

been held unconstitutional (*ALA v. Thornburgh*, 713 F. Supp. 469 (D.D.C. 1989)), revised in 1990, again held unconstitutional by the District Court (*ALA v. Barr*, 794 F. Supp. 412 (D.D.C. 1992)), held constitutional, although certain regulations were invalidated (*ALA v. Reno*, 33 F. 3d 78 (D.C. Cir. 1994)), and subsequently the Tenth Circuit has held a regulation more central to the regulatory scheme unconstitutional (*Sundance Assocs. Inc. v. Reno*, 139 F. 3d 804 (10th Cir. 1998)). Throughout, however, the records kept have been barred from use in prosecutions other than for the failure to keep the records.

S. 2520 would permit the use of the record-keeping records in a child pornography prosecution. However, requiring producers to maintain records at the risk of criminal liability for not doing so, which records can be used against them in a child pornography prosecution, violates the constitutional prohibition against mandatory self-incrimination.

4. Finally, there is a provision in Section 9 creating a new §2252A(f), which is particularly pernicious. It permits a person aggrieved by reason of child pornography to commence a civil action for injunction relief and compensatory and punitive damages. First, it is vague, since both the grievance and the person aggrieved are apparently in unlimited, undefined categories; and the potential civil defendant is in another unlimited, undefined category. Moreover, apparently a defendant is liable whether or not he or she knows of the minority of the child. And, since it applies to both the pandering and "appears to be" prongs of the statute, there may be civil liability even when no child is involved.

Most important, it opens a Pandora's Box. Under state law, a person using a minor to create child pornography is not only criminally liable, but is also liable to the child whom he or she has used. But to open the protected class to parents, spouses, etc. and the defendant class to distributors, retailers, etc. is inappropriate and ultimately harmful to legitimate First Amendment interests. It raises the specter of the Pornography Victims Compensation Act, which raised such an outcry that it failed to pass Congress.

H.R. 4623

A. Section 3(a) of the Bill criminalizes as child pornography computer images as long as they are, or are indistinguishable from, actual child pornography. The majority in *Free Speech Coalition* clearly held that unless material either meets the *Ferber* test, which protects children exploited in the production process, or is obscene under, *Miller v. California*, it is protected by the First Amendment. Like the material covered by the unconstitutional CPPA, the material described in the "indistinguishable from" portion of section 3(a) does not involve or harm any children in the production process. Thus, section 3(a) is unconstitutional under *Free Speech Coalition*.

B. Section 3(c) of the Bill provides an affirmative defense to a child pornography prosecution that no actual child was involved in the creation of the material. Thus, despite section 3(a) discussed above, the Bill actually permits computer-generated sexually explicit depictions of minors (other than pre-pubescent minors and computer morphing which appears as an identifiable minor), if the defendant meets the burden of proving the affirmative defense. (Curiously, the provision limiting the defense excludes material defined in §2256(8)(A), i.e., that which used an actual minor in its production. Read plainly, that suggests that in a non-computer child pornography case, one cannot escape liability by proving that only

adults were photographed. It is unlikely that this is what was intended.)

As Justice Kennedy, writing for the Court, says in *Free Speech Coalition* (122 S.Ct. at 1404), shifting the burden of proof on an element of the crime raises serious constitutional issues. In fact, in the First Amendment context, we believe that shift is unconstitutional; among other things, it violates *Smith v. California*, 361 U.S. 147, 153 (1959) in that it eliminates the requirement that the government prove knowledge of minority by shifting the burden of proof to the defendant. Thus, defendant must prove a negative—that no children were used—a difficult chore, particularly if the computer programmer-designer is not available or known to the defendant. Finally, under *United States vs. X-Citement Video, Inc.*, 513 U.S. 64 (1994), in the case of a librarian, retailer or distributor, the government must prove that he or she knew that the material was of an actual minor. This proposal impermissibly and unconstitutionally shifts this burden.

C. Section 4 creates a crime of pandering child pornography, defined as the sale or offer of material intending to cause the purchaser or offeree to believe that the material is child pornography, whether it is or not. Similarly, one who accepts or attempts to receive or purchase material, believing it to be child pornography (whether or not it is such), is also guilty of this new crime. This, in effect, transforms consumer fraud into a felony. Once could be selling copies of *Mary Poppins* or the Bible, but if one intends to cause the buyer to believe that the book contains a visual depiction of a minor engaging in sexual conduct, it is a felony. In fact, the Bill goes one step further and provides that the crime can be committed even though no person actually provides, sells, receives, purchases, possesses or produces any visual depiction (e.g., selling an empty box). In effect, it criminalizes the intent to market or to procure child pornography if some action is taken to effectuate that desire, even if the material actually is not child pornography. As discussed above, this seems to go significantly further than *Ginzburg v. U.S.* permits and is therefore likely unconstitutional.

D. The first portion of section 5 of the Bill (new 18 USC §1466A) provides that computer images of persons indistinguishable from pre-pubescent children in sexually explicit conduct are punishable as child pornography. (A pre-pubescent child is defined as a child whose "physical development indicates" the child is 12 or younger, or who "does not exhibit significant pubescent physical or sexual maturation." "Indistinguishable" is defined as "virtually indistinguishable, in that . . . an ordinary person . . . would conclude that the depiction is of an actual minor" engaging in sexual acts. Drawings, cartoons, sculptures and paintings are excluded.) This is based on Justice O'Connor's distinction between virtual youthful-adult and virtual-child pornography. However, there appears to be no requirement under 1466A that minors were involved in the creation of the depiction. Thus, it falls under *Free Speech Coalition*.

E. The second part of §5 of the Bill is new §1466B, which appears to be similar to §1466A except it does not have the "indistinguishable" concept and it does apply to drawings, cartoons, sculptures and paintings. Thus it seems directly contrary to the *Free Speech Coalition* holding, differing only in its limited application only to depictions of younger children (i.e., 12 and under). Further, it appears that material covered by §1466A is a subset of that covered by §1466B, and would be covered by both.

Media Coalition and its members urge you and the other members of the Judiciary Committee not to approve either of these

bills. Not only are they clearly unconstitutional, but passage of either bill would result in constitutional challenges that could be exploited by person charged with possession of actual child pornography.

Sincerely yours,

MICHAEL A. BAMBERGER,
General Counsel.

LOCAL LAW ENFORCEMENT ACT OF 2001

Mr. SMITH of Oregon. Mr. President, I rise today to speak about hate crimes legislation I introduced with Senator KENNEDY in March of last year. The Local Law Enforcement Act of 2001 would add new categories to current hate crimes legislation sending a signal that violence of any kind is unacceptable in our society.

I would like to describe a terrible crime that occurred January 11, 2002, in New York, NY. A gay man, Eric D. Miller, 26, was shot in the chest on a Harlem street by a man who shouted anti-gay remarks at him, according to police. Miller and his partner were walking down a street when they were confronted by two men who became enraged at the sight of the couple. The assailants yelled, "Black men shouldn't be gay," and threw rocks and bottles at the victims. During an ensuing scuffle, one of the assailants shot Miller in the chest. Miller was treated at a local hospital and released.

I believe that government's first duty is to defend its citizens, to defend them against the harms that come out of hate. The Local Law Enforcement Enhancement Act of 2001 is now a symbol that can become substance. I believe that by passing this legislation and changing current law, we can change hearts and minds as well.

IN HONOR OF THE NATION'S VETERANS

Mr. SANTORUM. Mr. President, I rise today in celebration of National Veterans Awareness Week, a time to commemorate and appreciate all the men and women who have served in America's Armed Forces. The week of November 10, 2002, is for honoring the soldiers, sailors, airmen, and marines—some now gone, and some still alive—who have fought to protect our freedoms and liberties.

The Nation's veterans have often stood as the last barrier between our country and the terrors of fascism, communism, and anarchy. They have waged war, kept peace, and deterred the threat of the unknown. The work of those in uniform is dangerous and difficult; it requires a personal commitment and sacrifice, as well as the patience and support of their families. Members of the armed services have a brave, admirable responsibility and a privileged perspective of history. It is with deepest respect that I thank them for their courage and their continued dedication to our Nation's security.

Pennsylvania is the proud home of more than a million veterans, all of