86.4% of homosexual pedophiles**. 30

< **Fred Berlin's John Hopkins Sexual Disorders Clinic.** In a group of more than 400 pedophiles treated at Berlin's John Hopkins Sexual Disorders Clinic, the **recidivism rate was less than 8% after 5 years**. In other words, 92% of these sex offenders were not

accused or convicted of subsequent sexual offense, a considerably lower level of recidivism than has been reported for untreated cases. [31]

< **The J.J. Peters Institute (Meyers & Romero, 1980; Romero & Williams, 1983).** They carried out a study where sexual offenders (mostly child molesters and rapist) were arbitrarily given outpatient treatment services or provided normal probation supervision and management. Their evaluation concluded that the unstructured outpatient group psychotherapy given to the treated group had a small effect on the rate of re-offense. [32]

< **Rice, Quinsey,& Harris (1991).** They assessed the efficacy of a treatment program for child molesters in Ontario, Canada. The treatment plan was intended to change the offenders' sexual preference for children. The study involved 136 child molesters released from a maximum security psychiatric institute before 1984. The usual follow-up period was 6.3 years. Of the 136 child molesters, there were 50 treatment participants. For the entire test, the reconviction rate was 31% for sex offenses. For offenders matched with respect to criminal history and sexual preferences, reconviction of sexual offense constituted 38% for the treated group and 31% for the non-treatment group. The difference between these two re-offense rates was not statistically considerable. Although the researchers doubted the way in which both groups were matched, they determined that treatment intervention had no influence on recidivism rates. [33]

< **Hanson, Steffy, & Gauthier (1992).** They assessed the rates of long-term re-offenses of 197 child molesters sentenced to a correctional establishment in Southern Ontario, Canada. Out of the 197 offenders, 106 child molesters were treated between 1965 and 1973 (treatment group); 31 offenders were imprisoned in the same establishment before the treatment plan (Control Group I); and 60 of the child molesters served in the same establishment at the same time as the treatment group, but were not treated (Control Group II). The duration of the follow-up period was 10 to 31 years, with 93% of the child molesters monitored for more than 15 years. The study concluded that the re-offense rates (measured by reconviction of a sexual and/or violent crime) of the treatment group and the control groups were not drastically dissimilar. The sexual recidivism rate of the

treatment group constituted 44%, 48% for Control Group I, and 33% for Control Group II. [34]

Despite the fact that the above research studies seem to indicate both positive and negative results on the effects of treatment to sexual offense recidivism, the majority of these research findings do appear to indicate that treatment intervention programs do in fact play a role in reducing recidivism statistics. However, there exists various factors, which have contributed to the contradictory nature of treatment outcome on recidivism rates. First, just as it is difficult to reach definitive conclusions regarding factors related to sex offender recidivism, there are similar challenges regarding the effect of treatment intervention programs. Sex offender treatment programs and the results of treatment studies are impacted by the following factors: [35]

< Type of therapeutic method;

< Location of treatment (i.e. community, prison, or psychiatric facility);

< Seriousness of the offender's past criminal and sexual offenses;

< Whether the offender voluntarily chose to undertake treatment or whether they were placed in a treatment program;

< The degree of dropout of offenders from treatment

Second, the amount of evaluative data with respect to treatment outcome and effects are not much. Few studies of satisfactory quality have been completed utilizing experimental or quasi-experimental designs that evaluate the outcome of various treatment methods, as well as compares treated sex offenders to untreated offenders (Quinsey, 1998). [36] The main problem in critiquing the majority of treatment studies is the failure to evaluate matched groups of both treated and untreated sex offenders. [37]

As such, even those most optimistic about treatment programs are aware that the benefits may never be dramatic. Given the problem of increasing controlled experimental or quasi-experimental designs, the analysis of treatment outcome will continue to be problematic. On the other hand, it is now fairly obvious that the global pessimism expressed by Furby (1989) about the efficacy of treatment programs was overstated. But, the treatment of sex offenders on its own will not resolve the problem of sexual re-offending. [38]

IV. **Variability in Sexual Offense Recidivism**

The underreporting of sexual crimes against children has made it extremely difficult to calculate either the rate of such occurrences, or the size of victim and offender populations. In addition, deficient research methods have produced contradictory conclusions regarding the characteristics, motivations and re-offense rates of sex offenders. 39 Because recidivism rates across studies are very conflicting, this therefore makes it impossible to arrive at any reliable or legitimate results about recidivism statistics among child molesters as a group. Recidivism rates are confounded by differences as a result of factors, which include, but are not limited to the following: 40

< Variations in the laws, sentencing and parole guidelines among jurisdictions;

< The amount of time in which sex offenders spend in the community;

< Individual characteristics of sex offenders;

< Treatment–related factors, such as differences in the reliability of treatment intervention programs, and the amount of treatment received by sex offenders.

< The quantity and quality of management and the supervision of sex offenders following treatment programs.

< Differences in the way in which recidivism or re-offense is defined or measured; definitions can range from the following: formal convictions for specific offenses to new charges for other offenses, new convictions and parole suspensions and revocations; 41

< Length of follow-up periods: re-offense measurements may in some cases be miscalculated because a study fails to take into account the span of time in which offenders may recidivate. 42 In addition, studies frequently differ in the length of time in which follow-up studies on a group of sex offenders is conducted in a given community;

. There are two problems with respect to follow-up periods. Preferably, all persons in any given study should have the same length of time at risk—i.e. time at large spent in the community—and thus, an equal chance to carry out subsequent crimes.

However, this almost never happens. For example, in a 10 year follow up study, some of the offenders will have been in the community for as long as eight, nine or ten years, while others for only two years. This particular issue is addressed by utilizing a method known as *survival analysis,* which takes into account the amount of time every individual has been in the community, instead of a simple percentage. Obviously, the longer the follow-up period, the more likely that re-offense will occur, and as a result, a higher rate of recidivism will exist. 43

< Lack of a Randomized Control Group when Assessing Sex Offender Treatment Programs: The effectiveness of treatment programs can only be assessed in controlled study situations, where both treated and untreated offenders are matched together based on variables, including age, previous criminal background, and admitting offense. 44

< Offense type: researchers must establish whether sex offenses or the commission of any offense is sufficient to constitute a recidivating offense for study purposes. For instance, if recidivism is only measured based on additional sex offenses, it must also be determined whether this includes felonies and misdemeanors; 45

< Sample selections: this also may affect re-offense figures. For example, samples derived from released prisoners normally consist of more serious criminals than samples based from official records or arrest or conviction, and therefore, may have greater recidivism rates. 46

< Differences in research methodologies, such as the sample sizes of subjects used within a study and recidivism measures, i.e. definitions of re-offense, etc. 47

< Unobserved sexual offenses: according to the Hanson & Bussiere study, the most important problem with respect to estimating general recidivism rates and statistics is that a significant percentage of sexual offenses continue to be unnoticed. As such, any observed approximations of recidivism rates of sex offenders should be deemed underestimates. 48 Thus, due to all the reasons mentioned above, a small number of studies can be directly compared to one another.

V. **Conclusion**

The likelihood of a sex offender recidivating will vary over time, depending on his state of mind, social conditions, and general well being. Therefore, it is necessary that there continue to be constant (i) assessments of risk factors and predictors, (ii) visible observations, and (iii) appropriate treatment interventions at moments of greater risk. Further, those persons whom are involved in the management and control of sex offenders must be familiar with how to evaluate risk and how to intervene for purposes of lowering it. [49] In addition, in order to reach more efficient levels of recidivism rates regarding treatment outcome, additional experimental studies of satisfactory quality are needed that compares the effects of a variety of treatment intervention methods, as well as compares treated offenders against untreated offenders.

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Testimony of Daniel P. Collins,
Associate Deputy Attorney General,
before the Committee on the Judiciary,
United States Senate
October 2, 2002

Concerning

Stopping Child Pornography

Chairman Leahy, Senator Hatch, and Members of the Committee, I appreciate the opportunity to testify here today on this important subject. The sexual abuse of children is an evil that no decent and civilized society can or should tolerate in any form. The harm inherent in abusive sexual conduct is bad enough; the fact that such abuse may be photographed or videotaped only multiplies the scope of the harm inflicted on the young victims. As the Supreme Court has recognized, because child pornography "permanently record[s] the victim's abuse," the very existence of such materials "causes the child victims continuing harm by haunting the children in years to come." *Osborne v. Ohio*, 495 U.S. 103, 111 (1990). With the advent of the Internet, this harm has been magnified exponentially: pedophiles can, with the click of a few keys, instantly make such materials available to literally thousands of persons. Moreover, as the Supreme Court has also stated, "evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." *Id.* Accordingly, the Court has properly held that the First Amendment provides no protection to such materials and that the government has compelling interests that justify "attempting to stamp out this vice at all levels." *Id.* at 110; *see also New York v. Ferber*, 458 U.S. 747, 756-58 (1982).

Over the years, the Congress – by large bipartisan majorities – has enacted a number of statutes designed to address the serious problems presented by the manufacture, possession, and trafficking of child pornography. One such law, the Child Pornography Prevention Act of 1996,

was favorably reported by this Committee by a vote of 16-2. The Department of Justice, in both the current and prior Administrations, vigorously defended the validity of this important law in the courts. Unfortunately, in April of this year, a divided Supreme Court held that this legislation was, in part, facially unconstitutional. The Department was obviously disappointed by the Court's decision. Nonetheless, we believe that the Court's decision and the Constitution leave the Congress with ample authority to enact a new, more narrowly focused statute that will allow the Government to accomplish its legitimate and compelling objectives without interfering with First Amendment freedoms.

The Department is deeply grateful to the leadership shown by the Congress in moving promptly to work with us to address this important issue. A bipartisan group of Representatives and Senators joined the Attorney General on May 1 to announce a legislative proposal aimed at strengthening the child pornography laws in the wake of the Supreme Court's decision. As that bill, which was introduced as H.R. 4623, moved through the House Judiciary Committee, we were pleased to work with Members on both sides of the aisle in further revising the bill so as to ensure that it would provide maximum protection to our Nation's children while complying with the Supreme Court's decision and the Constitution. Likewise, I have been pleased to meet with members of the staff of this Committee, on both the majority and minority side, in connection with the drafting of S. 2520. As I will explain in more detail below, the overall approach of the two bills is, at a conceptual level, very similar. There are points of difference, to be sure, but we start from a fairly large area of common ground.

In order to explain how the two bills address the constitutional deficiencies in the 1996 Act that were identified by the Supreme Court, I would like first to briefly outline the Court's

ruling. In *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002), the Court addressed the constitutionality of two provisions of law. The first was 18 U.S.C. § 2256(8)(B), which defines "child pornography" to include virtual child pornography, *i.e.*, visual depictions that "*appear[] to be*" minors engaging in sexually explicit conduct. The second was 18 U.S.C. § 2256(8)(D), which defines "child pornography" also to include materials that are pandered as child pornography – that is, visual depictions that are "advertised, promoted, presented, described, or distributed in such a manner *that conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."

The Supreme Court found these two definitional provisions to be unconstitutionally overbroad. In particular, with respect to "virtual child pornography" covered by § 2256(8)(B), the Court concluded that the definition extended far beyond the traditional reach of obscenity as described in *Miller v. California*, 413 U.S. 15 (1973), and thus could not be justified as a proscription of obscenity, *see* 122 S. Ct. at 1400-01; that *New York v. Ferber*, 458 U.S. 747 (1982), could not be extended to support a complete ban on virtual child pornography, *see* 122 S. Ct. at 1401-02; and that the "reasons the Government offers in support" of the prohibition of virtual child pornography were insufficient under the First Amendment, *id.* at 1405.

In particular, in defending the 1996 Act, the Government had argued that the existence of virtual child pornography threatened to render the laws against child pornography unenforceable, and that a ban on virtual child pornography, coupled with an affirmative defense allowing some defendants to prove that the material was made using only adults, struck a proper constitutional balance. Without reaching the question whether any sort of "affirmative defense" approach could be constitutional, the Court held that the affirmative defense in the 1996 Act was

"incomplete and insufficient." 122 S. Ct. at 1405. In particular, the Court noted that the affirmative defense did not extend to possession offenses and that it only extended to materials produced with youthful-looking adults; materials made by using computer imaging were not eligible for the affirmative defense.

The Government had also argued that child pornography, whether actual or virtual, "whets the appetites" of pedophiles to engage in molestation. In concluding that this could not sustain the 1996 Act's virtual child pornography definition, the Court held that the Government had "shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse." 122 S. Ct. at 1403. The Court held that "[w]ithout a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct." *Id.*

With respect to the "pandering" provision in 18 U.S.C. § 2256(8)(D), the Court held that the provision was overbroad because it criminalized speech based "on how the speech is presented" rather than "on what is depicted." 122 S. Ct. at 1405.

By invalidating these important features of the 1996 Act, the Court's decision leaves the Government in an unsatisfactory position that the Department believes warrants a prompt legislative response. Already, defendants often contend that there is "reasonable doubt" as to whether a given computer image – and most prosecutions involve materials stored and exchanged on computers – was produced with an actual child or as a result of some other process. There are experts who are willing to testify to the same effect on the defendants' behalf. Moreover, as computer technology continues its rapid evolution, this problem will grow increasingly worse: trials will increasingly devolve into jury-confusing battles of experts arguing

over the *method* of generating an image that, to all appearances, looks like it is the real thing. The end result would be that the Government may be able to prosecute effectively only in very limited cases, such as those in which it happens to be able to match the depictions to pictures in pornographic magazines produced before the development of computer imaging software or in which it can establish the identity of the victim. *See, e.g.*, *United States v. Fox*, 248 F.3d 394, 403 (5th Cir. 2001) (government's computer expert testified on cross-examination that there was no way to determine whether the individuals depicted even exist), *vacated*, 122 S. Ct. 1602 (2002).

As Justice Thomas noted in his concurring opinion, "if technological advances thwart prosecution of 'unlawful speech,' the Government may well have a compelling interest in barring or otherwise regulating some narrow category of 'lawful speech' in order to enforce effectively laws against pornography made through the abuse of real children." 122 S. Ct. at 1406-07 (Thomas, J., concurring in the judgment). Similarly, Justice O'Connor noted in her opinion concurring in part and dissenting in part that, "given the rapid pace of advances in computer-graphics technology, the Government's concern is reasonable." *Id.* at 1409. Moreover, to avert serious harms, Congress may rely on reasonable predictive judgments, even when legislating in an area implicating freedom of speech. *See Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180, 210-11 (1997). We believe that Congress has a strong basis for concluding that the very existence of sexually explicit computer images that are virtually indistinguishable from images of real minors engaged in sexually explicit conduct poses a serious danger to future prosecutions involving child pornography. Indeed, we already have some sense of the impact of the Court's decision. The Ninth Circuit had invalidated the same provisions of law in 1999, and all accounts

indicate that the number and scope of child pornography prosecutions brought by our prosecutors in the Ninth Circuit has been adversely impacted.

Inaction is, therefore, unacceptable. But let me also emphasize that, while we are disappointed with the Court's decision, we strongly believe that any legislation must respect the Court's decision and endeavor in good faith to resolve the constitutional deficiencies in the prior law that were identified by the Court.

The Supreme Court's decision in *Free Speech Coalition* leaves open two primary means for addressing the problems presented by virtual child pornography. First, the Court specifically left open the possibility that a more narrowly tailored regulation of virtual child pornography, coupled with a broader affirmative defense, could be constitutional. In addressing the adequacy of the affirmative defense contained in the 1996 Act, the Court noted that the use of an affirmative defense could raise constitutional issues, but the Court explicitly stated that it was *not* holding that an affirmative-defense approach was unconstitutional:

> We need not decide, however, whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms.

122 S. Ct. at 1405. As Justice Thomas correctly noted in his concurring opinion, the majority opinion thus explicitly "leave[s] open the possibility that a more complete affirmative defense could save a statute's constitutionality." *Id.* at 1407.

Second, the Court's opinion in *Free Speech Coalition* leaves open the possibility of enacting additional laws designed to more effectively prohibit obscene materials containing

depictions of children. The Court concluded that, because of its breadth, the prior law was "much more than a supplement to the existing federal prohibition on obscenity." 122 S. Ct. at 1399. But it did not foreclose the possibility that supplemental legislation aimed specifically at obscene depictions of children could properly be enacted. On the contrary, the Court went out of its way to note that obscenity doctrine may give the Government greater leeway when it comes to graphic depictions of sexual acts involving very young children:

> While we have not had occasion to consider the question, we may assume that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not.

122 S. Ct. at 1396.

H.R. 4623 and S. 2520 properly draw on both of these approaches in crafting a range of complementary provisions that aim to further the Government's compelling interest in protecting children, while avoiding infringement of First Amendment rights.

Let me first address how both bills implement the "affirmative-defense" approach that was explicitly left open by the Supreme Court. Section 3 of H.R. 4623 would significantly revise the existing law's coverage of virtual child pornography by substantially narrowing the scope of the definition of "child pornography" and by simultaneously expanding the affirmative defense. Section 3 of H.R. 4623 eliminates both of the problems identified by the Court in the prior affirmative defense, and more narrowly focuses the statute on the Government's core concern about enforceability. Specifically, section 3 would make at least five significant changes to the

prior law:

- The definition of virtual child pornography is explicitly limited to "computer image[s]" or "computer-generated image[s]." As a practical matter, it is the use of computers to traffic images of child pornography that implicates the core of the Government's practical concern about enforceability. The resulting prohibition is one that extends, not to the suppression of any idea, but rather to uses of particular instruments, such as computers, in a way that directly implicates the Government's compelling interest in keeping the child pornography laws enforceable.
- The definition of virtual child pornography is also revised to reach only images that are "indistinguishable" from actual child pornography. Again, the idea is that the Government's core interests are implicated by the sort of materials that, to an ordinary observer, could pass for the real thing. "[D]rawings, cartoons, sculptures, or paintings" – which cannot pass for the real thing – are specifically excluded from the scope of this provision.
- The definition of "sexually explicit conduct" has been narrowed with respect to virtual child pornography. In particular, "simulated" sexual intercourse would be covered only if it the depiction is "lascivious" and involves the exhibition of the "genitals, breast, or pubic area" of any person. Notably, this change alone eliminates most of the overbreadth identified by the Court; it was the breadth of the definition of "sexually explicit conduct" that led to distracting and unhelpful arguments over whether movies such as "Traffic" and "American Beauty" were

covered.

- The affirmative defense is explicitly amended to include possession offenses.
- The affirmative defense is also amended so that a defendant could prevail simply by showing that no children were used in the production of the materials. Prior law only granted an affirmative defense for productions involving youthful-looking adults.

With these changes, "'whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.'" *Ferber*, 458 U.S. at 773-74 (*quoting Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973)).

Three provisions of S. 2520 would, taken together, also appear aimed at implementing the "affirmative-defense" approach to regulating virtual child pornography. As a general matter, section 2 of the bill would amend 18 U.S.C. § 2252A(c) so that the affirmative defense would apply to possession offenses and would also be available to any defendant who could show that no children were used in the production of the materials. As noted above, these were the two deficiencies that led the Supreme Court to hold that the existing affirmative defense was constitutionally inadequate. Section 4 of the bill would create a new subsection "(E)" to the definition of "child pornography" in 18 U.S.C. § 2256(8); this new subsection, when read together with a third provision, would appear to extend to certain "virtual" materials. Specifically, proposed section 2256(8)(E) would define as proscribed child pornography any materials whose production "involves the use of an identifiable minor engaging in sexually explicit conduct." Section 4(3) of S. 2520 would, in turn, amend the existing definition of "identifiable minor" in section 2256(9) so that it would include certain images depicting persons

"who [are] virtually indistinguishable from an actual minor."

For several reasons, we believe that H.R. 4623's implementation of the "affirmative-defense" approach to regulating virtual child pornography is preferable. First, as a purely technical matter, S. 2520's use of the definition of "identifiable minor" as the vehicle for covering virtual materials is unduly complicated and, as drafted, may be internally inconsistent. Literally construed, S. 2520 would amend section 2256(9) so that it would only cover virtual materials that meet all of the following criteria: (1) the production of the material involves use of "a person," *see* 18 U.S.C. § 2256(8)(E) (as proposed by S. 2520); *id.*, § 2256(9)(A); (2) the person either (a) was a minor at the time of production or (b) is one whose image as a minor was used in the production, *see id.*, § 2256(9)(A)(i); and (3) the person is either (a) recognizable as an actual person or (b) virtually indistinguishable from an actual minor, *see id.*, § 2256(9)(A)(ii) (as proposed to be amended by S. 2520). From the context, criteria (1) and (2) seem clearly to presume that "person" means an actual person, and that the person, as depicted in the image, is a minor. This would appear directly to conflict with criteria (3)'s effort to cover images that are "virtually indistinguishable" from an actual minor. Indeed, if an image must satisfy § 2256(9)(a)(i)'s requirement that it be produced with a minor or with the image of a minor (criteria (2)), then, as a literal matter, the addition of a further requirement that the image be "virtually indistinguishable" from an actual minor is largely surplusage with no practical effect.

Second, although S. 2520 and H.R. 4623 both fix the affirmative defense, S. 2520 does not contain any of the three additional narrowing elements that H.R. 4623 would enact in order to reduce the substantial overbreadth in the underlying prohibition of virtual materials. As noted above, H.R. 4623 would narrow the definition of "sexually explicit conduct" insofar as it would

apply to virtual materials; would specifically and narrowly define "indistinguishable"; and would only reach virtual materials that were computer-generated or that are stored in a computerized format. These additional limitations are meant to help ensure that the Government will best be able to defend the legislation as being sufficiently narrowly tailored. Because S. 2520's regulation of virtual materials lacks these features, it is clearly more vulnerable to constitutional challenge than H.R. 4623.

For these reasons, we strongly urge adoption of H.R. 4623's provisions implementing an "affirmative-defense" approach to regulating virtual child pornography.

Let me now address how the two bills would strengthen the ability to go after obscene depictions of children. H.R. 4623 and S. 2520 each contain two provisions that seek to implement this approach.

First, both bills would enact a specific prohibition of "obscene" materials that depict minors engaged in sexually explicit conduct. Section 5 of H.R. 4623 would add a new section 1466B to title 18 that would prohibit "obscene" materials "of any kind, including a drawing, cartoon, sculpture, or painting" that "depicts a pre-pubescent child engaging in sexually explicit conduct." No real children need be depicted and no real children need have been used in the production. Notably, proposed § 1466B would explicitly incorporate the stricter penalties applicable to child pornography, and section 5(b) of the bill would likewise require application of the guidelines applicable to child pornography, which are substantially more strict than those applicable to obscenity offenses generally. S. 2520 would amend existing § 2256(8)(B) so that it would define as proscribed child pornography any "obscene" material that "is, or appears to be, of a minor engaging in sexually explicit conduct." Because the amendment is contained in

§ 2256, the harsher penalty structure of the child pornography laws would likewise be carried over by the Senate bill.

These corresponding provisions of the two bills are thus quite close in purpose and effect. Nonetheless, with one important exception, we prefer the House version. By retaining the phrase "is, or appears to be, of a minor," S. 2520 may create an argument that its prohibition is limited to obscene materials that are "virtually indistinguishable" from those of actual minors, since that was the meaning that the Justice Department had urged be given to this phrase in the existing statute. Because S. 2520 would require proof that the material is "obscene" in the sense described in *Miller v. California*, 413 U.S. 15 (1973), there is no reason to impose any such additional restrictions (or to use language that could be read to import them). On the other hand, for the same exact reason, there is no reason why proposed § 1466B in H.R. 4623 should be limited to depictions of "pre-pubescent" children. In addition, S. 2520 does not contain an explicit directive to use the harsher sentencing guidelines associated with child pornography. This is needed to ensure that the courts will not view these as subject to the more lenient guidelines applicable to "obscenity" generally. Moreover, as a technical matter, S. 2520's inclusion of the obscenity provision in a definition in the child pornography statute makes that statute somewhat complicated; it necessitates, for example, an explicit exception carving out "obscene" materials from the affirmative defense contained in that statute. It also conceivably could raise a question as to whether S. 2520 intends to create two separate offenses that can both be charged with respect to the same set of materials, *i.e.*, can the Government charge *two* violations of the same exact child pornography statute using two distinct definitions of "child pornography." Enacting an entirely separate obscenity provision, as in H.R. 4623, is cleaner and

more straightforward.

Second, both bills contain a second provision that would regulate a narrowly defined class of materials as proscribable obscenity *without* requiring, in every case, a case-by-case examination of all three of the elements of the *Miller* test for obscenity.

Section 5 of H.R. 4623 would add a new section 1466A to title 18. Proposed § 1466A would create a new obscenity offense that would generally prohibit the production, distribution, or possession of visual depictions of *pre-pubescent* children engaging in sexually explicit conduct, whether real or virtual. An individualized assessment of the *Miller* factors would not be required in every case. The penalties imposed on this subset of obscene materials would be the same as those for proposed § 1466B, discussed above.

By creating a new provision that more narrowly focuses on pre-pubescent materials, proposed § 1466A takes into account the fact that the *Free Speech Coalition* Court relied entirely on *post-pubescent* materials in finding that the prior law was substantially overbroad. Moreover, the Court specifically noted in its opinion that the age of the child depicted was an important consideration in determining whether a particular depiction was constitutionally unprotected obscenity: "Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not." 122 S. Ct. at 1396.

Congress may reasonably conclude that the very narrow class of materials covered by proposed § 1466A are the sort that would *invariably* satisfy the constitutional standards for obscenity set out in *Miller*, and that such materials therefore may be fully proscribed because they are constitutionally unprotected obscenity. The narrow class of images reached by proposed § 1466A are precisely the sort that appeal to the worst form of prurient interest, that are patently

offensive in light of any applicable community standards, and that lack serious literary, artistic, political, or scientific value in virtually any context. Once again, to the extent that there is any residual overbreadth, it is not substantial and may be satisfactorily addressed through case-by-case adjudication.

Section 4 of S. 2520 would enact a new § 2256(8)(D) that would effectively proscribe any depiction that is, or appears to be, a minor "actually engaging" in certain defined sexual activities and that "lacks serious literary, artistic, political, or scientific value." Thus, whereas the House bill would not require, in all cases, a case-by-case analysis of the *Miller* factors with respect to a narrowly defined class of "pre-pubescent" sexually explicit materials, the Senate bill would require a case-by-case analysis of only *one* of the *Miller* factors with respect to a somewhat more broadly defined class of materials that includes post-pubescent materials.

These approaches are, conceptually, not very far apart from one another. The most conservative approach would be to adopt the House bill's narrower definition of the subset of materials that would be subject to a "per se" obscenity approach and to combine it with the Senate bill's requirement of a case-by-case determination with respect to the third *Miller* factor, *i.e.*, whether the material lacks serious literary, artistic, political, or scientific value. On the other hand, it may seem unwarranted to require a jury to ask whether, for example, a graphic depiction of the sexual abuse of a five-year-old has "literary, artistic, political, or scientific value." On balance, we prefer the House version as it stands.

Notably, the obscenity provisions of both bills would extend their prohibitions to simple possession of the obscene materials at issue. We strongly endorse this feature of both H.R. 4623 and S. 2520. We do not believe that these provisions would be unconstitutional, notwithstanding

the Supreme Court's 1969 decision in *Stanley v. Georgia*, 394 U.S. 557 (1969), which held that a State could not constitutionally criminalize the simple possession of obscenity in the privacy of a person's residence. Several points are worth noting in this regard:

- In *Obsorne v. Ohio*, 495 U.S. 103 (1990), the Court held that *Stanley* does not apply to the possession of child pornography involving actual children, and the Court specifically cautioned that "*Stanley* should not be read too broadly." *Id.* at 108.
- The Court has explicitly rejected the contention "that [because] *Stanley* has firmly established the right to possess obscene material in the privacy of the home[, . . .] this creates a correlative right to receive it, transport it, or distribute it." *United States v. Orito*, 413 U.S. 139, 141 (1973). The lower courts have likewise extended the rationale of *Orito* to, in effect, cover "home receipt" situations under several federal obscenity and child pornography laws. *See, e.g.*, *United States v. Hurt*, 795 F.2d 765 (9th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987); *United States v. Kuennen*, 901 F.2d 103 (8th Cir.), *cert. denied*, 498 U.S. 958 (1990); *United States v. Hale*, 784 F.2d 1465 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986). Virtually all "possession" cases that would be prosecuted under the House and Senate bills will involve obscene materials that the defendant almost certainly received from someone else, and it makes little sense from a constitutional perspective to require the government to go through the mechanics of proving that the materials possessed by the defendant were unlawfully received.
- The possession prohibitions in the House and Senate bills are *not* premised "on

the desirability of controlling a person's private thoughts." *Stanley*, 394 U.S. at 566. Instead, they are premised on the Government's substantial and legitimate interest in preventing such obscenity from "entering the stream of commerce" in the first instance, *see Orito*, 413 U.S. at 143. The vast majority of the materials in question are computer-generated images that are easily susceptible of being transmitted by possessors over interactive computer networks to others seeking the same sorts of images. This fundamentally distinguishes a possession case under the proposed bills from *Stanley*.

- Recent evidence establishing a significant causal link between possession of child pornography and molestation (or other sex crimes) also provides an additional basis for the prohibition on possession of such obscene materials.

In addition to these various provisions aimed at remedying the Supreme Court's invalidation of the virtual child pornography prohibition in 18 U.S.C. § 2256(8)(B), both H.R. 4623 and S. 2520 contain new provisions designed to replace the "pandering" provision (18 U.S.C. § 2256(8)(D)) that was also struck down by the Court.

Section 3 of H.R. 4623 creates a new "pandering" provision that avoids the problems of the prior law. The Court sharply criticized the fact that prior law criminalized *materials* based on how they were marketed. Section 3, by contrast, would regulate the *marketing* itself by enacting a comprehensive prohibition on any offer to sell or buy "real" child pornography, *without* having to prove that any material was ever produced. This section presents no constitutional difficulty. There is no constitutional limitation on the ability of the legislature to establish inchoate offenses (attempt, conspiracy, solicitation, etc.) respecting conduct that is aimed at unlawful transactions.

For example, offering to provide or sell illegal drugs can be criminalized, even where the offeror does not actually have such drugs in hand.

Section 2 of S. 2520 would likewise enact a new prohibition on the advertising or promotion of any material "in a manner that conveys the impression that the material is, or contains, an obscene visual depiction of a minor engaging in sexually explicit conduct." This provision is, in our view, too narrow. There is no reason why a prohibition on pandering needs to be limited to "obscene" materials. Just as it is permissible to make it illegal to offer to sell drugs, even though the drugs are not in hand, so too the Congress can prohibit offers to buy or sell real child pornography, even if such materials are not in hand. Moreover, requiring that the Government show that the defendant has "convey[ed] the impression that the material is . . . obscene" could be construed to require the Government to prove that the recipient developed a belief with respect to each of the three prongs of the *Miller* test. There is no reason to impose such a potentially onerous proof requirement. In addition, section 2 of S. 2520 would treat as illegal "pandering" the act of "describing" any material as child pornography. The literal breadth of this prohibition undoubtedly exceeds what is intended (it would literally forbid, for example, a verbal description of the materials at issue in a child pornography prosecution). To avoid constitutional difficulties, the word "describes" should be deleted. Moreover, section 2's coverage of would-be receivers of child pornography – as opposed to purveyors – is unclear. Because the "conveys the impression" clause of section 2 seems to presume knowledge of the contents of a particular visual depiction, this phrasing does not fit recipients as comfortably as it does purveyors. For all of this reasons, we favor the provision in section 3 of H.R. 4623.

Both bills also contain provisions aimed at prohibiting the use of sexually explicit

materials to facilitate offenses against minors. Section 6 of H.R. 4623 would criminalize the knowing use of, *inter alia*, obscenity, child pornography, or "indistinguishable" virtual pre-pubescent pornography in connection with the commission of certain specified offenses against minors. Section 6 of H.R. 4623 would also enact a straightfoward prohibition on showing any such materials to children. In turn, section 2 of S. 2520 would prohibit the use of child pornography or virtual child pornography "for purposes of inducing or persuading [a] minor to participate in any activity that is illegal." We believe that the more expansive provisions in the House bill are preferable.

The remaining sections of H.R. 4623 and S. 2520 would make a number of other important changes to strengthen the law in this vital area. Both bills contain provisions to strengthen penalties for repeat offenders. Both bills provide for strengthening and clarifying the existing reporting requirements applicable to internet service providers. Both bills would strengthen the extraterritorial application of child pornography laws.

S. 2520 contains a number of additional provisions not found in the House bill. Among these are a requirement that a defendant provide advance notice of his intention to assert an affirmative defense under the child pornography laws, and civil remedies for victims of child pornography. We support inclusion of these two provisions in any legislation on this subject. We note, however, that section 2 of S. 2520, as currently drafted, provides that, if a defendant fails to comply with the requirement to provide advance notice of an affirmative defense, the court should generally prohibit "the defendant *from asserting a defense*." We assume that the breadth of this phrasing, which would raise serious constitutional concerns, is unintentional and that what is intended is that the defendant would be precluded from asserting "such a defense."

We are sympathetic to the aims of section 5 of S. 2520, which would amend the existing statute relating to recordkeeping requirements for the production of visual depictions of actual sexually explicit conduct. Section 5 would amend this provision so that it would extend to "computer generated image[s]". We believe that this provision needs more careful study. It may be more appropriate to craft a more tailored recordkeeping provision that would specifically apply to computer generated materials. Simply amending 18 U.S.C. § 2257 so that is applies to computer generated images creates some degree of ambiguity. For example, it is not at all clear what is meant by a "computer generated image" of "*actual* sexually explicit conduct"; arguably, this is a contradiction in terms. Moreover, section 5 of S. 2520 would only insert "computer generated image" in one subsection of the statute without making other conforming changes that would seemingly be required in other subsections. We would we happy to work with the Committee in attempting to craft a more suitable recordkeeping requirement. We do, however, support section 5(1)'s elimination of current law's unjustifiable limitation of the use of § 2257 records in criminal prosecutions. We would also suggest that it would be appropriate to make a technical change to section 2257(f)(4), by changing "produce" to "produced".

We do not support section 3 of S. 2520, which would make inadmissible "the name, address, or other identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography." As literally drafted, this provision could preclude the admission of evidence necessary to prove that a particular item of child pornography was in fact produced using a real child. We believe that the privacy protection provisions of 18 U.S.C. § 3509(d), together with the discretion afforded to district judges under the Federal Rules of Evidence, should be sufficient to address any concerns in this area.

We also do not support sections 12(a) or 12(b) of S. 2520. While we are certainly sympathetic to section 12(a)'s requirement that additional attorneys be appointed to prosecute child pornography cases, S. 2520 would provide no funding for that purpose. Section 12(b) would impose detailed reporting requirements that would divert resources that could be better spent on prosecuting child pornography cases.

We are not opposed to section 12(c), which would require the Sentencing Commission to promulgate guidelines with respect to certain of the amendments made by S. 2520.

I would be pleased to answer any questions the Committee might have on this subject.

STATEMENT OF PROFESSOR ANNE M. COUGHLIN
REGARDING THE REGULATION OF CHILD PORNOGRAPHY

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
OCTOBER 2, 2002

My name is Anne M. Coughlin, and I am the Class of 1948 Research Professor of Law at the University of Virginia School of Law. Before joining the law faculty at the University of Virginia, I was an Associate Professor of Law at Vanderbilt University Law School. I also practiced at private law firms in New York, New York and Washington, D.C., and I served as law clerk to the Honorable Jon O. Newman of the United States Court of Appeals for the Second Circuit and to the Honorable Lewis F. Powell of the United States Supreme Court. My areas of substantive expertise are Criminal Law and Criminal Procedure, including especially the jurisprudence developed under the Fourth, Fifth, and Sixth Amendments to the United States Constitution. I also do research and teach courses on Sex Discrimination and on Feminist Legal Theory, which evaluates, among other things, the laws aimed at eradicating sexual violence in our culture. I am co-author of a Criminal Law casebook, and I have published law review articles on the topics of domestic violence, the historical origins of contemporary rape doctrine, and the regulation of pornography.

When debating the provisions of S. 2520, the Prosecutorial Remedies and Tools Against the Exploitation of Children Today ("PROTECT") Act of 2002, the Committee faces a difficult and sensitive task. It must design a prosecutorial mechanism that balances two significant and potentially conflicting legal imperatives. As I understand it, the Committee aims to develop a penal statute that (1) will protect the nation's children from the serious harms caused by child pornography, but that (2) will not infringe our cherished constitutional liberty to think and speak free of governmental interference, including the right to think and speak about human sexuality. Up until the closing decade of this century, federal and state governments have been, for the most part, able to accommodate each of these imperatives by criminalizing only those pornographic materials that are produced by using real children, as well as (of course) by continuing to outlaw all pornographic materials that are legally obscene. These familiar criminal prohibitions have been scrutinized by the Supreme Court and have been found to be fully consistent with the First Amendment free speech guarantees. See New York v. Ferber, 458 U.S. 747 (1982) (upholding the prohibition of pornographic, but non-obscene, materials produced by using real children), and Miller v. California, 413 U.S. 15 (1973) (defining as obscene those works that, taken as a whole, appeal to the prurient

interest, are patently offensive in light of community standards, and lack serious literary, artistic, political, or scientific value).

With the emergence of new technologies capable of producing "virtual" child pornography, however, prosecutors have found themselves facing significant obstacles to winning just convictions in child pornography cases. In 1996, Congress recognized and aimed to ease this law-enforcement burden by passing the Child Pornography Prevention Act ("CPPA"), which added some forms of virtual child pornography to the list of actionable images. Earlier this year, in Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389 (April 16, 2002), the Supreme Court threw out key provisions of the CPPA on the ground that they infringed First Amendment freedoms. Therefore, this Committee finds itself back at the statute-drawing board, once again faced with the obligation and the opportunity to develop criminal prohibitions that will deter and punish those who sexually abuse children, but without infringing the free-speech rights of adults.

In *Free Speech Coalition*, the Supreme Court invalidated two specific prohibitions embodied in the CPPA. First, the Court rejected § 2256(8)(B), which criminalized a visual depiction that "is, or appears to be, of a minor engaging in sexually explicit conduct." Second, the Court disapproved § 2256(8)(D), the so-called "pandering" prohibition, which criminalized a visual depiction that is marketed in a manner that "conveys the impression" that the material depicts a minor engaging in sexually explicit conduct. The Court determined that each of these prohibitions was substantially overbroad. In particular, the Court concluded that the prohibitions covered materials (1) that were not regulable under *Ferber* because they were not the product of child abuse -- as the Court put it, images were criminalized even though they "record[ed] no crime and creat[ed] no victims by [their] production" -- *and* (2) that were protected by *Miller* because they were of serious literary, artistic, scientific, or other value. As such, these provisions of the CPPA went far beyond the boundaries established by the Court's First Amendment cases, and the Court refused to sustain them.

So far, Congress has responded to the decision in *Free Speech Coalition* by offering two pieces of proposed legislation, S.R. 2520 (the PROTECT bill) and H.R. 4623 (the House bill). Each of these bills represents a judgment that *Free Speech Coalition* permits some room for regulation of virtual child pornography, a judgment that I think is substantially correct. As is so often the case, moreover, each bill embodies a different response to the Supreme Court's criticisms, and each therefore proposes different methods for revising the objectionable provisions of the CPPA. As I amplify below and will do further in my oral testimony before the Committee, I believe that the PROTECT bill is a nuanced and responsible law-enforcement measure. The drafters of the bill have continued to search for legitimate solutions to problems that may hamper federal prosecutors in their effort to shut down the child porn business, and, at the same time, the drafters have made a conscientious and good faith effort to respond directly to the specific First Amendment concerns identified

by the Supreme Court in *Free Speech Coalition*. While it is difficult to offer accurate predictions in this sensitive area -- certainly, guarantees are impossible -- it is likely that, perhaps with some reworking, the PROTECT bill would survive constitutional scrutiny, and it therefore would be available to provide vital assistance to law-enforcement efforts in this area.

By contrast, the House bill seems to be both too broad and too narrow. A key definition contained in the House bill suffers from precisely the same form of overbreadth that killed the CPPA. Indeed, the House bill seems designed to reenact the very definition of child pornography that the Supreme Court so recently struck down on First Amendment grounds. Even more curiously, the House bill incorporates an affirmative defense that exempts from prosecution forms of child pornography that the government should be very interested in regulating and that the government seems likely to be allowed to regulate consistently with the constitutional strictures imposed by the reasoning in *Free Speech Coalition*.

As I see it, the proliferation of virtual child pornography gives rise to two potential arguments by defense counsel that might *unjustly* thwart prosecution of those who manufacture, distribute, and possess child porn. I describe these potential defense claims as *unjust* not to fault defense lawyers for raising them, nor to discredit the notion that defense counsel should do their utmost to protect the interests of clients accused of violating any criminal prohibition, including the prohibition on child pornography. As the Supreme Court emphasized in *Free Speech Coalition*, we must jealously guard against governmental infringement of First Amendment freedoms, and defense lawyers always have played and must continue to play an important role in upholding these and other constitutional rights. Rather, I aim here to isolate a class of cases in which the proliferation of virtual child porn is going to make it very difficult, maybe even impossible, for prosecutors to secure convictions that are legally justified and that should be constitutionally permissible.

The two potential defense arguments are the following. First, the defendant might argue that the government could not prove that the child pornography was made using real children, as opposed to virtual ones. As I read the legislative record, there is evidence that defendants have started making this argument, and advances in technology have made it very difficult for prosecutors to negate the claim. The material contains graphic sexually explicit images of real minors, but the prosecution cannot prove beyond a reasonable doubt that real minors were involved. There is a second defense theory that I have not seen mentioned in any materials I have reviewed, but it is one that I expect defense lawyers will start making very soon, if they have not done so already. Under this theory, the defendant's claim will be that he did not possess the guilty knowledge required for conviction because he thought that the images had been produced using virtual children, rather than real ones. Notice how this claim works in tandem with the first one, and notice how plausible this claim appears to be in a world where virtual child pornography (apparently) is increasingly common and is

(according to federal prosecutors themselves) almost impossible to distinguish from the "real" thing.

The PROTECT bill provides a mechanism for short-circuiting these claims, and, if carefully drafted, the mechanism is one that can be calibrated to satisfy the Supreme Court's analysis in *Free Speech Coalition* and thereby accommodate First Amendment rights. In effect, the PROTECT bill enacts a new congressional definition of illegal child pornography. Under this new definition, illegal child pornography would be defined to include not only those sexually-explicit materials that are made with real children, which is the definition that *Ferber* expressly allows. Rather, the definition of illegal child pornography would be expanded so that it also includes materials (1) that "appear" to depict minors engaged in sexual activity *and* (2) that "lack[] serious literary, artistic, political, or scientific value." The Committee should expressly notice that it is on the verge of endorsing a new, somewhat expanded, definition of child pornography. The Committee should evaluate the merits and wording of this new definition. And the Committee must consider carefully whether the new definition is one that is authorized, albeit implicitly, by the *Miller* standard as modified for the child-pornography context by the reasoning of *Free Speech Coalition*.

There is no doubt that this new, more expansive definition of child pornography will be challenged in the federal courts. Likewise, there is no doubt that the courts will carefully evaluate such challenges precisely because the PROTECT definition does not track the Supreme Court's holdings in the *Ferber* and *Miller* cases. At the same time, there is no doubt that the Supreme Court has been willing to allow governmental regulation of child pornography that is more stringent than the prohibitions authorized under the *Miller* obscenity standard. As I suggest above, it is plausible to read *Free Speech Coalition* as offering a modification of the *Miller* standard, one that is designed for the child porn context and that is sensitive to the specific law-enforcement problems created by the phenomenon of virtual child pornography.

I am much less sanguine about the prospects for the House bill. Indeed, it is difficult to understand how the House bill could be interpreted as an effort to correct the defects in the CPPA that were identified in *Free Speech Coalition*. Instead, the House bill seems to embody a decision merely to reenact the CPPA all over again. Thus, the House bill offers to define child pornography as encompassing virtual child porn that is "indistinguishable" from porn produced by using actual minors. Of course, this definition was considered and expressly rejected in *Free Speech Coalition*. In his opinion for the Court in that case, Justice Kennedy heavily criticized the CPPA for banning sexually explicit materials that "appear to depict" minors because, among other things, such materials often possess literary or other significant value. Along the way, Justice Kennedy noticed that the government sought to remedy this defect in the CPPA by arguing that the prohibited speech was "virtually indistinguishable" from the child porn that the government is free to regulate, and he disapproved this proposed understanding of the statute. Nonetheless, the House bill

continues to offer this precise definition as the basis for its prohibitions but without any explanation for why this definition would be greeted by the Court as an improvement over the definition it just rejected in *Free Speech Coalition* on overbreadth grounds.

Even more strange, the House bill proposes to put in place an affirmative defense that could be read to authorize child pornographers who produce and peddle materials that possess no redeeming social value to escape prosecution on the ground that the materials were made without using an actual minor. This proposed affirmative defense is so broad that it might offer a loophole to those who create and sell virtual child pornography that is obscene under the *Miller* definition. Under the definition of child pornography that would be put in place by the PROTECT bill, however, the affirmative defense would not sweep nearly so broadly. Rather, the affirmative defense included in the PROTECT bill would not be available in cases where the sexually explicit materials either (1) were obscene within the meaning of *Miller* or (2) constituted illegal child pornography under the new definition derived from *Free Speech Coalition*. And, as I explained above, it is plausible and, in my judgment, correct to conclude that no affirmative defense should be extended to those cases because they involve materials falling outside the scope of the First Amendment protections.

As was the case with the CPPA, both the PROTECT bill and the House bill are based on empirical findings and deep societal beliefs about the harms that sexually explicit materials inflict on children in our culture. The legislative record contains ample evidence concerning those harms, and I here want only to comment briefly on the rhetoric we use to capture the nature of those harms. The legislative record and the decision in *Free Speech Coalition* use various terms to identify the harms, including phrases condemning the "sexual abuse" of children, the "sexual exploitation" of children, the "sexual enticement" or "seduction" of children. This nomenclature -- abuse, exploitation, enticement, seduction -- is sensible and balanced, but it does not fully capture the core harm to children that the criminal law here aims to deter and punish. The harm involved in many of these cases is not merely sexual exploitation or seduction or (even) abuse. Rather, the harm is *rape*. For many years, the criminal law of every state has defined sex with a child under the age of consent to be a form of rape. (Sex with a minor is rape -- period -- full stop.) To put it bluntly, as our criminal law previously has been inclined to do, the people who use children to make pornographic movies are arranging for children to be raped so that they can record those rapes and then sell the rape recordings to other people. Likewise, the people who use pornographic images to convince children to have sex with them are raping those children. I realize that the fashion these days has been to move towards more neutral rhetoric when describing the sexual activity of children, including especially adolescent sexual activity. Nonetheless, with the category of materials and behaviors at issue here, it seems crucial to recall that the harm we are describing is rape and, emphatically, not seduction.

To be sure, the Supreme Court's *Free Speech Coalition* decision rejected the notion that virtual child pornography may be banned on the basis of the second kind of harm to

which I just alluded. According to the Court's analysis, the criminalization of pornography is not justified based on claims about secondary harms -- no matter how painful -- such as the role pornography plays in inducing children to have sexual intercourse with adults or in feeding pedophiliac desires and behaviors. But *Free Speech Coalition* creates no obstacle to legislation that targets those painful, if secondary, harms directly, and the PROTECT bill contains several provisions that do just that. Thus, the bill would extend victim shield protections to children who are depicted in child pornography. These protections are analogous to some of the privacy protections that our criminal law and rules of evidence currently extend to the victims of rape, and they are an appropriate, even necessary, part of the law enforcement response to child victims of the crimes punished by this legislation. The PROTECT bill also takes aim at another secondary harm caused by child porn, namely, its use to persuade children that it is acceptable for them to engage in the sexual activities that the porn depicts. In a new provision, the PROTECT bill recognizes that the perpetrators of this particular harm should be stigmatized and punished; hence, the bill proposes to make it a crime to provide minors with child pornography. The bill also would make available a private cause of action to the victims of child pornography. Whatever their merits and potential justifications in other areas, private remedies seem especially appropriate, even necessary, in a context such as this one where injuries are inflicted for the very purpose of creating commodities that profit perpetrator of the harm. Certainly, to the extent that pornographers are making money by the criminal harms they inflict, we should not hesitate to allow victims the right to obtain monetary damages in our civil courts.

NEWS RELEASE

ORRIN HATCH

United States Senator for Utah

October 2, 2002 Contact: Margarita Tapia, 202/224-5225

Statement of Senator Orrin G. Hatch
Ranking Republican Member
Before the United States Senate Committee on the Judiciary
Hearing on

S. 2520, The PROTECT Act of 2002

Mr. Chairman, thank you for holding a hearing on this critically important piece of legislation. I have worked for years to protect our nation's greatest resource – its children. I am pleased to report that my efforts have always enjoyed strong bipartisan support. The protection of our children, of course, matters immensely to those of us on both sides of the aisle. And I thank you especially, Mr. Chairman, for cosponsoring our most recent efforts in this area – the PROTECT Act of 2002.

I do not think it overstates the matter to say that child pornography represents one of the greatest dangers to the young and most vulnerable members of our society. Society has benefitted greatly from the technological advances of the last decade. However, an unfortunate byproduct of the growth of technology and the rise of the internet in our country has been the proliferation of smut involving children. Child pornography is itself repulsive, but even more damaging and more concerning are the purposes for which it routinely is used. Perverts and pedophiles not only use this smut to whet their sick desires, but also to lure our defenseless children into unspeakable acts of sexual exploitation. In sum, child pornography is a root from which more evils grow. It creates a measurable harm in our society. On this record, I am absolutely convinced that Congress must act – and act decisively.

Mr. Chairman, I am a staunch defender of the First Amendment. Everyone not only has a right to his or her opinion, but also a right to talk about it. We justifiably should be proud that the United States leads the world in fostering tolerance for the free exchange of ideas – particularly where political views are discussed. But there is no place for child pornography even in our free society. I believe that the overwhelming majority of Americans stand shoulder-to-shoulder with me on this issue. For this reason, I have long championed legislation designed to punish those who produce, peddle or possess this reprehensible material. As I stated in introducing the Child Pornography Prevention Act of 1996 – the "CPPA" – we have both the constitutional right and the moral obligation to protect our children from the horrors of child pornography.

I remain fully committed to these principles today. Earlier this year, a majority of the Supreme Court struck down some provisions of the CPPA under the First Amendment. Let me make clear that I respect the Supreme Court's role in interpreting the Constitution. But that decision left some gaping holes in our nation's ability to effectively prosecute child pornography. The PROTECT Act is designed to patch these holes in a way that permits effective prosecutions in a manner that does not offend the Constitution.

We can all agree that the government has a compelling interest in protecting children, policing pedophiles, and enforcing our child pornography laws. The PROTECT Act does many things to aid these efforts. Let me briefly summarize some of its most important provisions.

First, the Act plugs the loophole that exists today after the Supreme Court's ruling in *Ashcroft v. Free Speech Coalition*. In the wake of that decision, child pornographers can effectively escape prosecution by claiming that their sexually explicit material did not actually involve real children. Technology has advanced so far that even experts often cannot say with absolute certainty that an image is real or a "virtual" computer creation. If our criminal system fails to take account of such advances in technology that utterly thwart our ability to enforce important protections, then they become worthless. For this reason, the PROTECT Act permits a prosecution to proceed when the child pornography includes persons that appear virtually indistinguishable from actual minors. And when this occurs, the accused is afforded a complete affirmative defense by showing that the child pornography did not involve a minor.

Second, the Act prohibits the pandering or solicitation of anything represented to be obscene child pornography. The Supreme Court has ruled that this type of conduct does not constitute protected speech. Congress, moreover, should severely punish those who would try to perpetuate the market for such filth.

Third, the Act prohibits any depictions of minors, or apparent minors, in actual – *not* simulated – acts of bestiality, sadistic or masochistic abuse, or sexual intercourse, when such depictions lack literary, artistic, political or scientific value. This type of hardcore sexually explicit material merits our highest form of disdain and disgust and is something that our society ought to try hard to eradicate. I am convinced that the First Amendment does not bar us from banning the depictions of children actually engaging in the most explicit and disturbing forms of sexual activity, and we certainly have worked hard to draft the PROTECT Act in a manner that is consistent with the Supreme Court's rulings in this area.

Fourth, the Act beefs up existing record keeping requirements for those who chose to produce sexually explicit materials. These record keeping requirements are unobjectionable since they do not ban anything. Rather, the Act simply requires such producers to keep records confirming that no actual minors were involved in the making of the sexually explicit materials. In light of the difficulty experts face in determining an actor's true age and identity just by viewing the material itself, increasing the criminal penalties for failing to maintain these records are vital to ensuring that only adults appear in such productions.

Fifth, the Act creates a new civil action for those aggrieved by the depraved acts of those

who violate our child pornography laws. This is one area of the law where society as a whole can benefit from more vigorous enforcement, both on the criminal and civil fronts.

And finally, the PROTECT Act directs the Attorney General to appoint 25 more trial attorneys who are dedicated to the enforcement of federal child pornography laws. I think Congress needs to send a clear, unequivocal message to those child-smut peddlers who continually evade our laws and shared notions of decency: You are in our cross-hairs and your depravity will no longer go unchecked.

Mr. Chairman, I would like to speak for a few moments on two provisions of the PROTECT Act that have raised in at least some minds the specter of constitutional concern. The first is the affirmative defense. We all know that the central problem posed by technology is the inability to distinguish with certainty whether an item of child pornography actually involved real children. By creating an affirmative defense that allows anyone to escape prosecution by showing that the child pornography in fact did not involve real children, the PROTECT Act strikes a sensible and appropriate balance between the right of the government to police child pornography and the right of the person to own pornography that the Supreme Court has deemed to be protected. It is settled law that Congress can define the elements of the offense. Much like other affirmative defenses that exist in law – such as insanity and self-defense – this provision places the burden of proof on the party that is in the best position to gather the pertinent facts. On this score, the person who creates or receives child pornography is certainly in a better position to ascertain whether or not the child depicted is real – and to keep only those items that do not involve actual children – than a prosecutor who discovers these items at the end of the day and has no idea where they originally came from.

The second provision I want to talk about is the PROTECT Act's flat prohibition on hard-core depictions of real or apparent children engaged in the most perverse forms of sexual conduct. The Supreme Court ruled more than 50 years ago that there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem" including "the lewd and obscene." The Court explained that "such utterances are ***no essential part of any exposition of ideas***, and are ***of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality***."

This seems to me exactly what we are doing by placing a categorical ban on sexually explicit depictions of minors or apparent minors who are actually engaged in the ***most hard-core*** forms of depravity: bestiality, sadistic or masochistic abuse, and sexual intercourse. The Supreme Court said as much in the case of *New York v. Ferber*: ***"the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimus***." The Court further said – as should be obvious to all of us – that it was ***unlikely*** "that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work."

The PROTECT Act is certainly far removed from placing any sort of restraint on a person

who wants to stand on a soapbox or set up a internet web site to talk about Iraq, the death tax or his local school board. And even with these, the most extreme forms of lewd material, the PROTECT Act ensures that they are still protected if they contain any serious literary, artistic, political, or scientific value.

Mr. Chairman, I look forward to hearing from the distinguished witnesses who appear before the Committee today. But before we begin, I want to note the hearings that were held on this issue in June 1996 when I was Chairman. The information that we gathered during those hearings are still relevant today. We certainly have not forgotten all that we learned back then about the problems of child pornography, and for that reason, I view this hearing as a supplemental one. Mr. Chairman, I would ask that the complete record of those hearings be placed into this record so that all who look at what we do with the PROTECT Act today fully understand and appreciate how closely and carefully we have been studying this issue for years now.

I hope that this hearing can help us to more fully understand how the technology used by those who produce, peddle and possess child pornography has evolved in the past 6 years, and to predict how it will become even more sophisticated in the future. Technology moves by leaps and bounds, often in a very short span of time. Obviously, these technological advancements impact our ability to prosecute cases and enforce our laws. I am extremely concerned that law enforcement efforts to stem the flood of child pornography have been severely hampered – and that this problem will only get worse. Unlike the swift and relentless growth of technology, we all know that legislation may take months or years to be drafted, much less to be passed into law. So Congress may need to be proactive when it senses that a problem is imminent. On this issue, I want to be crystal clear: Just as we cannot wait for a war before building an army, Congress simply cannot wait for the problem to walk onto the floor of the Senate before we act to stem the damage.

Looking into the audience, I am pleased to see some familiar persons and institutions. I am pleased to hear testimony, once again, on the problem of child pornography from the Department of Justice. I learned quite a bit from Mr. Kevin Di Gregory in 1996, and I look forward to being similarly enlightened by Mr. Dan Collins today. Professor Fred Schauer, a distinguished academic from Harvard who has spent much of his career studying the problems of pornography, also came before the Committee in 1996 to testify on the CPPA. I am delighted to have his counsel again here today. I also welcome the National Center for Missing and Exploited Children, an organization that is absolutely committed to our nation's children. Let me extend my personal thanks to you for all the important work you and your fantastic organization do in this area. And last but certainly not least, I am pleased to welcome a newcomer to this debate, Professor Anne Coughlin from the University of Virginia Law School. Welcome aboard. I am eager to hear your thoughts on this issue.

Mr. Chairman, thank you again for holding this hearing on the PROTECT Act. I appreciate your leadership and your support on this most important issue.

# # # #

Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders

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Introduction

With the explosion of the Internet as a medium of communication and commerce, there has been an increasing number of individuals using cyberspace to commit sexual crimes in recent years. These crimes include downloading, trading, and distributing child pornography, as well as luring children via the Internet for the purpose of sexual abuse and exploitation. Until recently, the Internet has been largely unregulated and unmonitored by law enforcement. This has enabled many individuals to access cyberspace for various illicit purposes with perceived anonymity.

Child pornography, relatively unavailable to many individuals until recently, is now readily available through the Internet. Individuals accessing child pornography typically do so through electronic communications in chat rooms and bulletin boards. They collect and trade child pornography with other individuals with similar interests. They may amass collections of several thousand images depicting children in sexually explicit poses or in the act of being sexually abused by adults. These offenders target children in cyberspace in a similar manner as offenders who prey on children in their neighborhood or nearby park. They seek vulnerable children, gradually groom them, and eventually contact them to perpetrate sexual abuse.

As more Internet sex offenders are adjudicated in federal courts, arguments are raised by prosecutors, defense attorneys, law enforcement personnel, and mental health professionals about the nature of this criminal activity, the typology of this offender population, and the risk posed to the community. In the prosecution of these offenders, some attorneys have argued that the Internet, with its apparent anonymity and easy access to sexually explicit materials (including child pornography), is the culprit of the aforementioned criminal activity. They have argued that

without the availability of child pornography on the Internet, these individuals would not engage in criminal behavior. They blame those who produce child pornography and then distribute the materials via the Internet for their clients' criminal behavior. Others have argued that the Internet has simply given many of these individuals (i.e., child pornographers) more access to already existing or established patterns of behavior and sexual interest (e.g., pedophilia). They suggest that the Internet has merely given those with pedophilic interest and behavior access to a medium of communication that facilitates sexual predation, but does not cause it. Still, others have suggested that child pornographers are not sex offenders at all, and that downloading an image containing child pornography does not make a person a sex offender or a pedophile.

While these arguments require considerable more debate, they also should be subject to empirical analysis. The following study attempts to understand this largely misunderstood criminal population by presenting data obtained in the course of treatment of inmates who volunteered to participate in the Sex Offender Treatment Program at the Federal Correctional Institution in Butner, NC. The primary objective of this exploratory study was to examine the incidence of sexual offending involving contact crimes (e.g., child sexual abuse, rape) of program participants, including those inmates convicted of non-contact sexual offenses (e.g., possession of child pornography).

Method

Overview of the treatment program

The Sex Offender Treatment Program (SOTP) was established in 1990 at the Federal Correctional Institution in Butner, North Carolina. It is an intensive, residential therapeutic program for male sexual offenders in the Federal Bureau of Prisons. The program is voluntary; participants do not receive special privileges and are not eligible for a sentence reduction. The program is housed within the general population of a medium security correctional institution. It employs a wide range of cognitive-behavioral and relapse prevention techniques to treat and manage sexual offenders. This prison-based program is probably the only treatment program for sex offenders in which the majority of the participants are Internet sex offenders.

Data Collection

The data in the present study were obtained from a review of the clinical charts of former and current participants of the SOTP. The raters in this study were comprised of SOTP staff members and pre-doctoral psychology interns.

There were two variables examined in this study. The first was the number of contact sexual crimes the subject was known to have committed prior to entering treatment. This information was extracted from the Presentence Investigation (PSI) Report, a formal court document prepared by the United States Probation Office. The criteria for scoring a contact sexual crime on the PSI were prior convictions or arrests for, and/or self-reported offenses involving any type of sexual assault or molestation of an adult or child. The second variable was the number of self-reported contact sexual crimes divulged over the course of evaluation and treatment in the SOTP. This information was extracted from the subject's discharge report. This document summarizes the offender's self-reported sexual history and list of victims. To appease subjects' concerns

regarding self-incrimination in divulging unreported or undetected sexual crimes during the course of treatment, they had the option of referring to their victims by first name or with a number (e.g., victim 1).

Subjects

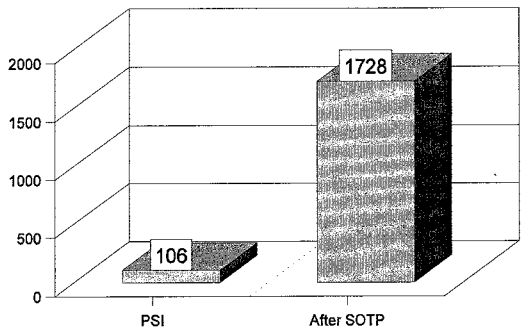
The subjects were 90 incarcerated males, ranging from 23 to 66 years of age, who volunteered to participate in the Federal Bureau of Prisons' SOTP. The racial/ethnic background of these offenders was 79% Caucasian, 19% American Indian, and 2% African-American. There were no Hispanics or Asians in the sample. Subjects were classified according to their instant offense and placed in one of three groups of criminal offense clusters.

1. Child Pornographer/Traveler (N= 62). These crimes involve the production, distribution, receipt, and possession of child pornography and crimes involving luring a child and traveling across state lines to sexually abuse a child.
2. Contact Sex Offender (N= 24). These crimes involve the sexual molestation, abuse, or assault of a child or adult.
3. Other (N= 4). These federal crimes are non-sexual offenses such as, bank robbery, mail fraud, or drug trafficking. All subjects except one did not have a history of sexual crimes for which they were previously adjudicated in state jurisdictions.

Results

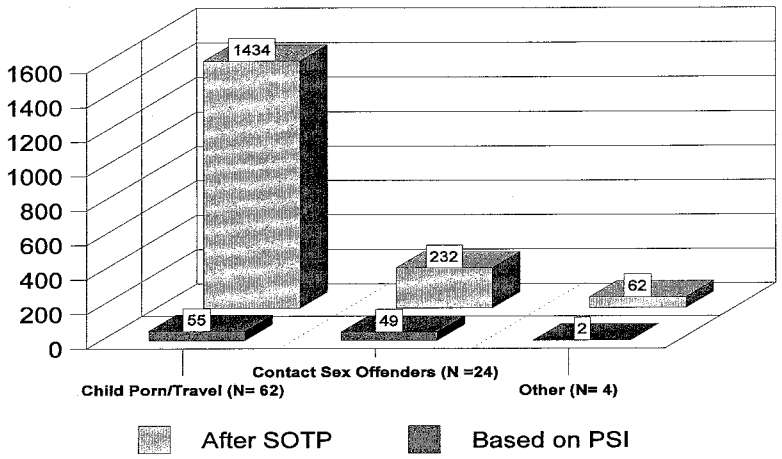
The review of clinical charts revealed that subjects in all three groups disclosed additional sexual crimes over the course of their participation in the SOTP. Subjects in the Child Porn/Travel and Other groups revealed extensive histories involving contact sexual crimes, including rape of adults and sexual abuse of minors. The 90 subjects in the sample recorded a total of 106 contact sexual crimes before they entered the SOTP (based on their PSI). After participation in the SOTP, these subjects divulged an additional 1,622 sexual crimes for which they were never detected by the criminal justice system (see Figure 1).

Figure 1: Contact sexual crimes based on PSI and self-report after SOTP participation



Of the 62 subjects in the Child Porn/Travel group, 55 contact sexual crimes were documented on their PSI. After participation in the SOTP, these offenders admitted to an additional 1,379 contact sexual crimes for which they were never detected by or reported to the criminal justice system. Of the 24 subjects in the Contact Sex Offender group, 49 contact sexual crimes were documented on their PSI. After participation in the SOTP, these subjects admitted to committing an additional 183 contact sexual crimes for which they were never detected. Of the four subjects in the Other group, two contact sexual crimes were documented on their PSI. After participation in the SOTP, these subjects admitted to committing an additional 60 contact sexual crimes for which they were never detected (see Figure 2).

Figure 2: Contact sexual crimes based on PSI and self-report after SOTP participation by criminal category



The increase in self-reported contact sexual crimes increased significantly in all three subject groups. The Child Porn/Travel group had an average of 0.89 victims per offender on the PSI, and 23.65 after participation in the Program. The Contact Sex Offender group had an average of 2.04 victims per offender on the PSI, and 9.6 after participation in the Program. Likewise, the Other group had an average of 0.5 victims per offender based on the PSI, and 15.5 after participation in the Program (see Table 1).

Table 1: The average number of contact sexual crimes for each subject group

	Child Porn/Travel (N=62)	Contact Sex Offender (N=24)	Other (N=4)
Average contact sex crimes based on PSI	0.89	2.04	0.5
Average contact sex crimes after SOTP	23.65	9.6	15.5
Range of self-reported contact sex crimes	0 to 202	1 to 40	0 to 25

Of the 62 subjects in the Child Porn/Travel group, 36 subjects had no documented history of contact sexual crimes based on the PSI. Of the 36 subjects in the Child Porn/Travel group with no prior history of contact sexual crimes based on their PSI, 15 (42%) subjects divulged no additional contact sexual crimes. If these 15 subjects are excluded from the calculations of average victims per offender, the subjects in the Child Porn/Travel group have an average of 30.5 victims per offender, rather than the 23.65 reported in the table above.

Of the 39 subjects in the Child Porn/Travel (36) and Other (3) groups who had no prior criminal history denoting a contact sexual crime, 24 subjects (62%), after participation in the SOTP, admitted to having committed 278 contact sexual crimes. These 24 subjects accounted for 19% of all of the sexual crimes committed by the Child Porn/Travel and Other subjects (see Table 2).

Table 2: Subjects without contact sexual crimes based on PSI who admitted to contact crimes

	Child Porn/Travel (N=36)	Contact Sex Offender (N=3)	Total (N=39)
Number of subjects in the group admitting to contact sexual crimes	21	3	24
Self-Reported contact sexual crimes after participation in SOTP	221	57	278

Discussion

The results of this study revealed findings consistent with other published studies on the incidence of sexual offending based on self-report (Abel, et al., 1987; Ahlmeyer, et al., 2000). While it is no surprise that sex offenders convicted of contact sexual crimes usually have committed more crimes than those for which they were apprehended, to date there has been no evidence to suggest that Internet sexual offenders (i.e., those in the Child Porn/Travel group)

engaged in sexual crimes other than the conduct for which they were convicted, particularly those involving physical/sexual contact with the victim. The results of the current investigation revealed that 76% of offenders convicted of crimes in the Child Porn/Travel category had contact sexual crimes. In fact, these offenders appear to have committed contact sexual offenses at higher rate (i.e., 30.5 victims per offender) than sex offenders convicted of contact sexual crimes (i.e., 9.6 victims per offender). There are some Internet sex offenders, however, whose PSI and self-report in the SOTP did not reveal any contact sexual crimes (25%).

These findings suggest that the majority of offenders convicted of Internet sexual crimes share similar behavioral characteristics as many child molesters. While these Internet sex offenders have unique patterns of sexual deviance, it appears that many can be equally predatory and dangerous as extra-familial child molesters. It is still unclear as to why some Internet sex offenders have had contact sexual crimes and others appear not to have had any. It may be that some offenders are simply denying past criminal behavior. Others may not have committed any contact sexual crimes because of lack of access to potential victims or poorly developed grooming and predatory skills. Future research should continue to examine this emerging and largely misunderstood criminal population.

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Written Testimony of the Internet Commerce Coalition ("ICC") and the U.S. Internet Service Providers Association ("USISPA")

Before the United States Senate Committee on the Judiciary

Stopping Child Pornography: Protecting our Children and the Constitution

October 2, 2002

TESTIMONY REGARDING INTERNET BLOCKING OBLIGATIONS

The Internet Commerce Coalition ("ICC") and the U.S. Internet Service Providers Association ("USISPA") appreciate the Chairman's invitation to submit written testimony for the record of this hearing regarding state requirements on Internet service providers to block Internet content.

The ICC is a coalition of leading Internet Service Providers ("ISPs"), e-commerce companies, and trade associations in the United States. Our members include AT&T, AOL Time Warner, BellSouth, CompTel, eBay, Internet Alliance, SBC Communications, Inc., Teleglobe, and Verizon. We work to promote policies that allow service providers, their customers, and other users to do business on the global Internet under reasonable rules governing liability and use of technology, and are concerned with maintaining and upgrading the reliability, security and robustness of the Internet infrastructure.

USISPA is a trade association made up of major ISPs. Its members include America Online, Cable & Wireless, EarthLink, eBay, Teleglobe, Microsoft, SBC, Verizon Online, and WorldCom. USISPA focuses on legal and policy issues that have a direct impact on the ISP industry in the areas of cybercrime, security, content liability, critical infrastructure protection,

and unsolicited email. Its major goal is to work with lawmakers to formulate sound policy that avoids unintended consequences that may stifle the growth of the Internet.

Service providers are committed to a safe and secure online experience for our customers. As we will explain in this testimony, they go above and beyond what the law requires to combat criminal activity online, at considerable expense to themselves because it is the right thing to do. Among other industry initiatives, we support measures that encourage greater cooperation between law enforcement and service providers to combat online crime.

Our members share your abhorrence of child pornography and other forms of criminal online content. All of our members rigorously enforce policies banning such content from their servers. They cooperate actively with law enforcement to combat illegal content in ways that do not adversely affect unrelated, lawful content. We believe that law enforcement and ISPs can most effectively work together to remove such content from the Internet by identifying its source and the Internet service provider that controls the computer server (a machine on which users may make Internet content available) where that content has been placed online. Only the content provider or the service provider that controls the computer server where the material is located can make the content inaccessible to Internet users in a reliable and effective manner.

We are concerned about proposals in the states that seek to address illegal content online by requiring ISPs to attempt to block user access to illegal websites located elsewhere on the Internet. These requirements have far-reaching effects on networks located in other states and content available in other states, and can seriously disrupt lawful Internet commerce. As described below, they can be circumvented easily by the websites that they attempt to target, and are far less effective than orders to remove the illegal content on the servers where it resides.

Moreover, they are not narrowly tailored, and can seriously interfere with lawful communications.

1. Service Providers' Work With Law Enforcement

While providing services that most of the Internet users in the United States depend upon, ICC and USISPA members are proud to work with federal and state law enforcement officials to combat the tiny, but unacceptable, percentage of activity on the Internet that violates federal or state criminal law. ISPs do this at considerable expense to their companies because it is the right thing to do, and because the safety and security of users' online experiences are extremely important to them.

Our members have longstanding working relationships with law enforcement at both the federal and state level. For example, our members work to respond thousands of times daily to judicial process to furnish electronic evidence relevant to investigations, and have worked to put in place internal procedures so that their responses are both timely and effective. They likewise include explicit language in customer contracts that prohibits illegal activity and makes clear that service providers have the right to terminate the accounts of customers who act in violation of the law.

The focus of this hearing, combating child pornography and child exploitation, is a particular priority for our members. All our members have Zero Tolerance Policies for child pornography and child exploitation. They report child pornography violations to law enforcement through the National Center for Missing and Exploited Children ("NCMEC"), and remove from their systems any child pornography that they learn of. Our members who operate specialized children's services obtain parental consent before children may communicate using

the service and offer filtering tools for parents to prevent children from entering chatrooms, or encountering objectionable material online. Additionally, our members who offer children's chatrooms and bulletin boards monitor them to protect children against harm.

Some of the examples of how our members have addressed these problems are as follows:

AOL has been the recipient of numerous awards for its active involvement in the protection of children online, including the first annual Charles B. Wang, International Children's Award, presented by NCMEC. AOL has been instrumental in NCMEC's CyberTipline and is the first ISP to participate in the new Amber Alert Program that disseminates information about child abductions quickly in an effort to rescue abducted children. AOL participates in dozens of national and international programs to train law enforcement in the investigation of crimes online, including the Dallas, Crimes Against Children Conference, the nation's largest gathering of law enforcement officers who investigate crimes against children.

eBay, which operates the largest online marketplace in the world, works actively to prevent the sale of illegal items through its site and publishes a detailed list of items that may not be sold through eBay. For example, the eBay site explains that it will not permit "the listing of any item that depicts nude minors (under 18 years of age)." Listings, such as those described as nude "teens," "children," "youngsters," or as "nudist" are all prohibited.

Verizon Online has a Zero Tolerance Policy that extends beyond child pornography and covers any "obscene, indecent, pornographic, sadistic, cruel, or racist content, of a sexually explicit or graphic nature." Verizon Online regularly reviews and acts on customer complaints indicating possible child abuse or pornography, in addition to routinely complying with law enforcement take down requests regarding child pornography. Among its other efforts, late last

year, Verizon Online played a significant role working with Virginia state law enforcement to identify a suspect who had abducted a minor across state lines and engaged in child abuse.

Microsoft makes every effort to enforce its Zero Tolerance Policy toward child pornography. In particular, Microsoft has developed a reporting tool that works directly with NCMEC to report instances of child pornography on a daily basis. Microsoft takes the extra step of preserving evidence pertaining to child pornography to allow law enforcement time to investigate reports made to NCMEC and seek that information from Microsoft with appropriate legal process. Microsoft is working with its local Internet Crimes Against Children ("ICAC") Task Force by providing technical training support to its investigators. Also, Microsoft will be releasing new parental controls that give parents the ability to monitor and manage their children's online experience whether it is in the chat room, on websites, or with instant messaging, and even when a child logs on away from home.

2. State Blocking Requirements Are Not an Appropriate Enforcement Strategy

One unfortunate recent state enforcement approach to Internet content is requiring Internet service providers to block access to websites that are not located on their computer servers. One state has imposed criminal penalties against ISPs unless they do this, and the same approach was put forward last spring to the Council of State Governments as proposed model legislation.

We believe these state Internet site blocking requirements are misguided for several reasons. First, they almost invariably involve one state telling the users in every other state in the Union what Internet content they may receive, thus creating a significant obstacle to interstate commerce. Second, they are easily circumvented by the actual wrongdoer, and focus

law enforcement resources inappropriately on innocent parties. Third, they are far less effective than actually removing the content from the computer servers where it has been posted. Fourth, they often block user access to large amounts of lawful websites, and if a significant number of blocks are put in place, will slow network operations, and in some cases, even cause network failures.

a. Blocking Requirements Should Not Be Imposed at the State Level

When one state requires an ISP to block a website, its request almost always affects network operations and Internet content available in every other state.

In the small number of centralized networks that route all traffic through a single point in the network, if a site is successfully blocked (which as discussed below, is far from a foregone conclusion), then the site will not be available to users of the network located *anywhere in the world*. On this sort of network, one state literally can tell the rest of the world that uses that ISP what content it may and may not receive.

On less centralized networks, to comply with a blocking order, an ISP must still program the routers (the intelligent computers that direct traffic around an Internet network) *throughout its entire network* to attempt to block the website in question. As explained below, blocking also can also disrupt access to lawful content and slow the operation of an ISP's network for lawful purposes. Either way, the operator of an interstate ISP network must change its conduct in other states to suit the demands of a state that imposes a blocking requirement.

For these reasons, the federal government has an important stake in clear, predictable rules with regard to this aspect of Internet regulation. If blocking requirements are ever justifiable, they should certainly not be imposed piecemeal by the states. Because content on any

computer server in the United States is available throughout the country and conflicting state regulation of this aspect of interstate commerce can raise impossible or very costly compliance problems, state blocking requirements are unwarranted.

b. Blocking Requirements Are Easily Circumvented and Less Effective Than Other Enforcement Strategies

Blocking user access to sites on other networks may sound like a relatively easy solution to the problem of illegal content on the Internet. In reality, however, ISPs are unable to block user access to websites on other ISPs' networks with any reliability. At minimal cost, unlawful sites can rapidly change locations, or proliferate at multiple Internet addresses using the same Uniform Resource Locator ("URL") (www.____.com/filename) to circumvent blocking efforts.

This is because the actual location of a website on the Internet is not its URL (www.____.com/filename), but something called an "IP address"—a long string of numbers punctuated by periods that is sometimes visible, for example, when a user types in a URL into a browser. All devices on the Internet communicate with each other using IP addresses, but because IP addresses are difficult for people to remember, web browsers allow users to access a site by using URLs instead of an IP address. When a user types the URL into a browser on the user's computer, that request is translated into a request for an IP address by one of many domain name system ("DNS") servers located throughout the world. DNS thus operates like a set of phone books for the Internet. These DNS servers are not controlled by any one ISP. Rather, control of the domain name system is distributed among many unrelated entities in many different countries, with multiple levels of redundancy, and the various DNS servers are updated constantly.

In practical terms, when an ISP is asked to block access from its network to a website on another network, the ISP must actually attempt to block the site's IP address. However, websites often reside at multiple IP addresses on the web servers of several web hosting companies (companies that offer third parties use of computer servers to make their content available online) in order to reduce delays and network congestion and to build-in redundancy that can sidestep a problem in one part of the network. (For example, eBay is located on at least five IP addresses.)

To make blocking even more difficult, software that is readily available in the marketplace for legitimate purposes can move a site's IP address many times a day.

All these factors permit any website that wants to do so to stay far ahead of any ISP's attempts to block access to the site through the ISP's network. They also mean that any serious effort to block a single site that wants to avoid blocking will require the ISP to program their networks to block many IP addresses.

Finally, ISP blocking requirements unfortunately encourage law enforcement to focus on ISPs who are the furthest removed from the illegal activity rather than on either: (1) the actual perpetrator of Internet crime or (2) the ISP who can take more effective action at the computer server where the illegal material is located. For these reasons, blocking a website through an ISP's network is highly uncertain,[1] and policy solutions that impose liability against an ISP unless it successfully blocks access to a website on another network are misplaced.

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[1] Blocking is somewhat more effective if filtering software is installed on the user's own computer. This sort of software prevents the user's computer from requesting a particular Internet domain name. However, the software is controlled by the user, not the ISP, and can be deactivated by the user. Nonetheless, ISPs work to make sure that their customers are fully informed of choices of such filtering software to help to protect customers and their families from objectionable material.

c. Removing Illegal Content at Its Source is Far More Effective than State Blocking Requirements

The only way reliably to prevent content from reaching users in one state is to make sure that the content is removed from the Internet the source where it resides on the Internet. For example, ISPs in the United States and in other countries routinely cooperate with law enforcement to remove child pornography content from their computer servers when it appears there. Such cooperation cuts off availability of the offending content. With regard to illegal foreign content, this sort of international cooperation is the only reliable way to make sure that the illegal foreign content is not accessible to U.S. citizens.

d. Negative Side Effects of IP Blocking

ISPs' efforts to block an unlawful website by its IP address risk having the unintended consequence of seriously disrupting a large number of lawful communications. There are two reasons for this.

First, different websites can share the same IP address. In fact, it is a fairly common practice for large web hosting companies to place a large number of customer websites on the same IP address. If an ISP controlling another network attempts to block one of these websites by its IP address, it will necessarily block user access all the other sites—which is the antithesis of "narrow tailoring" required under the First Amendment for content-based restrictions on freedom of speech.

For example, one state, understandably concerned about an illegal website located in Spain, asked several ISPs doing business in its state to block access to that site. It turned out,

however, that the IP address for the illegal site was actually shared by thousands of other ***lawful*** websites having nothing to do with the illegal content at issue. The illegal site happened to be located on the computer servers of one of Spain's largest web hosting companies, and one of the most popular Internet portal sites in the world of interest to Spanish speakers in the United States and elsewhere. The result was a significant disruption in lawful Internet traffic between the United States to Spain. Had law enforcement simply asked the Spanish ISP to remove the illegal content from its computer servers directly, it would have complied. Indeed, the Spanish company did so when eventually requested by U.S. ISPs.

The second type of interference with lawful communications is a function of the number of blocking requests. Routers on ISPs' networks contain configuration tables that determine where packets of data should be sent to reach the proper IP address, and depend upon these tables to transmit information across the Internet. On most networks, IP address blocking can be accomplished only by adding instructions to the configuration tables of many routers so that those routers do not send the packets to or from the prohibited IP address. As the list of prohibited IP addresses grows, it places more demands on the router, which at a certain point will cause the router to become overwhelmed, crash and cause network failures.

Ironically, an illegal website that is the intended target of an ISP blocking mandate can avoid blocking efforts, even as significant amounts of lawful content are disrupted.

3. Conclusion

Members of the ICC and USISPA are committed to taking action against illegal online content. When the lawmakers craft liability rules, they should do so carefully to assign liability to actual wrongdoers, while respecting constitutional values of free speech and due process.

Obviously, enforcement strategies must start with and focus on wrongdoers by deterring and punishing illegal conduct. Service providers play an important role in supporting enforcement of such laws by devoting significant resources to assisting law enforcement investigations promptly, taking down illegal material and hypertext links to illegal material that they learn has been posted on their computer servers, and referring cases to law enforcement.

The law should adopt effective, efficient enforcement approaches to illegal content on the Internet, approaches that are adapted to the ways that Internet technologies function. In particular, it should recognize that with regard to content on other providers' networks, ISPs function like trains or delivery services, not publishers or broadcasters. They simply move data to its destination, and do not select or initiate the communication. On the other hand, if a service provider controls the computer server where unlawful content is located, then that provider can take effective action to prevent Internet users from viewing that content. In short, the responsibility to disable access to illegal content should reside with the company on whose computer server the content resides.

We thank you, Mr. Chairman and other members of the Committee, for considering our views, and hope that you and other members of this Committee will keep these principles in mind when considering what sorts of enforcement strategies should apply in the area of illegal online content.

U.S. SENATOR PATRICK LEAHY

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Statement Of Senator Patrick Leahy,
Chairman, Senate Judiciary Committee,
Hearing On
"Stopping Child Pornography:
Protecting Our Children And The First Amendment"
October 2, 2002

Let us make clear at the outset of this hearing that we are all against child pornography – that vote would be an easy one. The harder task is finding legislative solutions that are not merely designed to make us all look tough on child pornography in the short term, but that can withstand the test of time and the scrutiny of the courts. We need a law with teeth, but not one with false teeth.

This hearing will allow experts from all perspectives to come together as we work toward a solution that both protects our children and honors the First Amendment. Too often these issues become temptations to demagoguery. We owe our children more than a press conference. We owe them action that will be effective in helping prosecutors build solid cases and obtain convictions that stick.

Earlier this year, the Supreme Court in Ashcroft v. Free Speech Coalition [122 S. Ct. 1389 (April 16, 2002) ("Free Speech")] struck down portions of the 1996 Child Pornography Protection Act ("CPPA") for violating the First Amendment. We should not have been surprised on this Committee since we had been warned in 1996 that parts of this law were unconstitutional. Now, with varying legislative proposals before us, we must work together not to repeat our earlier mistakes.

We should be wary of enacting quick fixes that risk doing more harm than good. Even with parts of the CCPA struck down, many effective federal laws dealing with child pornography and obscenity remain on the books. A cursory review of Department of Justice and FBI press releases shows that federal enforcement of the child pornography laws continues and that it is resulting in people being investigated, prosecuted, and sent to jail. That being said, we should always be examining our laws to see if additional tools are required to fight crime.

That is why I joined Senator Hatch in introducing S.2520, the PROTECT Act, shortly after the Supreme Court's decision in Free Speech, to protect our Nation's children from exploitation by those who produce and distribute child pornography, and to do so within the parameters of the First Amendment. It is a good faith response to the Supreme Court's decision, not a challenge to it.

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The *Free Speech* Decision and its Implications: In Free Speech, the Supreme Court voted 7-2 to strike down a provision banning virtual child pornography – that is, child porn made with morphed computer images and without using real children -- and a second provision banning material that is "pandered" as child pornography.

The Court in Free Speech faced a difficult task – applying the time honored principles of the First Amendment to the computer age. The Internet provides many opportunities for doing good, but also for doing harm. In recent years, the Congress has made a number of attempts to stop the Internet from being used to distribute child pornography involving the sexual abuse of children, but those efforts have time and again failed to pass constitutional muster. Past efforts, such as the Communications Decency Act, the CPPA, and the Child Online Protection Act have violated constitutional limits and been nullified by the courts. Each time the Supreme Court has faced this task, it has provided valuable guidance to the Congress that we should heed.

The majority opinion in Free Speech is grounded on two basic premises. First, the Court ruled that the definition of child pornography in the CPPA was overbroad and covered a substantial amount of material that was not "obscene" under the Supreme Court's traditional obscenity test. [Miller v. California, 413 U.S. 15 (1973).] The CPPA would have criminalized such non-obscene movies as *Traffic*, *Romeo and Juliet*, and *American Beauty* simply because minors were depicted in some sexually explicit scenes, because there was no requirement that the material be evaluated as a whole.

Second, the CPPA was unconstitutional for covering a broad array of pornographic material involving computer-generated images or youthful-looking adults.

The PROTECT Act of 2002: Senator Hatch and I have together crafted a bipartisan bill that attempts to work *within* the limits set by the Supreme Court. It narrows the definition of virtual child porn by requiring consideration of the artistic, literary or educational value of the work as a whole, so that films like *Traffic* are not covered and banned. It also fixes the specific concerns raised about the affirmative defense in the old CPPA.

One approach would simply be to add an "obscenity" requirement to the child pornography definitions. Outlawing all obscene child pornography – real and virtual; minor and 'youthful-adult;' simulated and real – would clearly pass a constitutional challenge because obscene speech enjoys no protection at all. Under the Supreme Court's Miller test, such material (1) "appeals to the prurient interest," (2) is utterly "offensive" in any "community," and (3) has absolutely no "literary, artistic or scientific value." Other provisions are intended to address the fatal flaws identified by the Supreme Court in the CPPA with more narrow definitions of "child pornography." While these new provisions are more narrowly tailored than both the original CPPA and the Administration's proposal, I look forward to hearing from the constitutional scholars here today whether further refinements are warranted.

I recognize that it does not do America's children any good to write an unconstitutional law to prove an ideological point. The Hatch-Leahy bill reflects a good faith attempt to protect children to the greatest extent possible without crossing that line.

Our legislation -- unlike the Administration's proposal -- also provides new tools to help police and investigators prosecute child pornography cases and protect the rights of child victims. As a former prosecutor, I know these tools will help. Let me name a few of these provisions:

- **Victim Shield Law**: The PROTECT Act would provide, for the first time ever, a children's shield law to keep the identity of child victims out of court and protect them from being traumatized again in the court process..

- **Sentencing Enhancement for Child Sex Offenders**: Incredibly, the current sentencing guidelines carry a lower sentence for someone who actually travels across state lines to sexually molest a minor than for someone who possesses child pornography that has crossed state lines. The PROTECT Act would ask the Sentencing Commission to fix that disparity and increase penalties for repeat offenders.

- **New Felony for Using Pornography to Induce a Minor to Engage in Illegal Activity**: The PROTECT Act creates a new crime for using any child pornography, virtual or not, to persuade a minor to engage in illegal activity. This directly addresses the concern that sex offenders use this material in molesting children and presents no First Amendment problem because it is based on conduct, not speech.

- **Notice Requirements to Prevent Surprise Defenses**: The PROTECT Act allows defendants to assert an affirmative defense that no real children were involved in making the images in question, but imposes strict new notice and discovery requirements on the defense. As a former prosecutor, I know how difficult it is when defendants can come in at the last second – or even during the trial – and assert a new defense. This bill levels the playing field.

- **Better Record Keeping**: The Act enhances the record-keeping requirements for pornographic material and the penalties for keeping false records. It also allows prosecutors for the first time to use those materials in court to prove child pornography cases, which may provide evidence to defeat a virtual porn defense.

- **New Pandering Felony**: The PROTECT Act also creates a new crime for the act of pandering obscene child pornography.

The Justice Department Proposal: Everyone wants to protect our children, but we need to do it with cases and laws that stick. That is what we have tried to do in the PROTECT Act. It is far easier to come up with a "quick fix," without attention to constitutional limits. Constitutional law experts and law professors with whom I have consulted on this matter have confirmed the Justice Department's proposal will not withstand scrutiny under the First Amendment after the Free Speech case.

Let me discuss a couple of the most problematic aspects of the Justice Department's proposal. First, it rejects any attempt to incorporate the Supreme Court's doctrine of "obscenity" into the definition of child pornography. Not even one provision takes that approach, which would at least ensure that some of the law was upheld. Instead, in its new definition of "child

pornography," the Justice Department simply changes the words "appears to be" in the current statute to "appears virtually indistinguishable from" in the new provision. The problem with that approach is the same argument that was urged by the Department in the Free Speech case and overwhelmingly neglected.

Second, the Justice Department's proposal regarding the new crime for child pornography involving "prepubescent" children is also problematic under the Court's Free Speech case. Although the section is entitled "*Obscene* visual depictions of young children" the Justice Department has assiduously avoided any "obscenity" requirement in the provision itself. Headlines and titles like "prepubescent" and "obscene" are popular, but will not fool our federal judges when there is no obscenity requirement in the statute itself, only in the title.

Moreover, the provision contains absolutely no requirement that the material be judged *as a whole* for artistic, literary, or scientific value. That was a point that the Supreme Court repeatedly pounded home in the Free Speech case, yet it is ignored by the Justice Department. This approach is especially frustrating because in the cases that the Department is likely to prosecute, it would be easy to meet the obscenity test. The Department's current approach, however, invites a parade of legitimate movies and scientific or educational materials that may be covered by the overbreadth of the provision to challenge the legislation. Since no affirmative defense is available under this new crime, it cannot be saved from the Free Speech case on that basis either.

There are other problematic provisions in the Justice Department's proposal, but I simply raise these two in order to make the point that the Department's proposal seems to be more concerned with making a public point than with making successful cases. If the Department's proposal becomes law, it will result in yet another round of court cases, followed by another round of cases being thrown out, followed by another round of legislation.

America's children deserve better, and I think that, while we may disagree on some of the specifics, Senator Hatch and I have made a good faith and bipartisan effort to come up with a law that will survive judicial scrutiny and protect them for years to come.

I hope that today's hearing will be an opportunity for reasoned discussion and debate. These are important problems that deserve serious consideration. We can protect our children while honoring the First Amendment. We owe it to them to do no less.

# # # # #

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Statement of Representative Earl Pomeroy
Senate Judiciary Committee Hearing
"Stopping Child Pornography: Protecting our Children and the Constitution"
October 2, 2002

Good morning Chairman Leahy, Senator Hatch, and members of the Senate Judiciary Committee. Thank you for convening today's hearing on this issue of critical importance to the safety of our children, and thank you for inviting me to testify before you. As a member of the Congressional Caucus on Missing and Exploited Children, and as a father of two young children, I consider child protection issues to be of the utmost importance.

In April of this year, the Supreme Court, in *Ashcroft v. The Free Speech Coalition*, struck down as unconstitutional portions of the Child Pornography Prevention Act (PL 104-208) that made it illegal to create, distribute or possess "virtual" child pornography. In its opinion striking down the provisions of the law, the court ruled that extending the reach of child pornography laws to computer-generated and other images involving no real children was "over-broad and unconstitutional." The Court's opinion stated that the law would prohibit visual depictions, such as movies, art or medical manuals, that have redeeming social value.

The Supreme Court's decision left our children vulnerable, so I was pleased to join the Chairman of the House Judiciary Subcommittee on Crime Representative Lamar Smith of Texas in introducing a bill to strengthen the provisions deemed unconstitutional. Working closely with constitutional scholars at the Department of Justice, we carefully crafted a bill to narrowly define the terms and scope of the law. I believe we have addressed the concerns raised by the Court to provide lasting protection for our children against would-be pedophiles and exploiters. This bill, H.R. 4623, passed the House by an overwhelming margin of 413 - 8 on June 25, 2002.

Mr. Chairman, you have aptly titled this morning's hearing "Protecting our Children and the Constitution." Because of the many important freedoms our Constitution guarantees, it is a delicate exercise to prohibit even the most vile forms of expression. I believe we have achieved that balance in our bill by clearly defining that which we seek to ban, while protecting our freedom of speech. I recognize that creating a law dealing with free speech that will withstand challenge in the Supreme Court is an extremely difficult exercise. That said, I look forward to working with the members of this committee to strengthen our approach, and I am confident that, together, we can craft a law that will stand up to challenge.

That is the legal landscape of this issue. But as you know Mr. Chairman, this issue is first and foremost about protecting our children. We all know that today's teens can log onto their computers and find a world of information at their fingertips. The Internet can help our children

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do everything from getting help with school work to applying to college to keeping in touch with their friends in realtime. It is an exciting world for them to explore, and a nearly limitless resource in terms of information.

However, this tremendous tool also has a dark side. The very technology that has wired the world, allowing information to flow like never before, also presents new dangers for our children. The Internet has created an avenue for child molesters to reach through our computer screens, into our homes, and forever change even the small, safe hometowns of my state of North Dakota. Twenty years ago, we taught our kids *never* to talk to strangers. But today, it is commonplace for kids to "chat" online with strangers everyday.

There is an undeniable link between child pornography and exposure of children on the Internet to pornography, virtual or real. In addition to harming the child who is the subject of the pornography, this material harms other children in at least three additional ways. First, the mere exposure of a child to child pornography has damaging psychological effects. Second, child pornography is often used to seduce children into sexual activity, either pornography or other forms of abuse. A child who initially resists an adult's solicitation may be convinced that such behavior is acceptable after viewing the pictures of other children. Third, child pornography is used by pedophiles and other sexual abusers to whet their own sexual appetites. In this way, child pornography can desensitize the viewer to the pathology of sexual abuse of children.

A June 2000 report published by the National Center for Missing and Exploited Children ("*Online Victimization: A Report on the Nation's Youth*") reveals some ghastly statistics that illustrate that strangers are not just talking to our children. The report, which was based on interviews with a nationally representative sample of 1,501 youth, ages 10 to 17, who use the Internet regularly, found the following.

- Approximately one in five youths received a sexual solicitation or approach over the Internet in the last year and one in thirty-three were asked to meet somewhere, or communicate directly otherwise.
- One in four youths had an unwanted exposure to pictures of naked people or people having sex in the last year and one in seventeen was threatened or harassed.
- Less than 10% of these sexual solicitations and only 3% of unwanted exposure episodes were reported to authorities, while a mere 25% of the youth who encountered a sexual solicitation or approach told a parent.

As the statistics illustrate and the report summarizes, our children encounter a disturbingly high number of offensive sexual episodes online, and most go unreported. What this means is, first, we as parents need to talk with our children about the importance of reporting these solicitations to parents. But secondly, and the reason we are here today, we, as

members of Congress, need to ensure that there are effective tools for law enforcement and prosecutors to utilize once episodes are reported.

Because of the Supreme Court decision, prosecutors currently are severely limited in making cases involving child pornography -- either virtual or actual. Computer animation technology has evolved so remarkably that even experts can often not tell the difference between that which is "virtual" and that which is "real." This scourge, therefore, not only serves to whet the appetites of pornographers and pedophiles, but also potentially protects those who exploit real children by allowing them to claim that images are not real. Obscenity laws may still apply, but these laws generally do not carry the same penalties as child pornography and molestation laws.

I know this problem is real in my own state. The North Dakota U.S. Attorney's Office has informed me that they have been forced to change course midstream in a number of cases that are pending prior the Supreme Court's April decision because the cases they were making at the time no longer have merit. The law on which they built their cases no longer exists, and any new law we create can not be applied retroactively.

I strongly believe the first line of defense is with parents, teachers and others in our communities talking to our children about being safe on the Internet. I have spent a significant amount of time during the past several months talking with kids and their parents at North Dakota schools about just that. But I also believe our role as lawmakers is to provide the next line of defense in the event the first fails. We must provide adequate tools to law enforcement and prosecutors -- reliable laws that will stand up to challenge -- to put away those who would bring harm to our children. A law that will withstand Supreme Court challenge is the key, so that prosecutors do not find themselves in the position that the U.S. Attorney in North Dakota does today. A strong, narrowly-defined law that effectively prohibits virtual child pornography will not only help to eliminate these vile virtual images, it will also, perhaps more importantly, remove a tool and a layer of protection from child pornographers and pedophiles who exploit real children.

Today, because of the Court's action, there is a vacuum in child protection law. The fact is that the world has changed around us, and now, so must the law change to protect our children. Our analog laws need to be updated to keep our kids safe in this digital world. It is imperative that Congress act swiftly, and deliberately, to restore the prohibitions in law that recognize virtual child pornography for what it is: yet another way for pedophiles and molesters to exploit children.

Thank you Mr. Chairman and members of the Committee. I look forward to working with you as we restore these essential protections for our nation's children.

STATEMENT OF PROFESSOR FREDERICK SCHAUER
REGARDING S. 2520 AND THE REGULATION OF CHILD PORNOGRAPHY

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
OCTOBER 2, 2002

My name is Frederick Schauer, and I am Frank Stanton Professor of the First Amendment at the Kennedy School of Government, Harvard University. I have previously served as Professor of Law at he University of Michigan, and have served as Visiting Professor of Law at the law schools of Harvard University, the University of Chicago, and the University of Virginia. In 1985-96 I served as a Commissioner of the Attorney General's Commission on Pornography, and was the principal author of the Commission's findings, analysis, and conclusions, including the findings, analysis, and conclusions on the subject of child pornography. I am the author of The Law of Obscenity (BNA, 1976), Free Speech: A Philosophical Enquiry (Cambridge, 1982), The First Amendment: A Reader (West, 1992, 1996), and numerous articles on the law of obscenity and pornography, on freedom of speech and press, and on constitutional law generally. Among my publications are an article in the 1982 Supreme Court Review analyzing the child pornography case of New York v. Ferber, 458 U.S. 747 (1982), an article in the 1995 Supreme Court Review analyzing the child pornography case of United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994), and other articles specifically focused on obscenity and pornography law in the American Bar Foundation Research Journal, West Virginia Law Review, North Carolina Law Review, Hastings Law Journal, and Georgetown Law Journal.

I appear before the Committee not as a representative of the Kennedy School of Government nor of Harvard University. Nor do I appear on behalf of any other person, corporation, or organization, and I have no political, financial, organizational, or other connections with anyone interested in one way or another in the proposed legislation. As a political independent, I have not been a member of a political party for over twenty-five years, and I do not represent or consult for clients, or their lawyers, directly or indirectly. I appear today at the unsolicited request of the Committee on the Judiciary, as I did in 1996 when S.2520's predecessor, the Child Pornography Prevention Act of 1996, was considered by the Congress.

The bill before the Committee, the Prosecutorial Remedies and Tools Against the Exploitation of Children Today ("PROTECT") Act of 2002, is a proposed congressional response to the Supreme Court's decision in Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (April 16, 2002), in which the Supreme Court invalidated on First Amendment grounds two different provisions of the Child Pornography Prevention Act of 1996. Both of these provisions were aimed at stemming the increasing proliferation of virtual child pornography, a genre of child pornography produced with modern computer technology to resemble closely the genre of unlawful child pornography, but which, unlike "traditional" child pornography, does not employ

real children in its production. To the Supreme Court in Free Speech Coalition, the distinction between actual child pornography, using real children, and virtual child pornography, in which actual children are not employed in the process of production, was the crucial factor. Although the Supreme Court reaffirmed that legally obscene virtual child pornography could be proscribed without affronting the First Amendment, the Court also reaffirmed that the key to allowing the proscription of child pornography that was not legally obscene was the presence of an actual child in the production process. Without the exploitation of a real child in the production of the material, said the Court, the requirements of existing obscenity law could not be circumvented, nor could the requirements of child pornography law as established by Ferber be satisfied.

The Supreme Court's opinion in Free Speech Coalition is hardly above criticism. But whether open to academic or congressional criticism, Justice Kennedy's opinion for a 7-2 Court still represents the definitive and authoritative interpretation of the First Amendment in the child pornography context, and thus represents the law. Legislation inconsistent with Free Speech Coalition would not only be inconsistent with current constitutional law, therefore, and not only be certain to fail in light of this very recent 7-2 decision of the Supreme Court, but would also represent a tactical mistake in the attempt to combat the horror of child pornography. As the six-year course of litigation under the previous Act so well demonstrates, constitutionally suspect legislation under existing Supreme Court interpretations of the First Amendment, whatever we may think of the wisdom and accuracy of those interpretations, puts the process of prosecuting the creators of child pornography on hold while the appellate courts proceed at their own slow place. There is room in our legislative world for legislation that is largely symbolic, but for Congress to enact symbolic but likely unconstitutional legislation would have the principal effect of postponing for conceivably six more years the ability to prosecute those creators of child pornography whose prosecution is consistent with the Supreme Court's view of the First Amendment.

Child pornography damages real children in at least four ways. One is by requiring the sexual abuse of children in its production. A second is by creating a permanent and mortifying record of that abuse that will stay with the children for the remainder of their lives. Both of these harms provided the support for the Supreme Court's willingness in Ferber to allow the prosecution of even non-obscene child pornography. In addition, child pornography is often used as a way of convincing real children to engage in sexual acts with those who would abuse them, and is often used to fuel and reinforce the predilections of the abusers. Significantly, neither of these last two justifications require the use of real children in the production process, but the harm to real children still exists.

Despite the fact that real children are harmed when virtual child pornography is used by child abusers both to reinforce their own desires and to assist in the abuse of real children, the Supreme Court in Free Speech Coalition held both of these justifications to be constitutionally impermissible. Because a wide variety of non-pornographic and plainly constitutionally protected material is often used to persuade children to engage in sexual activity, and because the First Amendment equally plainly protects material advocating or encouraging or approving of

otherwise illegal activity,[1] Justice Kennedy's opinion for the Supreme Court essentially ruled that the third and fourth of the above-mentioned justifications could not be used to support constitutionally acceptable virtual child pornography legislation.

Against that background, S.2520 needs to be evaluated, and if necessary rewritten, to ensure that it neither conflicts with the Supreme Court's holdings in Free Speech Coalition nor relies on justifications that the Court has so recently rendered constitutionally illegitimate, no matter how compelling and empirically well-supported they may be. In what follows, I will divide my comments in the various themes implicated by S.2520.

1. Pandering. In Ginzburg v. United States, 383 U.S. 463 (1966), the Supreme Court upheld the obscenity conviction of the publisher of a magazine called Eros, relying largely on the way in which the magazine had been "pandered," which Justice Brennan defined as the "commercial exploitation of erotica solely for the sake of their prurient appeal." S.2520 adds a new §18 U.S.C. 2252A(a)(3)(B), which would make criminal the pandering, including by computer, of legally obscene child pornography.

   The new provision is limited to the legally obscene, and is likely for that reason to be constitutionally permissible. Ginzburg did not create or recognize pandering as an independent offense, and this understanding of pandering as being largely about the evidence available to prove appeal to the prurient interest,[2] the first prong of the obscenity standard in Miller v. California, 413 U.S. 15 (1973), has been reaffirmed by both Hamling v. United States, 418 U.S. 87 (1973), and more recently in Free Speech Coalition. 122 S. Ct. At 1405-06. But although the pandering of otherwise constitutionally protected material cannot be made unlawful consistent with the First Amendment, the pandering of otherwise obscene material is tantamount to the advertising of an unlawful transaction. Because obscenity is unlawful conduct, and because the advertising (or, therefore, pandering) of unlawful products and services is not itself protected by the First Amendment, see Virginia Pharmacy Board v. Virginia Citizens

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[1]See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969)(advocacy of racist violence); Noto v. United States, 367 U.S. 290 (1961)(advocacy of forcible overthrow of the government). See also Hess v. Indiana, 414 U.S. 105 (1973) (encouragement to unlawful violence during a demonstration); Kingsley International Pictures Corp. V. Regents, 360 U.S. 684 (1959)(advocacy of immoral activities).

[2]In effect, Ginzburg recognizes either an estoppel principle, such that a person who promotes his material as appealing to the prurient interest is estopped from denying its prurience at trial. And even if there is no complete estoppel, the pandering operates as an evidentiary admission, much like the admission of any defendant to having committed a crime or some element of it. On the same day that the Supreme Court decided Ginzburg, it confirmed this understanding of the holding of Ginzburg in two other cases. Mishkin v. New York, 383 U.S. 502, 510 (1966); Memoirs v. Massachusetts, 383 U.S. 413, 420 (1966).

Consumer Council, 425 U.S. 748 (1976), the limitation of this provision to legally obscene material renders it constitutional even though the solicitation, pandering, or promotion is not itself obscene. Were it not for this limitation, the pandering provision would likely be unconstitutional, because the Supreme Court has never indicated that pandering can be an independent offense. Thus, in order to reinforce the constitutional basis for §2252A(a)(3)(b), it might be wise for Congress to make clear that it views such advertising and solicitation as the advertisement of an otherwise illegal product, thus establishing the "commercial advertisement of an unlawful product" foundation for this section.

By contrast to S.2520, Section 4 of H.R.4623 treats pandering as an independent offense without the necessity of a showing that the material pandered is in fact legally obscene or is in fact child pornography made with the use of a real child. In the absence of such a showing, the "advertising for an unlawful transaction" rationale disappears, and the pandering provision appears instead as a prohibition on the advertising of an immoral or unhealthy but lawful product, plainly protected by the First Amendment under recent court rulings. See Rubin v. Coors Brewing Co., 514 U.S. 476 (1995). Before Free Speech Coalition, there existed plausible arguments to justify such an expansion of the pandering idea in the context of virtual child pornography. After Free Speech Coalition, however, such arguments, and the statutes they would support, are highly likely to be exercises in symbolism alone.[3]

2. Defining Child Pornography. S.2520 would make two changes in the definition of child pornography, both in response to the Supreme Court decision in Free Speech Coalition. The bill requires that material coming under 18 U.S.C.§2256(8)(B) not only be or appear to be of a minor engaged in sexually explicit conduct, but be legally obscene as well. With this modification, §2256(8)(B) is plainly constitutional, but the question remains about its effectiveness. Although the vast majority of child pornography is in fact legally obscene, the numerous procedural and substantive hurdles to proving obscenity make the difference between what is theoretically obscene and what can actually be proved beyond

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[3]It is possible that advertising for an unlawful product when the product does not in fact exist is also outside of the protection of commercial advertising under Virginia Pharmacy, although here is no clear law on the subject. As a matter of substantive criminal law, prosecution of such "inchoate" crimes is commonplace, as with the law of attempts. But when the non-existence of illegality is a function not of the non-existence of an illegal product but rather the non-illegality of an existing product, the First Amendment returns to the picture. Advertising virtual child pornography as if it were real child pornography would not serve the same function in a child pornography prosecution as it does under Ginzburg in an obscenity prosecution, because Ginzburg pandering is evidentiary of appeal to the prurient interest, but no amount of pandering, even misleading pandering, can convert a virtual child into a real child. Ass a rsult, the pandering provision of H.R. 4623 appears to be somewhat more constitutionally risky than its proponents are willing to acknowledge.

a reasonable doubt to be obscene an important distinction. It is to this issue that §2256(8)(D) appears to be directed.

In Free Speech Coalition, the Supreme Court struck down the existing §2256(8)(D), concluding that the First Amendment prohibited the pandering of non-obscene and otherwise lawful material. S.2520 appears to address this issue in two ways. First, it requires that the depiction be of a minor, or a person who appears to be a minor, engaged in actual and specified sexual activities. And, second, it requires the prosecution to prove that the material lacks serious literary, artistic, political, or scientific value, just as in an obscenity case.

The new §2256(8)(D) in fact comes quite close to the legal definition of obscenity found in Miller. The new §256(8)(D) would contain exactly the third prong – lacking in serious literary, artistic, scientific, or political value – and §2256(8)(D)'s specification of the types of depictions that are impermissible tracks both the letter and the spirit of Miller. Although the United States and most states have included the "patently offensive" language in their post-Miller obscenity laws, a close reading of Miller makes it clear that what Miller requires is not necessarily the ritual inclusion of the "patently offensive" language, but rather a specification of the type of material that the legislature finds to be patently offensive. Because the proposed new §2256(8)(D) does this,[4] and because there has never been any indication that the activities specified are not within the range that a legislature may constitutionally find to be patently offensive, the second prong of the Miller standard appears to be satisfied as ell.

This leaves only the first prong – appeal to the prurient interest, which is not included. Although a showing of appeal to the prurient interest is part of the constitutionally required definition of obscenity under existing law, it is certainly plausible to believe that it may not be necessary in this particular context. That is, it is plausible to believe that obscenity in the virtual or actual child pornography context would not necessarily require proof of an appal to the prurient interest, especially given the inclusion here of the "serious literary, artistic, political, or scientific value" aspect, the aspect that carries almost all of the First Amendment concerns, as part of the prosecution's burden of proof. As a result, it is reasonable to argue that the new §2256(8)(D) comes not under Ferber (at least not where no real child is involved), but under Miller as slightly, and only slightly, modified in the particular context where children are involved. This is consistent with the spirit of Ginsberg v. New York, 390 U.S. 629 (1968), in which the Supreme Court allowed modification of the obscenity standard (although, to be sure, not the explicit words of the standard) when material is directed to children, and much the same approach, based on Ginsberg, would seem to apply to material directed to children in the

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[4]S.2520 could be nudged slightly closer to Miller, with little loss of prosecutorial effectiveness, by inserting the words "a patently offensive depiction " between the words "is" and "of a minor" in the first line of the proposed §2256(8)(D)(i).

particular way in which child pornography is used.[5]

S.2520 could be strengthened slightly in this regard if the new §2256(8)(D) also contained some elements of the pandering section, since the Supreme Court from Ginzburg to Free Speech Coalition has emphasized that pandering is best seen as proof of an appeal to the prurient interest. Without the addition of any reference to pandering, the proposed §2256(8)(D) is close enough to Miller, especially in its most important First Amendment dimensions, and far enough away from the provision invalidated in Free Speech Coalition, that here seems a reasonable likelihood that it could be upheld as a contextual Congressional specification of obscenity under Miller that is consistent with the spirit of Miller, consistent with the spirit of Free Speech Coalition, and fully cognizant of the need to modify Miller in its non-essential (in free speech terms) to take account of the special dimensions of the modern production and use of material portraying explicit sexual acts by children. Adding elements of pandering would make the argument even stronger.

By contrast, H.R.4623's proposed modification of §2256(8)(D) would almost certainly fail to survive a constitutional challenge after Free Speech Coalition. The addition of the word "indistinguishable" does narrow the class of covered materials substantially, but does not change the nature of the government's interest. Even if no person at all could tell the difference between materials using real children and materials using computer-generated images, the absence of real children in the latter case is exactly why the Supreme Court in Free Speech Coalition refused to find Ferber applicable, and no degree of indistinguishability in he image can create a real child where none existed before. §2256(8)(D) can be rehabilitated only by moving its category closer to the category of Miller-defined legal obscenity, and the insertion of indistinguishability, which is on a different dimension entirely, thus makes H.R.4623's approach no more likely to be upheld than was its predecessor.

3. The Affirmative Defense. A recurring prosecutorial problem in child pornography cases is the difficult of proving, given modern computer technology, that an actual child used in the materials is in fact an actual child. The Child Pornography Protection Act of 1996 attempted to address this problem by not requiring the prosecution to prove the presence of an actual child, but by giving the defendant an affirmative defense if the defendant could show that no children were used in the production.

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[5]In Free Speech Coalition, Justice Kennedy was concerned that the omission of the prurient interest requirement could lead to the possible prosecution of a picture in a psychology manual. 122 S. Ct. At 1400. Because such a picture in such a manual would plainly have scientific value, however, and might also have literary, artistic, and political value, the justified fears of Justice Kennedy under the 1996 Child Pornography Protection Act are totally eliminated by this portion of S.2520.

The Supreme Court expressed some skepticism about whether First Amendment values could be carried by an affirmative defense, but in fact this is not an uncommon feature of First Amendment law. The First Amendment-motivated Noerr-Pennington defense against an antitrust prosecution,[6] for example, is an affirmative defense,[7] and the prosecution or plaintiff need not initially prove that the defendants' collaboration is not for the purpose of petitioning the government. Similarly, in a civil action for invasion of privacy or copyright the First Amendment concerns of newsworthiness and political commentary are permissibly embodied in an affirmative defense.[8] Where a law of general application imposes an incidental burden on First Amendment activities, it is up to the defendant to make the case that the First Amendment is implicated. Arcara v. Cloud Books, 478 U.S. 697 (1986). Where a dismissed public employee claims that the dismissal violates the First Amendment, the employee must make that showing, and it is not the "burden" of the dismissing employer to show that the First Amendment was not violated. Connick v. Myers, 461 U.S, 138 (1983). And insofar as there is a First Amndment privilege against compelled disclosure of journalistic sources, the privilege is something that must be raised by the journalist and not initially negated by the subpoenaing authority. Branzburg v. Hayes, 408 U.S. 665 (1972)(Powell, J., concurring).

Although affirmative defenses have traditionally been allowed to carry First Amendment values, the Supreme Court in Free Speech Coalition was concerned that this particular affirmative defense was defective because it omitted possession offenses and because it did not allow the defense in cases where actual adult actors who appeared to be children were used. S.2520 cures both of these defects, and thus respects the authority of Free Speech Coalition while at the same time going a long way towards addressing what has become an important procedural problem in the effective prosecution of genuine – actual child – child pornography cases. S.2520 explicitly includes mere possession cases, and explicitly allows the affirmative defense where only adults – but real adults – are used, and thus appears to satisfy the primary concerns expressed in Free Speech Coalition. It is possible that the Court's skepticism about the wisdom of allocating the First Amendment concerns to an affirmative defense will make even S.2520's response insufficient, but because of the frequency with which such an allocation pervades all of First Amendment doctrine, and because of S.2520's specific response to the Court's detailed concerns about

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[6]United Mine Workers of America v. Pennington, 381 U.S. 657 (1965); E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

[7]Bayou Fleet, Inc. V. Alexander, 234 F.3d 852, 860 (5th Cir. 2000); In re Wheat Rail Freight Rate Antitrust Litigation, 759 F.2d 1305, 1309 n.3 (7th Cir. 1985), cert. Denied, 476 U.S. 1158 (1986); North Carolina Electricity Membership Corp. V. Carolina Power & Light Co., 666 F.2d 50, 52 (4th Cir. 1982).

[8]See Pamela Samuelson, Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases, 57 Tulane L. Rev. 836 (1983).

the content of the affirmative defense, there seems a substantial likelihood that this provision will survive further constitutional challenge.

4. Other Provisions. S.2520 contains a number of other provisions that are largely constitutionally non-controversial. Some of these provisions, such as those regarding additional staffing for child pornography prosecution and the inclusion of a separate offense for using child pornography in actual child molestation, will be useful in the fight against child pornography. Others, such as the constraints on unlimited venue, will be important in protecting against overzealous and ultimately counter-productive prosecution, even though broader venue provisions would likely be constitutional.

It is common to talk about "the" problem of child pornography, but in fact there are several problems. One is the abuse and exploitation of children in the actual production of child pornography. Another is the use of already existing child pornography in the seduction and exploitation of children. Another is the way in which child pornography provides reinforcement for pre-existing proclivities sometimes created but much more often simply exacerbated by the existence of child pornography. And another is the way in which the very existence of child pornography, even apart from their consequences to real children, debases the society and the environment in which we all live. Yet although all of these concerns are real, pursuit of all of them is not equally constitutionally permissible. If modified as I have suggested, S.2520 is likely to provide a constitutionally safe way of pursuing some but not all of these objectives. Legislation that seeks to pursue all of them simultaneously, however, or that seeks to pursue them without regard for existing constitutional limitations, will likely wind up serving none of these objectives. Tailoring legislation to existing First Amendment constraints represents neither approval of the content that the First Amendment protects nor agreement with the Supreme Court decisions protecting them. It does, however, represent the most effective and the quickest way to deal now with the gaps the exist in the present legislative portfolio, and thus represents the best and fastest ay to increase the effectiveness of the fight against child pornography.

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