Then PHILL GRAMM took the Senate floor, and laid out a withering assessment of the bill and why it would do so much harm to the country if passed. He wrapped up his remarks by saying that ''the Clinton health bill would pass the Senate over my cold, dead political body.'' That served as a rallying cry for the rest of the Congress and signaled a real turning point in the debate. But, at the time, it wasn't popular and most people on Capitol Hill thought it wasn't very smart. But it was right. That's PHIL GRAMM for you.

I have heard him say on more than one occasion. ''I've never taken a hostage I wasn't willing to shoot.'' Everyone knows Senator PHIL GRAMM will kill a bill if he thinks it's bad for America or if fellow Texans are being treated unfairly. And he has shot some legislative hostages.

But more often than not, he was able, through negotiation, to work out a better product.

I think the Senate will miss his homespun eloquence. I don't think there is anyone better at simplifying a complicated bill for his colleagues and the American people. Whether he uses the ''Dicky Flatt test'' or the wisdom his mama passed down to him, Senator GRAMM has the unique ability to make the complicated simple. On this side of the aisle, that eloquence will be missed, he always did a great job of articulating our position.

Mr. President, Senator GRAMM will be missed not just by me, but this entire body, the people of Texans and all Americans. I will miss him as a Senator and a friend.

TRIBUTE TO SENATOR FRED THOMPSON

Mr. BUNNING. Mr. President, I rise today to pay tribute to my good friend and colleague, Senator FRED THOMPSON.

Since his arrival in the Senate in 1994, Senator THOMPSON has been one of the most respected Members on both sides of the aisle. His constituents clearly have great admiration and respect for him. In 1996, Senator THOMPSON received more votes than any other candidate in the history of Tennessee and won his reelection by more than twenty points!

Throughout his tenure in the Senate, Senator THOMPSON has been a tremendous supporter of conservative ideals and principles. As a member of the Senate Finance Committee, he has fought to reduce taxes for his fellow Tennesseans and all Americans, and helped to stabilize Medicare and Social Security for future generations.

As a member of the Senate Government Affairs Committee, I have had the privilege of working with Senator THOMPSON on various projects when he served as chairman, and later as the ranking Republican member. The Senator should be congratulated for his hard work on the President's priority to create the Homeland Security Department.

In a recent interview, Senator THOMPSON said he has ''always looked at public service as more an interruption to a career than a career itself.'' It is now time for Senator THOMPSON to begin his new career as the District Attorney on the hit television show ''Law and Order.'' I wish my good friend Senator THOMPSON well in his new job, and I leave him with this little piece of advice: don't let Hollywood turn you into a liberal!

Senator THOMPSON will be missed not just by me, but this entire body, the people of Tennessee and all Americans. I will miss him as a Senator, but look forward to watching my friend on Wednesday nights as he begins his new career on ''Law and Order.''

TRIBUTE TO SENATOR TIM HUTCHINSON

Mr. BUNNING. Mr. President, it is with great pride that I rise today to pay tribute to Senator TIM HUTCHINSON of Arkansas

Since 1985, when he first began his career in public service as a member of the Arkansas State House of Representatives, TIM HUTCHINSON has fought for the people of Arkansas and the citizens of the United States of America. Throughout his 12 years in public office at the State and Federal level, TIM has worked hard to push his conservative agenda and ideals. He has been a strong proponent of a balanced budget, tax relief and reform of our Nation's education system.

As a Member of the House of Representatives from 1992 to 1998, TIM authored the much needed $500-per-child tax credit, which allows parents to place as much as $2,000 per year, per child, in a designated savings account. He was also one of the main actors in the pursuit to reform this nation's struggling and inefficient welfare system. Besides his many accomplishments in the areas of tax relief, education and welfare reform, TIM has been a major advocate of issues affecting our nation's veterans. He has worked tirelessly over the years to open additional outpatient clinics for veterans across Arkansas.

As a Member of the U.S. Senate, TIM HUTCHINSON served on the Armed Service Committee, Health, Education, Labor and Pensions Committee, Agriculture Committee, Veterans Affairs Committee and the Special Committee on Aging. As a member of the Education Working Group, Senator HUTCHINSON led the charge to pass the ''Education Savings Accounts'' Legislation. I am also very proud to have worked with Senator HUTCHINSON on trying to pass legislation which bans human cloning.

I have had the honor of serving with TIM HUTCHINSON in both the House and Senate. I have served with him on the Senate Armed Service Committee and know first hand how hard this individual has worked to make this Nation a safer and better place for all to live. With his background as a teacher and businessman, TIM was able to bring both expertise and leadership to the Republican party. We need more public servants like TIM HUTCHINSON who champion empowerment over dependency. It was a pleasure and honor to serve with him in this body.

THE PROTECT ACT

Mr. LEAHY. Mr. President, last night the Senate passed, by unanimous consent, the Hatch-Leahy PROTECT Act providing important new tools to fight child pornography. I want to take a moment to speak about the passage of this important bill and the effort that it took to get to this point. Although they have recessed subject to the recall of the Speaker of the House, I also want to implore the Republican leadership in the House of Representatives not to miss this important opportunity to pass such important bipartisan legislation as this.

In April, I came to the Senate floor and joined Senator HATCH in introducing S. 2520, the PROTECT Act, after the Supreme Court's decision in Ashcroft v. Free Speech Coalition (''Free Speech''). Although there were some others who raised constitutional concerns about specific provisions in that bill, I believed—and still believe—that unlike the Administration proposal, it was a good faith effort to work within the First Amendment.

Everyone in the Senate agrees that we should do all we can to protect our children from being victimized by child pornography. That would be an easy debate and vote. The more difficult thing is to write a law that will both do that and will stick. In 1996, when we passed the Child Pornography Prevention Act, ''CPPA'', many warned us that certain provisions of that Act violated the First Amendment. The Supreme Court's recent decision in Free Speech has proven them correct.

We should not sit by and do nothing. It is important that we respond to the Supreme Court decision. It is just as important, however, that we avoid repeating our past mistakes. Unlike the 1996 CPPA, this time we should respond with a law that passes constitutional muster. Our children deserve more than a press conference on this issue. They deserve a law that will last.

It is important that we do all we can to end the victimization of real children by child pornographers, but it is also important that we pass a law that will withstand First Amendment scrutiny. We need a law with real teeth, not one with false teeth.

After joining Senator HATCH in introducing the PROTECT Act, I convened a Judiciary Committee hearing on the legislation. We heard from the Administration, from the National Center for Missing and Exploited Children, NCMEC, and from experts who came and told us that our bill, as introduced, would pass constitutional muster, but the House-passed bill would not.

I then placed S. 2520 on the Judiciary Committee's calendar for the October 8, 2002, business meeting. I continued to work with Senator HATCH to improve the bill so that it could be quickly enacted. Senator HATCH circulated a Hatch-Leahy proposed Judiciary Committee substitute that improved the bill before our October 8 business meeting. Unfortunately the Judiciary Committee was unable to consider it because of procedural maneuvering by my colleagues that had nothing to do with this important legislation, including the refusal of Committee members on the other side of the aisle to consider any pending legislation on the Committee's agenda.

I still wanted to get this bill done. That is why, for a full week in October, I worked to clear and have the full Senate pass a substitute to S. 2520 that tracked the Hatch-Leahy proposed committee substitute in nearly every area. Indeed, the substitute I offered even adopted parts of the House bill which would help the NCMEC work with local and state law enforcement on these cases. Twice, I spoke on the Senate floor imploring that we approve such legislation. As I stated then, every single Democratic Senator cleared that measure. I then urged Republicans to work on their side of the aisle to clear this measure—so similar to the joint Hatch-Leahy substitute—so that we could swiftly enact a law that would pass constitutional muster. Unfortunately, instead of working to clear that bipartisan, constitutional measure, colleagues on the other side of the aisle opted to use this issue to play politics before the election.

They redrafted the bill, changed crucial definitions, and offered a new version. Facing the recess before the mid-term elections, we were stymied again.

Even after the election, however, during our lame duck session, I have continued to work with Senator HATCH to pass this legislation through the Senate. As I had stated I would do prior to the election, I called a meeting of the Judiciary Committee yesterday. In the last meeting of the Judiciary Committee under my Chairmanship in the 107th Congress, I placed S. 2520, the Hatch-Leahy PROTECT Act, on the agenda again. At that meeting the Judiciary Committee approved this legislation, as amended. We agreed on a substitute and to improvements in the victim shield provision that I authored. Although I did not agree with two of Senator HATCH's amendments because I thought that they risked having the bill declared unconstitutional, I nevertheless both called for the Committee to approve the bill and voted for the bill in its amended form.

I then sought, that same day, to gain the unanimous consent of the full Senate to pass S. 2520 as reported by the Judiciary Committee, and I worked with Senator HATCH to clear the bill on both sides of the aisle. I am please that late last night that the Senate passed S. 2520 by unanimous consent. I want to thank Senator HATCH for his help clearing the bill for passage last night.

I am glad to have been able to work hand in hand with Senator HATCH on S. 2520, the PROTECT Act, a bill that gives prosecutors and investigators the tools they need to combat child pornography. The Hatch-Leahy PROTECT Act strives to be a serious response to a serious problem.

The provisions of the Hatch-Leahy bill, S. 2520, as we introduced it are bipartisan and good faith efforts to protect both our children and to honor the Constitution. At our hearing last month, Constitutional and criminal law scholars—one of whom was the same person who warned us last time that the CPPA would be struck down—stated that the PROTECT Act could withstand Constitutional scrutiny, although there were parts that were very close to the line.

Unfortunately these experts could not say the same about the administration's bill, which seems to challenge the Supreme Court's decision, rather than accommodate the restraints spelled out by the Supreme Court. I have also received letters from other Constitutional scholars and practitioners expressing the same conclusion, which I will place in the RECORD with unanimous consent. The Administration's proposal and House bill simply ignore the Supreme Court's decision and reflect an ideological response instead of a carefully drawn bill that will stand up to scrutiny.

The PROTECT Act is a good faith effort, but it is not perfect and I would have liked to have seen some additional changes to the bill. Unfortunately, I could not obtain agreement to make the following modifications:

First, regarding the tip line, I would have liked to clarify that law enforcement agents cannot ''tickle the tip line'' to avoid the key protections of the Electronic Communications Privacy Act.

Second, regarding the affirmative defense, I would have liked to ensure that there is an affirmative defense for the new category of child pornography and for all cases where a defendant can prove in court that a specific, non-obscene image was made using not any child but only actual, identifiable adults.

Nevertheless, we were able to reach agreement in Committee on modifying the bill with my amendment to the victims' shield law by giving federal judges and prosecutors the discretion to override the new victim shield law when there is good cause, such as cases where the shield law is actually used as a sword by the defendant to help assert a defense.

As a general matter, I would have thought it far simpler to take the approach of outlawing ''obscene'' child pornography of all types, which we do in one new provision that I suggested. That approach would produce a law beyond any possible challenge. This approach is also supported by the National Center for Missing and Exploited Children, which we all respect as the true expert in this field.

Following is an excerpt from the Center's answer to written questions submitted after our hearing, which I will place in the RECORD in its entirety:

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

Thus, according to the National Center for Missing and Exploited Children, the approach that is least likely to raise constitutional questions—using established obscenity law—is also an effective one.

Because that is not the approach we decided to use, I recognize that S. 2520 contains provisions about which some may have legitimate Constitutional questions. These provisions include:

A new ''pandering'' provision with a very wide scope;

a new definition of 'obscenity' that contains some, but not all, of the elements of the Supreme Court's test;

a new affirmative defense for pornography made not using any minors that does not apply to one new category of child pornography.

These provisions raise legitimate concerns, but in the interest of making progress I am pleased, as Chairman of the Judiciary Committee, to have tried to balance all the competing interests to produce a bill with the best chance of withstanding a constitutional challenge.

That is not everyone's view. Others evidently think it is more important to make an ideological statement than to write a law. A media report just this week on this legislation noted the wide consensus that S. 2520 is more likely than the House bill to withstand scrutiny, but quoted a Republican House member as stating: ''Even if it comes back to Congress three times we will have created better legislation.''

To me, that makes no sense. Why not create the ''better legislation'' right now for today's children, instead of inviting more years of litigation and putting at risk any convictions obtained in the interim period before the Supreme Court again reviews the constitutionality of Congress' effort to address this serious problem? That is what S. 2520 seeks to accomplish as drafted.

I want to commend Senator HATCH for working with me to include many other important provisions in the Hatch-Leahy bill that we developed together and are not as controversial. These include:

A tough new private right of action for victims of child pornography with punitive damages;

a victims' shield law to keep child victim's identity out of court and prevent them from suffering a second time in the criminal process;

a new notice provision designed to stop ''surprise defenses;''

sentencing enhancements for recidivists and a directive to correct the disparity in the current sentencing guidelines that provides a lighter sentence for offenders who cross state lines to actually molest a child than for offenders who possess child pornography that has crossed State lines.

These provisions are important, practical tools to put child pornographers out of business for good and in jail where they belong.

I support S. 2520 as a good faith effort to protect our children and honor the Constitution, and the Committee substitute, which improved upon the original bill.

There were two amendments adopted in Committee to which I objected. I felt that they needlessly risked a serious constitutional challenge to a bill that already provided prosecutors the tools they needed to do their jobs. Let me discuss my opposition to two amendments offered by my good friend Senator HATCH that were adopted by voice vote by the Judiciary Committee.

Although I worked with Senator HATCH to write the new pandering provision in S. 2520, I do not support Senator HATCH's amendment, which criminalizes speech even when there is no underlying material at all—whether obscene or non-obscene, virtual or real, child or adult.

The pandering provision is an important tool for prosecutors to punish true child pornographers who for some technical reason are beyond the reach of the normal child porn distribution or production statutes. It is not meant to federally criminalize talking dirty over the internet or the telephone when the person never possesses any material at all. That is speech, and that goes too far.

The current pandering provision in S. 2520 is quite broad, and some have argued that it presents constitutional problems as written, but I thought that prosecutors needed a strong tool, so I supported Senator HATCH on the current provision.

I was heartened that Professor Schauer of Harvard, a noted First Amendment expert, testified at our hearing that he thought that the provision was Constitutional, barely.

Unfortunately, Professor Schauer has since written to me stating that this new amendment ''would push well over the constitutional edge a provision that is now up against the edge, but probably barely on the constitutional side of it.'' I will place that letter and other materials in the RECORD with unanimous consent of the Senate.

Because this amendment endangers the entire pandering provision, because it is unwise, and because that section is already strong enough to prosecute those who peddle child pornography, I oppose this amendment. Nevertheless, in light of the broader support for this amendment on the Committee, it was adopted over my objection.

Senator HATCH and I agree that legislation in this area is important. But regardless of our personal views, any law must be within constitutional limits or it does no good at all. Even though it is close to the line, I support S. 2520 as Senator HATCH and I introduced it in the Senate. Senator HATCH's amendment which would include all ''virtual child pornography'' in the definition of child pornography, in my view, crosses the constitutional line, however, and needlessly risks protracted litigation that could assist child pornographers in escaping punishment.

Although I joined Senator HATCH in introducing S. 2520, even when it was introduced I expressed concern over certain provisions. One such provision was the new definition of ''identifiable minor.'' When the bill was introduced, I noted that this provision might ''both confuse the statute unnecessarily and endanger the already upheld 'morphing' section of the CPPA.'' I said I was concerned that it ''could present both overbreadth and vagueness problems in a later constitutional challenge.''

The Supreme Court made it clear that we can only outlaw child pornography in two situations: No. 1, it is obscene, or No. 2, it involves real kids. That is the law as stated by the Supreme Court, whether or not we agree with it.

The ''identifiable minor'' provision in S. 2520 may be used without any link to obscenity doctrine. Therefore, what saves it is that it applies to child porn made with real ''persons.'' The provision is designed to cover all sorts of images of real kids that are morphed or altered, but not something entirely made by computer, with no child involved. That is the provision as Senator HATCH and I introduced this bill.

The Hatch amendment adopted in Committee that redefined ''identifiable minor'' by creating a new category of pornography for any ''computer generated image that is virtually indistinguishable from an actual minor'' dislodged, in my view, that sole constitutional anchor. The new provision could be read to include images that never involved real children at all but were 100 percent computer generated.

That was never the goal of this provision and that was the reason it was constitutional. There are other provisions in the bill that deal with obscene virtual child pornography that I support. This provision was intended to ease the prosecutor's burden in cases where images of real children were cleverly altered to avoid prosecution.

I support the definition of 'identifiable minor' as we originally wrote and introduced it. Because Senator HATCH's amendment seriously weakened the constitutional argument supporting this entire provision, I opposed it. Nevertheless, given the broader support for this amendment on the Judiciary Committee it was been adopted, over my objection and I still sought passage of the bill, which we achieved last night.

Even though S. 2520 is not perfect, I was glad that I was able to work with Senator HATCH to secure its approval last night. I had hoped that the House of Representatives would adopt the bill before they recessed for the end of the year. That way, we could have sent a bill to the President for his signature right now. Instead, the House of Representatives' Republican leadership decided to adjourn without either taking up the Hatch-Leahy bill or working with us to resolve any differences. I hope that the House leadership will reconsider this decision and consider this measure, rather than start all over again in the next Congress. It is certainly unfortunate that the House Republican leadership would rather adjourn for a recess than take the opportunity to pass a bipartisan bill which passed the Senate unanimously.

As I have explained, I believe that this issue is so important that I have been willing to compromise and to support a measure even though I do not agree with each and every provision that it contains. That is how legislation is normally passed. Again, however, I fear that some in the Administration and the House have decided to play politics with this issue that is so important to our nation's children. I urge them to reconsider their ''take it or leave it approach'' and consider the Hatch-Leahy PROTECT Act—or at least come back to discuss our differences.

I ask unanimous consent that the letters and materials to which I referred be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW,
Charlottesville, VA.

Senator PATRICK J. LEAHY,
Chairman, Senate Committee on the Judiciary, Washington, DC.

DEAR CHAIRMAN LEAHY: On October 2, 2002, I testified before the Senate Judiciary Committee concerning S. 2520 and H.R. 4623. Each of these bills was drafted in response to Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002), in which the Supreme Court threw out key provisions of the federal child pornography laws. As I stated in my testimony, the new sections contained in S. 2520 have been carefully tailored with an eye towards satisfying the precise concerns identified by the Supreme Court. Recently, Senator Hatch offered an amendment in the nature of a substitute to S. 2520 (hereinafter ''the Hatch Substitute''). I have examined the Hatch Substitute, and I believe that it contains a definition of child pornography that is nearly identical to the definition rejected by Free Speech Coalition. Therefore, the Hatch substitute is unlikely to survive constitutional challenge in the federal courts, and the Committee should decline to adopt it.

As you know, each of these bills contains some complicated provisions, including especially their definition sections. As you also

know, this complexity is unavoidable, for the Congress aims to intervene in and eliminate some of the complex law enforcement problems created by the phenomenon of virtual pornography. In the following comments, I will try to state my concerns about the Hatch Substitute as concisely as possible, while identifying the statutory nuances that are likely to generate significant constitutional questions in the event that the Hatch Substitute is enacted.

In Free Speech Coalition, the Supreme Court scrutinized provisions of the Child Pornography Prevention Act of 1996 (''CPPA'') that were designed to eliminate obstacles to law enforcement created by virtual child pornography. The proliferation of virtual pornography has enabled child pornographers to escape conviction by arguing that it is so difficult to distinguish the virtual child from the real one that (1) the government cannot carry its burden of proving that the pornography was made using real children and/or (2) the government cannot carry its burden of providing scineter because the defendants believed that the images in their possession depicted virtual children, rather than real ones. In order to foreclose these arguments, the CPPA defined ''child pornography'' broadly so that it extended not only to a sexually-explicit image that had been produce using a real minor, but also to an image that ''appears to be of a minor'' engaging in sexually-explicit conduct. Free Speech Coalition rejected this definition of First Amendment grounds. The Court reaffirmed the holding of New York v. Ferber, 458 U.S. 747 (1982), under which the government is free to regulate sexually-explicit materials produced using real minors without regard to the value of those materials. However, the Court refused to extend the Ferber analysis to sexually-explicit materials that only appear to depict minors. The court noticed that many mainstream movies, as well as works of great artistic, literary, and scientific significance, explore the sexuality of adolescents and children. Such works, including ones that are sexually explicit, are valuable in the eyes of the community, and, as long as their production involves no real children, such works are protected by the First Amendment against governmental regulation.

In Free Speech Coalition, the Supreme court expressly considered and rejected a number of arguments made by the Solicitor General on behalf of the CPPA definition. One of these arguments was that the ''speech prohibited by the CPPA is virtually indistinguishable from child pornography, which may be banned without regard to whether it depicts works of value.'' In his opinion for the Court, Justice Kennedy explained that this argument fundamentally misconceived the nature of the First Amendment inquiry. Materials that satisfy the Ferber definition are regulable not because they are necessarily without value; to the contrary, Ferber itself recognized that some child pornography might have significant value. Indeed, the Court there reasoned that the ban on the use of actual children was permissible in part because virtual images—by definition, images ''virtually indistinguishable'' from child pornography—were an available and lawful alternative. Hence, as Justice Kennedy put it: ''Ferber, then, not only referred to the distinction between actual and virtual child pornography, it relied on [the distinction] as a reason supporting its holding. Ferber provides no support for a statute that eliminate the distinction and makes the alternative mode criminal as well.''

S. 2520 aims to reform the CPPA in ways that are sensitive to these First Amendment value judgments. By contrast, the Hatch Substitute proposes that the Congress should reenact a definition that is almost identical to the one that the Supreme Court just rejected. In the Hatch Substitute, the definition of child pornography would cover, among other things, sexually-explicit materials whose production involved the use of an ''identifiable minor.'' The Hatch Substitute defines ''identifiable minor'' as including a ''computer or computer generated image that is virtually indistinguishable from an actual minor.'' As I explained above, the Solicitor General suggested in Free Speech Coalition that the First Amendment would be satisfied if the Supreme Court limited the CPPA to depictions that are ''virtually indistinguishable'' from child pornography, and the Court rejected that interpretation. To put it mildly, it is hard to imagine that the Supreme Court would be inclined to view the Hatch Substitute as a good faith legislative responses to Free Speech Coalition when all it does is reenact a definition that the Court there expressly considered and disapproved. You will notice that I here am paraphrasing the definition provisions in the Hatch Substitute and omitting some of their complexity. In particular, the Hatch Substitute provides a further definition of the phrase ''virtually indistinguishable,'' requiring that the quality of the depiction be determined from the viewpoint of an ''ordinary person'' and providing an exception for ''drawings, cartoons, sculptures, or paintings.'' But neither the definition of ''identifiable minor'' nor these refinements of ''virtually indistinguishable'' are calculated to satisfy the concerns raised in Free Speech Coalition. As Justice Kennedy explained for the Court, an absolute ban on pornography made with real children is compatible with First Amendment rights precisely because computer-generated images are an available alternative, and, yet, the Hatch Substitute proposed to forbid the computer-generated alternative as well. Likewise, an exception for cartoons and so forth is insensitive to the Supreme Court's commitment to protect realistic portrayals of child sexuality, a commitment that is clearly expressed in the Court's recognition of the value of (among other things) mainstream movies such as Traffic and American Beauty.

In this regard, you will notice that the Hatch Substitute closely resembles some of the defective provisions of H.R. 4623, which would prohibit virtual child porn that is ''indistinguishable'' from porn produced with real minors. Unlike S. 2520, both H.R. 4623 and the Hatch Substitute seem to embody a decision merely to endorse the unconstitutional portions of the CPPA all over again. The Committee should refuse to engage in such a futile and disrespectful exercise. The law enforcement problems posed by virtual pornography are not symbolic but real, and the Congress should make a real effort to solve them. In my judgment, S. 2520 is a real effort to solve them, and the Committee should use S. 2520 as the basis for correcting the CPPA.

The Hatch Substitute contains additional innovations that the Committee should study carefully. Because this letter already is too long, I will allude to only one of them here. The ''pandering'' provision set forth in the Hatch Substitute contains some language that strikes me as being both vague and unnecessarily broad, and the provision therefore is likely to attract unfavorable attention in the federal courts. The Hatch pandering provision would punish anyone who ''advertises, promotes, presents, distributes, or solicits . . . any material or purported material in a manner that conveys the impression that the material or purported material'' is child pornography. To be completely candid, I am not sure that I understand what problems would be solved by defining the items that may not be pandered so that they include not only actual ''material,'' but also ''purported material.'' I suppose that there might be cases where a person offers to sell pornographic materials that do not actually exist and that the person might make the offer in a manner that violates the pandering prohibition. If that is the problem that the drafters of the Hatch Substitute have in mind, it seems that they might solve that problem more cleanly by adding the word ''offers'' to the list of forbidden conduct and deleting the references to ''purported material.'' (In other words, the provision would punish anyone who ''advertises, offers, promotes, presents, distributes, or solicits through the mails . . . any material in a manner that conveys the impression that the material'' is child pornography.) If that is not the problem that the Hatch Substitute has in mind, I would suggest that the drafters identify the problem precisely and develop language that is clearer and narrower than the phrase ''purported material,'' for that ambiguous term is likely to generate First Amendment concerns that otherwise could and should be avoided.

Respectfully yours,

ANNE M. COUGHLIN,
Class of 1948 Research Professor of Law.

THE COMMUNITARIAN NETWORK,
Washington, DC, October 11, 2002.

Hon. PATRICK J. LEAHY,
Chairman, U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR CHAIRMAN LEAHY: I want to thank you for your efforts to protect American children by filling the gap left by the Supreme Court's decision to strike down the Child Pornography Prevention Act. Ashcroft v. Free Speech Coalition dealt a blow to those who appreciate the important role the federal government must play in protecting young people from those who would exploit them. Your efforts to craft a bill, the PROTECT Act, that will withstand Constitutional scrutiny deserves the public's applause.

I would like to draw your attention to a similar, but separate, matter that also reflects on the health and security of our children in regards to pornography. Like the Child Pornography Prevention Act, the Child Internet Protection Act (CIPA), which was passed by the 106th Congress, has been struck down by the federal judiciary. In American Library Association, et al. v. United States of America, et al, a District Court in Pennsylvania threw CIPA out, arguing that its efforts to prevent children from exposure to harmful material on school and library computers amounted to a violation of the First Amendment. The Justice Department has appealed that case to the Supreme Court, where the lower court's decision will very likely be upheld. Unfortunately, as Harvard Law School professor Frederick Schauer testified at the hearing you recently held on CPPA, ''constitutionally suspect legislation under existing Supreme Court interpretation of the First Amendment, whatever we may think of the wisdom and accuracy of those interpretations, puts the process of [prosecution] . . . on hold while the . . . courts proceed at their own slow pace.''

I think we ought not wait for what will likely be a disappointing conclusion. Rather, I hope you will lead an effort to craft new legislation which (1) passes Constitutional muster, and (2) better enables schools and libraries to protect children from harmful images and websites. Let me take a moment to delimit how exactly a new, improved Children's Internet Protection Act would differ from the bill passed by the 106th Congress.

First, a new bill should distinguish clearly between measures affecting adults and minors. Though the title of the legislation is

the Children's Internet Protection Act, it requires technology protection measures on all computers with Internet access, regardless of the age of the patron using each computer. If the aim is to protect minors, it is unnecessary to put filters on every computer in a library. This, of course, was one of the District Court's primary concerns. I hope you will draft legislation requiring separate computers for adults and minors. All those under 18 should be required to use filtered computers, unless accompanied by a parent or teacher. Those over 18 should have access to un-filtered computers in a separate area. In smaller facilities, where only one computer is available, special adult hours could be set during which the filter is disabled and only adults may use the computer. The rest of the time a filter would be in place.

Second, I would encourage you to incorporate language that distinguishes children 12 and under from teenagers 13–18. Teenagers have greater capacities to process information than children, as well as different needs for information. In recognition of this, I would hope that your new bill would require different policies for children and teenagers, such as providing different filter settings.

Third, I hope you will consider expanding the scope of your bill to include provisions that protect minors from violent images as well as sexual ones. I realize that limiting the access of children to violent content poses a potentially more difficult constitutional question, but based on the weight of social science evidence showing the harm caused to children by violence in the media, I believe that violence must be included in any definition of content that is ''harmful to children.''

To further explain the reasoning behind these recommendations, I am enclosing a law review article, ''On Protecting Children from Speech,'' which will be published next fall in the Chicago-Kent Law Review. I would welcome the opportunity to discuss our position with you further. In the meantime, please feel free to contact Marc Dunkelman, Assistant Director of the Communitarian Network, with any questions. Thank you for your consideration.

Sincerely,

AMITAI ETZIONI.

May 13, 2002.

Chairman PATRICK J. LEAHY,
U.S. Senate Judiciary Committee
Washington, D.C.

DEAR CHAIRMAN LEAHY: We write to express our grave concern with the legislation recently proposed by the Department of Justice in response to the Supreme Court's decision in Ashcroft, et al. v. The Free Speech Coalition, et al., No. 00–795 (Apr. 16, 2002). In particular, the proposed legislation purports to ban speech that is neither obscene nor unprotected child pornography (indeed, the bill expressly targets images that do not involve real human being at all). Accordingly, in our view, it suffers from the same infirmities that led the Court to invalidate the statute at issue in Ashcroft.

We emphasize that we share the revulsion all Americans feel toward those who harm children, and fully support legitimate efforts to eradicate child pornography. As the Court in Ashcroft emphasized, however, in doing so Congress must act within the limits of the First Amendment. In our view, the bill proposed by the Department of Justice fails to do so.

Respectfully submitted,

Jodie L. Kelley, Partner, Jenner & Block, LLC; Washington, DC.

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HARVARD UNIVERSITY,
Cambridge, MA, October 3, 2002.

Re S. 2520.

Hon. PATRICK LEAHY,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR LEAHY: Following up on my written statement and on my oral testimony before the Committee on Wednesday, October 2, 2002, the staff of the Committee has asked me to comment on the constitutional implications of changing the current version of S. 2520 to change the word ''material'' in section 2 of the bill (page 2, lines 17 and 19) to ''purported material.''

In my opinion the change would push well over the constitutional edge a provision that is now right up against that edge, but probably barely on the constitutional side of it.

As I explained in my statement and orally, the Supreme Court has from the Ginzburg decision in 1966 to the Hamling decision in 1973 to the Free Speech Coalition decision in 2002 consistently refused to accept that ''pandering'' may be an independent offense, as opposed to being evidence of the offense of obscenity (and, by implication, child pornography). The basic premise of the pandering prohibition in S. 2520 is thus in some tension with more than thirty-five years of Supreme Court doctrine. What may save the provision, however, is the fact that pandering may also be seen as commercial advertisement, and the commercial advertisement of an unlawful product or service is not protected by the Supreme Court's commercial speech doctrine, as the Court made clear in both Virginia Pharmacy and also in Pittsburgh Press v. Human Relations Commission 413 U.S. 376 (1973). It is important to recognize, however, that this feature of commercial speech doctrine does not apply to noncommercial speech, where the description or advocacy of illegal acts is fully protected unless under the narrow circumstances, not applicable here, of immediate incitement.

The implication of this is that moving away from communication that could be described as an actual commercial advertisement decreases the availability of this approach to defending Section 2 of S. 2520. Although it may appear as if advertising ''material'' that does not exist at all (''purported material'') makes little difference, there is a substantial risk that the change moves the entire section away from the straight commercial speech category into more general description, conversation, and perhaps even advocacy. Because the existing arguments for the constitutionality of this provision are already difficult ones after Free Speech Coalition, anything that makes this provision less like a straight offer to engage in a commercial transaction increases the degree of constitutional jeopardy. By including ''purported'' in the relevant section, the pandering looks less commercial, and thus less like commercial speech, and thus less open to the constitutional defense I outlined in my written statement and oral testimony.

I hope that this is helpful.

Yours sincerely,

Frederick Schauer,
Frank Stanton Professor of the First Amendment.

THE MEDIA COALITION INC.,
New York, NY, September 23, 2002.

Re S. 2520 and H.R. 4623.

Sentor PATRICK J. LEAHY,
Chairman, Committee on the Judiciary, Washington, DC
Sen. ORRIN G. HATCH,
Ranking Republican Member, Committee on the Judiciary, Washington, DC

DEAR SENATORS LEAHY AND HATCH: I am General Counsel of The Media Coalition, a trade association whose members represent most of the publishers, booksellers, librarians, periodical wholesalers and distributors, movie, recording and video game manufacturers, and recording and video retailers in the United States. While Media Coalition and its members unanimously deplore child pornography and support prosecution of offenders, they are also concerned that the dictates of the First Amendment remain inviolate, even as to material that one finds to be offensive.

The Media Coalition and its members believe that the various attempts to respond to the decision in *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002), are unconstitutional and problematic in a number of respects, as described below.

S. 2520

1. As to proposed §2252A(a)(3)(B)—the ''pandering'' provision—it seems to criminalize commercial fraud as child pornography. *Ginzburg v. U.S.*, 383 U.S. 463 (1966), held only that pandering could convert borderline non-obscene material into obscenity. (''Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity.'') This goes must further. It applies without regard to the nature or quality of the material ''pandered''.

2. Proposed §2252A(c) adds an affirmative defense that, for computer-generated images, each pictured person was an adult and, for virtual child pornography, it was not produced using any actual minor. With respect to non-virtual child pornography, this results in a reversal of the usual burden of proof. IN a prosecution for traditional child pornography (e.g., as defined in §2256(8)(A)), one of the elements of the crime that the government must prove is that the production of the material involved the use of a minor. Further, under *United States v. X-Citement Video, Inc.*, 513U.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.

With respect to virtual child pornography, there are similar constitutional problems. The Supreme Court in *Free Speech Coalition* found that the evil in child pornography, and the basis for excluding it from First Amendment protection, is the unlawful conduct visa-vis an actual child. Thus, the Court held that, unless an actual child is used and thus abused in the creation of the material, there can be no crime as to otherwise First Amendment-protected material. The government must provide this necessary factual predicate. To shift the burden of proof as to this necessary element of the crime to the defendant is unconstitutional, even putting aside the often impossible task of proving the negative—that no child was used.

3. S. 2520 also amends the record-keeping provisions, which themselves have had a checkered constitutional history, having

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 unconstitional (*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