Testimony of

Mr. Bruce Taylor

October 15, 2003

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING OF OCTOBER 15, 2003,
"INDECENT EXPOSURE: OVERSIGHT OF DOJ'S
EFFORTS TO PROTECT PORNOGRAPHY'S VICTIMS"

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Mr. Chairman and Members of the Committee:

Obscenity is a crime and deserves to be prosecuted to the fullest extent of the law. It has been an offense to traffic in obscenity since the beginning of our Nation and is still a crime under Federal law and the laws of nearly every State. Because it is a crime and because organized crime has always played a dangerous role in controlling the porn syndicates that make and distribute hard-core pornography, I believe obscenity should be treated as any other serious crime and prosecuted in persistent and fair fashion, consistent with the Equal Protection Clause that should insure that all violators share an equal chance at facing justice in the courts of law. I also agree with the Congress and the State Legislatures that obscenity and its modern extreme form known as child pornography are not victimless crimes and contribute to anti-social conduct, sex crimes, deterioration of neighborhoods, and influence attitudes and activities among men, women, and children that contribute to a lack of respect for human dignity, personal privacy, mutual rights, and personal safety. As the Supreme Court said in the Paris Adult Theatre case in 1973, "The sum of experience...affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. ... The States [and Congress] have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' 'right...to maintain a decent society'."

I have been prosecuting obscenity cases for thirty years, since June 21, 1973, when the Supreme Court handed down the famous Miller decisions and gave us a three-prong test to separate illegal pornography from expression protected by the First Amendment. I was a law clerk in the Cleveland Prosecutor's Office and was asked that day by the Chief Prosecutor to read the new opinions and see how they would change how that office prosecuted its obscenity cases. Over the next five years, I would handle over 600 obscenity cases, obtain over 450 guilty pleas, and see jury convictions in all but two of at least 38 obscenity jury trials in Cleveland Municipal Court. Between 1976 and 1981, we would also prevail in over 100 obscenity law appeals, including before the Supreme Court of Ohio, the U.S. Court of Appeals for the Sixth Circuit, and

the Supreme Court of the United States. The Cleveland Police brought cases against all known employees of all the hard-core obscenity outlets and against all types of the hard-core pornography sold and the City's prosecutors brought those cases into the courts. Because of my having learned this field of prosecution under a policy of full and fair law enforcement, I have continued to prosecute and assist in the prosecution of obscenity, child exploitation, prostitution, and related vice crimes as both a special prosecutor for counties and cities across the Country and as a federal prosecutor for DOJ's Child Exploitation and Obscenity Section from 1989 through 1994. I have now been in about 100 jury trials for such offenses in almost half of the States. I have been in state and federal courts in big cities like Los Angeles, Phoenix, Cleveland, Cincinnati, Las Vegas, Houston, Miami, and Indianapolis, and in smaller communities such as Fort Wayne, Jeffersonville, Concord, Horry County, South Carolina, and Brazos County, Texas. On occasion, some of those obscenity or child porn cases involved extreme forms of what used to be "underground" materials, such as ABCDE porn (Animals, Bondage, Children, Deviance, Excretory), but almost all of the cases I had the privilege to act as a state or federal government attorney have involved hard-core pornography depicting adults engaged in explicit sexual conduct with "PCV" (penetration clearly visible). This is the "hard-core pornography" that the "porn syndicates" produce by pimping performers into actual sex acts for money in violation of state prostitution laws (and often the Federal "Mann Act," 18 U.S.C. § 2421, et seq., for interstate travel for prostitution purposes). It is this PCV form of hard-core pornography that has always been recognized as within the legitimate scope of Federal and State obscenity laws and prosecutable by prosecutors in any and every jurisdiction in the United States. The porn industry knows the line well and has, until recently, kept it to itself. Hollywood has never crossed that line and only the porn syndicate members and their associates have dared to occupy that territory. It is an objective line that allows prosecution policy to be consistent and predictable across urban and rural borders and known to the offenders and juries alike. In fact, I suggested in a law review article that Congress and the States could consider adopting a per se law to prohibit traffic in "hard-core pornography" that shows penetration clearly visible and lacks serious literary, artistic, political, or scientific value or purpose. In light of the rampant and technologically sophisticated nature of today's Internet and wireless transmissions of hard-core obscenity within, into, and out of the United States, it is worth considering whether such a per se obscenity law for hard-core pornography would be an effective and constitutionally permissible law enforcement measure for Congress to enact to deter this crime in this modern age.

We applaud the renewed efforts of the Department of Justice to begin again to enforce Federal obscenity statutes against this criminal activity and we will continue to encourage the Criminal Division's Child Exploitation and Obscenity Section to take on the challenge and privilege of enforcing these laws against the unlawful traffic in obscenity over the Internet, over the airways, in America's cities, and at our borders. The Attorney General has repeatedly stated his intent and policy of full enforcement of Federal obscenity laws, as well as increased enforcement of child exploitation and trafficking laws, both in his public addresses and in his policy statements to the Department and the United States Attorneys. His word must not be allowed to fail and their recent efforts must be continued "to the fullest extent of the law." It has taken some time for the Department to re-staff CEOS, train the new federal prosecutors, and begin co-training with U.S. Attorneys offices and federal law enforcement investigators at the U.S. Postal Inspection Service and FBI. The first federal obscenity cases in a decade have been indicted this year. These efforts must be continued and supported so that this crime may be successfully prosecuted for the benefit of the next generation of our children, grand-children, spouses, families, and victims. The specialized First Amendment sensitive and industry specific training and experience sharing must continue among federal and state prosecutors and police agencies. Federal resources should be strengthened by funding and implementing the 25 additional prosecutors that Congress provided for CEOS as part of the PROTECT Act of 2003 to handle obscenity and child exploitation cases. Federal and State efforts could also be dramatically increased by regular appointment of local assistant district attorneys and county prosecutors as cross-designated special assistant United States Attorneys to work on federal felony obscenity cases in the Federal courts, to complement or take the place of state law prosecutions (that are sometimes felonies, for wholesale promotion or repeat offenses, but often misdemeanors for retail traffic or first offenders). Joint obscenity and child exploitation, and trafficking seminars should be regularly held in regional locations across the Country to facilitate knowledgeable, consistent, and constitutionally sound investigations and prosecutions on both Federal and State levels. This is a national and international crime that is committed primarily by a syndicate of hard-core pornographers who supply the obscenity to local porn shops,

commercial Websites, video outlets, and pay-per-view movie services. Effective and fair enforcement of Federal and State laws requires the latest information and the highest standards of law enforcement to deal with this complex and widespread criminal enterprise. Existing laws can be effective, if universally enforced and the public deserves the benefit of those laws and deserves the continued vigilance of the Congress in keeping our laws up to date and in seeing that they are well and justly enforced against those who knowingly pander unprotected pornography in violation of those existing and future laws.

There are three classes of unprotected pornography that Congress and the States have prohibited from commercial and public distribution under criminal statutes, nuisance abatement statutes, and civil injunction laws, which are Obscenity, Child Pornography, and Harmful To Minors pornography.

Obscenity (which may include all hard-core adult pornography) is not protected by the First Amendment and is unlawful to produce or sell under the laws of most States and is a felony under Federal laws to transmit or transport by any facility of interstate or foreign commerce.
Obscene pornography is unprotected even for "consenting adults" and the Supreme Court upheld the right of Congress to declare it contraband and prohibit the use of any means or facility of interstate or foreign commerce to move or ship any obscene materials. Under existing U.S. Code sections, traffic in obscenity is a felony offense, such as 18 U.S.C. § 1461 (crime to knowingly mail obscenity, even for private use, or to mail advertisements for obscenity), § 1462 (crime to knowingly import/export or ship obscenity by common carrier via ground, air, water, satellite, Internet, phone, TV, or cable, etc., even for private use), § 1465 (crime to knowingly transport obscenity, for sale or distribution, across state lines or by any means or facility of interstate or foreign commerce, §§ 2252 & 2252A (crime to knowingly transport, receive, or possess child pornography within, into, or out of the United States by any means, including computer, and § 1961, et seq., RICO crime for knowingly using an enterprise in a pattern of obscenity or child exploitation offenses (including federal and state violations).

The Supreme Court has consistently held that obscenity is not protected speech under the Constitution and upheld the power of Congress and State Legislatures to prohibit obscenity from the streams of commerce. "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." Miller v. California, 413 U.S. 15, at 23 (1973). This is true even for "consenting adults." Paris Adult Theatre v. Slaton, 413 U.S. 49, at 57-59 (1973). "Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles." Reno v. ACLU, 521 U.S. 844, 117 S.Ct. 2329, at 2347, n. 44 (1997). The "Miller Test" was announced by the Court to provide the legal guidelines for determining obscenity under both federal and state laws. See Miller v. California, 413 U.S. 15, at 24-25 (1973); Smith v. United States, 431 U.S. 291, at 300-02, 309 (1977); Pope v. Illinois, 481 U.S. 497, at 500-01 (1987), providing the three-prong constitutional criteria for federal and state law enforcement and court adjudications:
(1) whether the average person, applying contemporary adult community standards, would find that the material, taken as a whole, appeals to a prurient interest in sex (i.e., an erotic, lascivious, abnormal, unhealthy, degrading, shameful, or morbid interest in nudity, sex, or excretion); and
(2) whether the average person, applying contemporary adult community standards, would find that the work depicts or describes, in a patently offensive way, sexual conduct (i.e., "ultimate sexual acts, normal or perverted, actual or simulated; ... masturbation, excretory functions, and lewd exhibition of the genitals"; and sadomasochistic sexual abuse); and
(3) whether a reasonable person would find that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Child Pornography consists of an unprotected visual depiction of a minor child under age 18 engaged in actual or simulated sexual conduct, including a lewd or lascivious exhibition of the genitals. It is a crime under Federal and State laws to knowingly make, send, receive, or possess child pornography. See 18 U.S.C. § 2256 and 2256A; New York v. Ferber, 458 U.S. 747 (1982), Osborne v. Ohio, 495 U.S. 103 (1990), United States v. X-Citement Video, Inc., 115 S.Ct. 464 (1994). See also United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987), cert. denied, 484 U.S. 856 (1987), United States v. Knox, 32 F.3d 733 (3rd Cir. 1994), cert. denied, 115 S. Ct. 897 (1995). In 1996, 18 U.S.C. § 2252A was enacted to include "child pornography" that consists of a visual depiction that "is or appears to be" of an actual minor engaging in

"sexually explicit conduct". Section 2252A was upheld as Congress intended it to apply to computer generated realistic images that cannot be distinguished from actual photos of real children in United States v. Hilton, 167 F.3d 61 (1st Cir. 1999), and United States v. Acheson, 195 F.3d 645 (11th Cir. 1999), but the Supreme Court declared the statute invalid as applied to child pornography that is wholly generated by means of computer in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). Congress then amended that law in the PROTECT Act of 2003, S.151, which also enacted a new section 18 U.S.C. § 1466A to give greater penalty for obscene child pornography.
Pornography Harmful To Minors (which may include soft-core pornography) is unlawful to knowingly sell or display to minor children under State laws and under federal law as enacted in the Child Online Protection Act of 1998 (COPA, 47 U.S.C. § 230), even if the material is not obscene or unlawful for adults. "HTM/OFM" pornography is known as "variable obscenity" or what is "obscene for minors". See Ginsberg v. New York, 390 U.S. 629 (1968), as modified by Miller, Smith, Pope, supra. See also Commonwealth v. American Booksellers Ass'n, 372 S.E.2d 618 (Va. 1988), followed, American Booksellers Ass'n v. Commonwealth of Va., 882 F.2d 125 (4th Cir. 1989), Crawford v. Lungren, 96 F.3d 380 (9th Cir. 1996), cert. denied, 117 S. Ct. 1249 (1997). Under the "Millerized-Ginsberg Test," pornography is "Harmful To Minors" or "Obscene For Minors" when it meets the following three prong test, as defined by statute and properly construed by the courts and judged in reference to the age group of minors in the intended and probable recipient audience:

(1) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion (as judged by the average person, applying contemporary adult community standards with respect to what prurient appeal it would have for minors in the intended and probable recipient age group of minors); and
(2) depicts or describes, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals (as judged by the average person, applying contemporary adult community standards with respect to what would be patently offensive for minors in the intended and probable recipient age group of minors); and
(3) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors (as judged by a reasonable person with respect to what would have serious value as to minors in the age groups of the intended and probable recipient audience of minors).

In addition to criminalizing traffic in obscenity and child pornography for both adults and minors, Congress has acted to provide further provisions to protect children from exposure to adult and child pornography, starting with COPA in 1998 to stop commercial porn Websites from showing free teaser samples of pornographic pictures on their front pages and to require an adult identifier such as a PIN or credit card number to exclude minors. Congress also required federally subsidized schools and libraries to use Internet filters to attempt to restrict adult access to visual images of Obscenity (hard-core pornography) and Child Pornography (sexually explicit images of minors) and to also try to block pornography that is Harmful To Minors ("Obscene For Minors") on terminals while used by minors under 17, as part of the Children's Internet Protection Act of 2000, recently upheld in United States v. American Library Ass'n, 529 U.S. ___, 123 S.Ct. 2297 (2003). Finally, as part of the PROTECT Act of 2003, Congress amended the Communications Decency Act of 1996 in light of the Court's 1997 decision in Reno v. ACLU, and thereby re-instituted 47 U.S.C. § 223 to require Internet sites and providers to take good faith steps to prevent the knowing display to minors of obscenity or child pornography.

It cannot be said that Congress has not given law enforcement the tools to protect the public from the harms of illegal pornography and the intent is clear to continue to maintain and improve those laws for the good of society and the protection of victims of pornography. It is essential to preserving respect for the laws of public morality and to do as the Supreme Court recognized as the "right of the Nation and of the States to maintain a decent society", as well as to protect the next generation of children, women, and men from the harms and addiction of pornography, that these laws be persistently and consistently enforced against all classes of offenders who violate our laws and against all classes of unprotected pornography that are prohibited by those laws, by the prosecutors and police who are charged with the duty and privilege to enforce these Federal and State laws for the good of all our children and families.

Respectfully submitted,
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