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## CHILD PORNOGRAPHY: AN UNSPEAKABLE CRIME AUGMENTED BY THE COURT†

ORRIN G. HATCH\*

“Lo, children are an heritage of the LORD . . .”<sup>1</sup> The words of the Psalmist eloquently proclaim the status of children in our world. Parents, adult citizens, and even the government have a moral obligation to protect and care for this most vulnerable and underrepresented segment of our society. The special status of children in society as worthy of special protection, coupled with the fact that crimes against them are universally despised, makes the rampant problems of child abuse, exploitation, and pornography simply incomprehensible. The wave of child abductions across our nation in recent years, including the kidnapping of Elizabeth Smart in my own home state of Utah, has highlighted the need for legislation to enhance our ability to protect our nation’s children against predators of all types.

To be sure, my efforts to stem the tide of crimes against our nation’s children began long before the well-publicized tragedies of recent years. I have strived to end the proliferation of child pornography by enhancing our nation’s laws against these materials and its purveyors. My most recent efforts in this area began in 1996 when I sponsored legislation to prohibit production and viewing of “virtual child pornography.”<sup>2</sup> But somewhat surprisingly, my efforts in this area have met substantial obstacles. New legislation was required in 2003 to ensure our children are not harmed by the production and trade in virtual child pornography.<sup>3</sup> It is my hope that this legislation will survive and make

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† A more complete discussion of child pornography can be found in the committee report accompanying the submission to the full Senate by Senator Hatch on the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), S. 151, 108th Cong. (2003). S. REP. NO. 108-2 (2003).

\* United States Senator, Utah. Senator Hatch is Chairman of the Senate Committee on the Judiciary. He also sits on the Joint Committee on Taxation, Committee on Indian Affairs, Select Committee on Intelligence, Special Committee on Aging, and Committee on Finance.

1. *Psalms* 127:3 (King James).

2. See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

3. See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650.

great strides towards ending the proliferation of child pornography and stemming the tide of crimes against children.

Virtual child pornography is distinguishable from actual child pornography in that the former is not produced by using real children, but by using youthful-looking adults or through advanced computer-imaging technology. Congress attempted to stop the trade in these materials by enacting the Child Pornography Prevention Act of 1996, which I sponsored.<sup>4</sup> In April 2002, to my deep disappointment, these provisions were struck down by the Supreme Court in *Ashcroft v. Free Speech Coalition*.<sup>5</sup> Essentially, the Court found there to be a First Amendment right to create, distribute, and view virtual child pornography.<sup>6</sup> While I respect the Court's role in reconciling the values of our Constitution with the values embodied in legislation, it is difficult to comprehend how these sickening materials can be found worthy of Constitutional protection.

Critics of virtual child pornography regulation claim that viewing virtual pornography does not contribute to the abuse of real children. In fact, they argue that it diminishes such abuse by satisfying the appetites of pedophiles without the abuse or exploitation of children. Even the Supreme Court reasoned that "[f]ew pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice."<sup>7</sup> These arguments are difficult to accept. Legalizing virtual child pornography, at a minimum, helps sustain a market for child pornography in general. This is particularly so where virtual images are not a financially feasible option. Further, amongst the morass of virtual and actual images on the internet and elsewhere, I have a hard time believing that the individuals who consume these materials will have the moral fortitude to restrict themselves only to virtual creations.

Contrary to the Court's prediction, rather than using computer technology to exercise their First Amendment right to create and view virtual child pornography, child pornographers have simply used the legal precedent regarding the technology to thwart *actual* child pornography prosecutions. Child pornographers do this in various ways including "picture modification" and "picture distortion." Through picture modification, child pornographers change actual images just enough to make

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4. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

5. 535 U.S. 234 (2002).

6. *Id.* at 258.

7. *Id.* at 237.

them look digitally created and form reasonable doubt in the minds of judges and juries as to their reality. The process of picture distortion thwarts prosecutions in a different manner. Computer-imaging technology has advanced to the point that virtual images can be indistinguishable from actual images.<sup>8</sup> Thus, because all virtually created images are protected, including realistic ones, prosecutors must show (beyond a reasonable doubt, no less) that the child depicted actually exists to prove that the image in question is in fact real child pornography. Identifying child victims of these crimes can be a difficult feat, in and of itself, due to the fact that the industry, for obvious reasons, thrives on anonymity.<sup>9</sup> But picture distortion makes prosecution of child pornographers all but impossible. This occurs when the pornographer distorts an image to make the victims unrecognizable while, at the same time, retaining the realistic appearance of the image. Thus, the victims become unidentifiable to prosecutors, judges, and juries, and the image, despite its origin from actual abuse, cannot successfully be used to convict its creator or viewer. Since the ruling in *Free Speech Coalition*, defendants in child pornography cases have consistently asserted these “virtual porn defenses.”<sup>10</sup> It is disheartening to see this succeed.

In his concurring opinion, Justice Thomas confirmed that prosecution of actual child pornographers could justify virtual child pornography regulations.<sup>11</sup> He writes:

[T]he Government’s most persuasive asserted interest . . . is the prosecution rationale—that persons who possess and disseminate pornographic images of real children may escape conviction by claiming that the images are com-

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8. The National Center for Missing and Exploited Children (NCMEC) assembled a photographic array containing both real and virtual pictures and presented it to members of the House Judiciary Committee Subcommittee on Crime during a hearing that was held on May 1, 2002. An ordinary person looking at these pictures would be hard-pressed to distinguish between the real and virtual depictions. See *Oversight Hearing on Enhancing Child Protection Laws After the April 16, 2002 Supreme Court Decision*, Ashcroft v. Free Speech Coalition, 107th Cong. (2002) (statement of Ernest E. Allen, President and Chief Executive Officer, National Center for Missing and Exploited Children).

9. Contrast this with the adult pornography industry in which many actors become well-known, to the industry at least, as “porn stars.”

10. See, e.g., *United States v. Sims*, 220 F. Supp. 2d 1222 (D.N.M. 2002) (entertaining a motion to reconsider a previously denied motion for judgment of acquittal; then granting a judgment of acquittal with respect to one set of images); *United States v. Reilly*, No. 01 CR. 1114(RPP), 2002 WL 31307170 (S.D.N.Y. Oct. 15, 2002) (granting defendant’s motion to withdraw a guilty plea and further holding that the government must prove beyond a reasonable doubt that the defendant knew that the images depicted real children).

11. *Free Speech Coalition*, 535 U.S. at 259 (Thomas, J., concurring).

puter-generated, thereby raising a reasonable doubt as to their guilt. . . . [T]echnology 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. . . . [T]he Government should not be foreclosed from enacting a regulation of virtual child pornography . . . .”<sup>12</sup>

As explained above, Justice Thomas’ words reflect the state of child pornography prosecutions under the Court’s decision. Child pornographers use the legal status of virtual child pornography to thwart prosecution for actual child pornography crimes.

My conscience will not allow me to ignore the pernicious evils of child pornography or the actual harm that child pornography effectuates in all of its forms. In my role as a United States Senator and Chairman of the Senate Judiciary Committee, I feel a deep moral duty to do all in my power to ensure the safety of our nation’s children. As a result of my convictions, following the *Free Speech Coalition* decision, I redoubled my efforts and committed to drafting legislation that would protect our nation’s children in a manner consistent with the First Amendment as interpreted by the Court.

On January 13, 2003, I sponsored new legislation that would address the problems associated with virtual child pornography in a manner consistent with the Court’s interpretation of the First Amendment. This legislation, the recently signed Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003,<sup>13</sup> or “PROTECT Act,” institutes a broad array of important measures to protect children. Much like laws dealing with actual child pornography, the virtual child pornography provisions are aimed at preventing horrible crimes committed against society’s most vulnerable members.

The PROTECT Act of 2003 was signed into law on April 30, 2003. The Act aims to enhance the Government’s ability to obtain child pornography convictions within the Constitutional parameters determined by the Supreme Court. The Act does this by refining the definition of “child pornography” and other terms, clarifying the elements of child pornography crimes, and providing strong affirmative defenses to those accused of violating child pornography laws. Specifically, the Act refines the definition of child pornography to enhance the Government’s ability to prosecute child pornographers who use computer programs

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12. *Id.*

13. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650.

to modify visual depictions of real children to avoid conviction. The definition now includes any "computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct."<sup>14</sup> Consistent with this definition, the Act specifies that "[i]t is *not* a required element of any offense under this section that the minor depicted *actually exist*."<sup>15</sup> Thus the Government is able to establish its *prima facie* case when the children portrayed in sexually explicit depictions appear indistinguishable from actual minors, and need not prove that actual children are being depicted.

If the Government meets this burden the Act nonetheless provides an absolute defense if the defendant can show that the child pornography at issue was not produced using any actual minors.<sup>16</sup> In other words, the defendant must show that the person depicted was an adult at the time the material was produced or that the material resulted from some other method such as computer generation.<sup>17</sup> This affirmative defense is intended to remedy the constitutional concerns addressed by the Supreme Court that production and viewing of virtual child pornography is free speech. Defendants that trade and consume this material are free to do so as long as it can be shown that this material is in fact virtual. It is well-settled that Congress can define the elements of an offense. Much like other affirmative defenses that exist in law, such as self-defense, insanity, or provocation, this provision places the burden of proof on the party that is in the best position to determine the pertinent facts.

The shifted burden in virtual child pornography cases makes common sense. The person who creates child pornography certainly is in a better position to ascertain whether or not the children depicted are real than a prosecutor who discovers these items at the end of the day and, due to advances in technology, has no reasonably effective means for tracking their source. Those who receive and view these materials are also properly assigned the risk of viewing such materials. The grave threat that child pornography poses to children justifies placing this risk upon those who would view its virtual imitations. The Government has both the right and the obligation to bring effective prosecutions for child pornography offenses. I believe that, coupled with the new definition of child pornography, this affirmative defense strikes an appropriate balance between the

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14. § 502(a), 117 Stat. at 678.

15. § 504(a), 117 Stat. at 680–81 (emphasis added).

16. § 502(d), 117 Stat. at 679.

17. *Id.*

Government's right to police child pornography and the individual's right to deal in virtual pornography.

The PROTECT Act, due to constitutional restraints, does not solve all the problems related to virtual child pornography. For example, defendants may still hinder prosecution by making actual pictures look computer-generated. Nonetheless, it tempers the advantage that child pornographers have under *Free Speech Coalition* by ending their ability to thwart prosecution solely because they have made their victims unidentifiable.

It is my hope that the PROTECT Act will do just what its title suggests and protect our nation's children from those who would commit such despicable crimes. My efforts to end the scourge of child pornography and other child crimes do not end here. I am open to enacting new laws, creating prosecutorial tools, and even starting new government programs that will help us reach the goal of ending child exploitation and abuse.

As Nobel Laureate Gabriela Mistral so eloquently stated, "Many things can wait. Children cannot. Today their bones are being formed, their blood is being made, their senses are being developed. To them, we cannot say 'tomorrow.' Their name is today."<sup>18</sup>

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18. Johann Christoph Arnold, ENDANGERED: YOUR CHILD IN A HOSTILE WORLD 172 (2000) (quoting Gabriela Mistral).