

2013 SENATE JUDICIARY

SB 2265

2013 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2265
1/28/2013
Job #17807

Conference Committee

Committee Clerk Signature



Minutes:

Attached testimony

Relating to sexual performance by a minor

Senator David Hogue - Chairman

Senator Schneider - District 42 - Written testimony (1)

Senator Hogue - Asks about the 1985 legislation

Senator Schneider - Replies he did look at the legislative history and the revisions in 1989. He said it does not touch on the affirmative defense.

Senator Lyson - Asks how this bill fits with the Federal laws.

Senator Schneider - Said it is complimentary. States that by in large the vast majority of child pornography cases are handled at the Federal level.

Senator Berry - Asks if there are any unintended consequences.

Senator Schneider - He replies that the affirmative defense appears to be as written intended to be narrow, but is so ambiguous it can be used broadly now. He goes on to explain.

Senator Sitte - Asks if someone can be tried for sexting.

Senator Schneider - Responds potentially, even under present statute.

Aaron Birst - Association of counties - written testimony (2)

Senator Birst - Explains young people sending to another young person and is handled in juvenile court. Adult level is child pornography.

Jonathan Byers - Attorney General's Office - In support - Points out that criminal offenses, including child pornography have a willful component, it can't be accidental. If you are texted an image of an underage person and delete it, you haven't willfully possessed that because you got rid of it immediately.

Senator Hogue - Asks if they are prosecuting those types of cases where the kids are taking a lot of crude pictures and sending them to one another.

Byers - Replies that in those cases they look for a criminal sanction that fits the conduct. He goes to explain other things that could apply to that.

Opposition - none
Neutral - none

Close the hearing

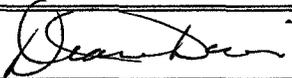
Handout from Byers (3)

2013 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2265
1/28/2013
Job #17852

Conference Committee

Committee Clerk Signature	
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Minutes:

Vote

Senator David Hogue - Chairman

Committee work

Senator Armstrong moves a do pass
Senator Nelson seconded

Discussion - Committee discusses ambiguous defense and legislative history.

Vote - 7 yes, 0 no

Senator Grabinger will carry

Date: 1/28/13
 Roll Call Vote #: 1

**2013 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2265**

Senate JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By S Armstrong Seconded By S Nelson

Senators	Yes	No	Senator	Yes	No
Chairman David Hogue	X		Senator Carolyn Nelson	X	
Vice Chairman Margaret Sitte	X		Senator John Grabinger	X	
Senator Stanley Lyson	X				
Senator Spencer Berry	X				
Senator Kelly Armstrong	X				

Total (Yes) 7 No 0

Absent 0

Floor Assignment S. Grabinger

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2265: Judiciary Committee (Sen. Hogue, Chairman) recommends DO PASS
(7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2265 was placed on the
Eleventh order on the calendar.

2013 HOUSE JUDICIARY

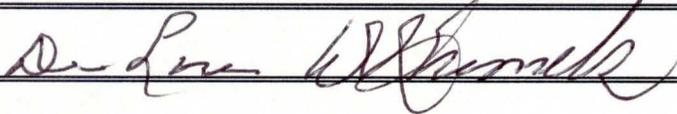
SB 2265

2013 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

SB 2265
JOB #20408
Date March 25, 2013

Conference Committee



Explanation or reason for introduction of bill/resolution:

Relating to sexual performance by a minor.

Minutes:

Testimony #1

Chairman Kim Koppelman: Opens the hearing on SB 2265.

Senator Schneider: (See testimony #1) 00:31- 6:18.

Vice Chairman Larry Klemin: Could you go over how this works in practice with respect to raising an affirmative defense. How does that apply?

Senator Schneider: The statute outlaws the crime; but provides an exception so if you raise no further defense saying you have no financial interest in this maybe you could escape criminal culpability in that matter. It isn't an absolute defense, but it was enough for the Grand Forks states attorney's office to decline to prosecute this individual because of the existence of that defense alone. The evidence was, but it was the statutory language that prevented prosecution in this case.

Vice Chairman Larry Klemin: So a States Attorney is declining to prosecute internet child pornography because there was no financial interest. That would seem to apply in almost all cases of child pornography. How are they getting prosecuted by other States Attorneys?

Senator Schneider: I think it was rare because federal jurisdiction usually carries.

Chairman Kim Koppelman: I am familiar with several North Dakota prosecutions for child pornography on computers. It is pretty active on the state level as well?

Senator Schneider: Very much so. There is a lot of cooperation with BCI and federal agencies and prosecutors.

Chairman Kim Koppelman: When I read the bill before you explained your reason for introducing it; my concern that I read this section as the plain language indicates. This looked like someone working in a movie theatre and somebody made a movie involving a minor and the person selling the ticket or popcorn had no idea and I think that is why this subsection is there. Is there a way to offer that kind of protection without just deleting the whole item?

Senator Schneider: There probably is. The first coma is pragmatic. If you don't blow through that coma the interpretation no longer holds. This was written before the internet; I don't think these performances happen in a theatre very often. Most of these crimes are internet based.

Chairman Kim Koppelman: Based on one prosecutor declining to prosecute because of language that an enterprising defense attorney found. For example if you eliminated the coma as you suggested and maybe put a period after theatre and get rid of the language; maybe that is too broad?

Senator Schneider: Perhaps. Changes are there will be no sexual performance by a child. If there was the person taking tickets did not have any role in promoting it to begin with. He was just doing his job.

Jonathan Byers, Attorney General's office: Another Grand Forks prosecutor, Camille Madison actually approached the Attorney General at the States Attorney conference in January and raised this issue. He told us about it in the hallway I said I think you must be mistaken. It would have to apply only to an enhanced penalty or something so I was taking the position with my boss, but I don't think she was right so I go back to my office and looked at the statute and I think she is right. I am not sure why it wasn't raised before and when I look at it I think it does create a legitimate defense that the defendant may raise. It is creating a shield for which there are no people behind it. I don't think this kind of exhibition happens in a theatre now and if it did law enforcement would be looking to go after somebody beside the one selling the ticket at the door. Primarily we are looking at internet pornography. Those people need to be prosecuted without this defense.

Rep. Karen Karls: We see news stories in the paper about someone who has been caught and arrested for having child prone on their computer. We very rarely see how these cases are resolved. How do you ever find out what happens?

Jonathan Byers: One of the reason you may not hear as much about the conclusion of the case is although these have been historically joint investigation between state and federal authorities. In the past a lot of the prosecutions happen in the federal court system and I am not sure whether the newspaper and media reporting and that occurs as much through the federal court system as it does the state. That changed somewhat when this legislation a number of sessions ago increased the penalty for the first offense of possession of child pornography from a misdemeanor to a C felony so there is States Attorney prosecuting is getting more bang for the buck than they use to when it was only a misdemeanor. That is why many of those cases before would go to the federal system because they were always were felonies.

Jackson Loftgren, Assistant Morton County States Attorney: I would support SB 2265. Unfortunately these cases do happen. Anyone with a cell phone now has the ability to produce child pornography unfortunately. I agree with what Mr. Byers said. This is a protection. I can't see that we need these people operate generally on the internet; they operate in darkness, they don't like to do what they are doing in public; there are no theater's that show this kind of thing and I agree that this affirmative defense the way it is worded could come into play with someone saying I am not getting paid for this; I am just doing it because I am deviant. I do it for my own interest and I don't do it to get paid and that could come into play. The state has to prove that the affirmative defense does not exist; it now becomes a burden on the state to prove. I recommend a do pass on the bill.

Opposition: None

Neutral: None

House Judiciary Committee
SB 2265
March 25, 2013
Page 3

Hearing closed.

Do Pass Motion Made by Rep. Andy Maragos: Seconded by Rep. Delmore

Discussion:

Vote: 14 Yes 0 No 0 Absent Carrier: Rep. Brabandt

Closed.

Date: 3-25-13
Roll Call Vote #: 1

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2265

House Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Rep. Maragos Seconded By Rep. Delmore

Representatives	Yes	No	Representatives	Yes	No
Chairman Kim Koppelman	/		Rep. Lois Delmore	/	
Vice Chairman Lawrence Klemin	/		Rep. Ben Hanson	/	
Rep. Randy Boehning	/		Rep. Kathy Hogan	/	
Rep. Roger Brabandt	/				
Rep. Karen Karls	/				
Rep. William Kretschmar	/				
Rep. Diane Larson	/				
Rep. Andrew Maragos	/				
Rep. Gary Paur	/				
Rep. Vicky Steiner	/				
Rep. Nathan Toman	/				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep. Brabandt

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2265: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends DO PASS
(14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2265 was placed on the
Fourteenth order on the calendar.

2013 TESTIMONY

SB 2265

TESTIMONY OF SENATOR MAC SCHNEIDER (DISTRICT 42 - GRAND FORKS)

SENATE BILL 2265 - SENATE JUDICIARY COMMITTEE - JANUARY 28, 2013

Mr. Chairman, members of the committee, my name is Mac Schneider and I represent Grand Forks' District 42 in the North Dakota Senate. I am the prime sponsor of Senate Bill 2265, which seeks to repeal an antiquated and ambiguous affirmative defense to the crimes listed in chapter 12.1-27.2 of the Century Code dealing with sexual performances by children.

Chapter 12.1-27.2, in essence, outlaws the production, promotion, and possession of child pornography. See N.D.C.C. § 12.1-27.2-02; N.D.C.C. § 12.1-27.2-03; N.D.C.C. § 12.1-27.2-04; N.D.C.C. § 12.1-27.2-04.1. However, N.D.C.C. § 12.1-27.2-05 lists three affirmative defenses to the crimes against children in this chapter. The affirmative defense subject to repeal under Senate Bill 2265 is listed in subsection 3, which provides "an affirmative defense to prosecution" where:

The defendant had no financial interest in promoting a sexual performance by a minor, other than employment in a theater, which employment does not include compensation based upon any proportion of the receipts arising from promotion of the sexual performance, and that person was in no way responsible for acquiring the material for sale, rental, or exhibition.

This statutory language, which was enacted during the 1985 legislative session and has remained substantively unchanged since that time, is now acting as an impediment to the effective prosecution of those who "promot[e] a sexual performance by a minor" where the motivation for commission of the crime is satisfaction of their own prurient interests rather than a "financial interest[.]" N.D.C.C. § 12.1-27.2-05(3).

Specifically, the office of the Grand Forks County State's Attorney recently reviewed a case in which an individual recorded a nude child using his computer. As is all too common, the video was then posted on the internet for his gratification and that of others. Because the individual did not sell the video or seek to make money off of it, he "had no financial interest in promoting" this "sexual performance[.]" *Id.* Accordingly, the individual was able to avail himself of the above affirmative defense to prosecution and the Grand Forks County State's Attorney declined to charge the individual.

I have attached to my testimony an email from Haley Wamstad, an assistant state's attorney in Grand Forks who is familiar with the facts of this particular case. In this email, Ms. Wamstad says, quite aptly, that this defense "no longer makes sense" and questions if it ever did. I have reviewed the language of the affirmative defense and agree: It is ambiguous at best and, at worst, flat out harmful to effective enforcement of laws that are designed to protect kids.

Perhaps the language seeks to provide an affirmative defense to the hypothetical person who is working for a wage at a theater (i.e., he has "no financial interest . . . other than employment in a

1

theater") and unwittingly promotes a sexual performance by a minor as part of his job (i.e., he is just taking tickets for an hourly wage, doesn't get "any proportion of the receipts[,] and had nothing to do with "acquiring the material for sale, rental, or exhibition.").

However, the comma after "minor" could give rise to a contrary interpretation in which the clause "[t]he defendant had no financial interest in promoting a sexual performance by a minor" stands alone as the affirmative defense. Thus, under this interpretation, if you have "no financial interest in promoting a sexual performance by a minor" but still undertake "employment in a theater" under the circumstances listed in that subsection, you would not be able to avail yourself of the affirmative defense of having "no financial interest in promoting a sexual performance by a minor[.]"

I have no doubt that members of the committee could poke holes in either one of these interpretations, but doing so would merely reinforce the need for repeal of this affirmative defense since the rule of lenity "requires ambiguous criminal statutes to be construed in a defendant's favor." State v. Laib, 2002 ND 95, ¶ 15, 644 N.W.2d 878.

Very simply, no one who preys on children should be able to avail himself of an ambiguity in the Code as a means to escape culpability. Senate Bill 2265 was advanced with this goal in mind.

Before I conclude, I would like to share with you an excerpt from an article that ran last week in the New York Times entitled "The Price of a Stolen Childhood." The article notes that in 2009, police "logged . . . almost 10 million" I.P. addresses in the United States that offer "child-pornography pictures or videos via peer-to-peer file sharing[.]" These illicit channels provide a mechanism for child porn to go "viral," like some sort of heinous YouTube video. This has a real impact on real victims who become well-known through the repeated viewing of their victimization. As recounted in the article:

Late that spring, Nicole got a series of messages on Myspace from a man who said he had been looking for her for five years. He asked, "Want me to come visit u?" When Nicole blocked him, he wrote to one of her friends on Myspace, telling her that Nicole was a "porn star" — and sending two images. "That's when I fully realized what it meant for these pictures to be out there," Nicole said. "I couldn't get away from it, not really. I started getting paranoid and having nightmares."

That concludes my testimony. I would be happy to stand for any questions.

From: Haley Wamstad <haley.wamstad@gfcounty.org>
Date: January 18, 2013, 9:24:40 AM CST
To: "Schneider, Mac J." <macschneider@nd.gov>
Subject: 12.1-27.2-05(3)

Dear Senator Schneider,

I am writing regarding an amendment to N.D.C.C. 12.1-27.2-05(3) relating to an affirmative defense to the crime of sexual performance by a minor. More specifically, it is my opinion that subdivision 3 of this section should be eliminated. Subdivision 3 provides an affirmative defense if the perpetrator did not receive financial gain from the creation of child porn. Our office reviewed a case in which an individual was involved in directing the creation of child porn. This individual recorded a child nude on his computer and then posted that video on the internet. This video was made for the individual's own satisfaction and that of others on the internet. The individual, however, did not sell the video or receive any financial gain from its production or distribution. As a result, our office had to decline charging this individual for this act because N.D.C.C. 12.1-27.2-05(3) provides an affirmative defense if the defendant did not receive any financial gain.

I'm not sure of the intention of this defense when the law was enacted, but it no longer makes sense (if it ever did) - it is like the current law is saying it is okay to make child porn, just don't make any money off of it. Today, with the use of technology and the internet, defendants often participate in a "sharing" of materials. These websites allow for an individual to see another person's porn if they share the porn they have. Therefore, the individual is not receiving a financial gain from the sharing of his production, but receives an incentive to share his production in order to see that of others.

Thank you for your consideration of this very important amendment.

Haley L. Wamstad
Assistant State's Attorney
Grand Forks County States Attorney's Office
124 S. 4th St.
P.O. Box 5607
Grand Forks, ND 58206

Telephone: 701.780.8281
Fax: 701.780.8402

NOTICE REGARDING ELECTRONIC SERVICE OF DOCUMENTS: I do not accept e-service of documents at this individual e-mail address. If you are e-serving a document upon anyone in the States Attorney's Office, please use the office e-mail address: sasupportstaff@gfcounty.org. Thank you.

Testimony to the: SENATE JUDICIARY

Prepared January 28, 2013 by the North Dakota Association of Counties

Aaron Birst, Legal Counsel

CONCERNING SB 2265

Chairman Hogue and members of the committee, NDACo and specifically our State's Attorney members support SB 2265. Fortunately, we in North Dakota, don't often see cases involving sexual performances of minors. However, recently in Grand Forks County the State's Attorneys office came across a case in which the bill in front of you originated. In that particular case, after reviewing NDCC § 12.1-27.2-05, the prosecution came to the conclusion that an individual could not be charged with promoting the sexual performances of a minor given that he received no financial compensation. However, the defendant was still charge with possession of child pornography which was a lesser crime.

When you review the wording in NDCC § 12.1-27.2-05, there appears to be little sense in providing an affirmative defense for the production of child pornography if you are simply doing it for something other than financial gain. I have reviewed the scant legislative history behind this bill and can only conclude this language is the result of numerous statutes being crafted over the years and ending with this presumably irrational result.

The intent of this bill would be to remove this affirmative defense while still providing the other affirmative defense already in the code.

Thank you,

12.1-27.2-01. Definitions.

As used in this chapter:

1. "Obscene sexual performance" means any performance which includes sexual conduct by a minor in any obscene material or obscene performance, as defined in section 12.1-27.1-01.
2. "Performance" means any play, motion picture, photograph, dance, or other visual representation, or any part of a performance.
3. "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise.
4. "Sexual conduct" means actual or simulated sexual intercourse, sodomy, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the buttocks, breasts, or genitals, including the further definitions of sodomy and sadomasochistic abuse under section 12.1-27.1-01.
5. "Sexual performance" means any performance which includes sexual conduct by a minor.
6. "Simulated" means the explicit depiction of any of the conduct set forth in subsection 4 which creates the appearance of actual sexual conduct and which exhibits any nude or partially denuded human figure, as defined in section 12.1-27.1-03.1.

12.1-27.2-02. Use of a minor in a sexual performance.

A person is guilty of a class B felony if, knowing the character and content of a performance, that person employs, authorizes, or induces a minor to engage in sexual conduct during a performance or, if being a parent, legal guardian, or custodian of a minor, that person consents to the participation by the minor in sexual conduct during a performance.

12.1-27.2-03. Promoting or directing an obscene sexual performance by a minor.

A person is guilty of a class B felony if, knowing the character and content of a performance, that person produces, directs, or promotes any obscene performance which includes sexual conduct by a person who was a minor at the time of the performance.

12.1-27.2-04.1. Possession of certain materials prohibited.

A person is guilty of a class C felony if, knowing of its character and content, that person knowingly possesses any motion picture, photograph, or other visual representation that includes sexual conduct by a minor.

12.1-27.2-04.2. Sexual performance by a minor -- Enhanced penalties.

1. Notwithstanding the provisions of sections 12.1-32-01 and 12.1-32-01.1 relating to fines, a person who commits an offense under this chapter and who acts in the course of a commercial or for-profit activity or transaction in which the offender had or shared ownership, control, managerial responsibility, or a financial interest other than wages is subject to the following penalty:

a. For an individual, a fine not to exceed ten thousand dollars; or

b. For a corporation, limited liability company, association, partnership, or other legal entity, a fine not to exceed twenty-five thousand dollars.

2. Notwithstanding the provisions of sections 12.1-32-01 and 12.1-32-01.1 relating to fines, the court shall impose the following fine upon the conviction of a person or entity described in subsection 1 for a second or subsequent offense under this chapter:

a. For an individual, a fine not to exceed fifty thousand dollars; or

b. For a corporation, limited liability company, association, partnership, or other legal entity, a fine not to exceed one hundred thousand dollars.

12.1-27.2-05. Sexual performance by a minor -- Affirmative defenses.

It is an affirmative defense to a prosecution under this chapter that:

1. The defendant in good faith reasonably believed the person appearing in the performance was eighteen years of age or older;

2. The material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other appropriate purpose by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a similar interest in the material or performance; or

3. The defendant had no financial interest in promoting a sexual performance by a minor, other than employment in a theater, which employment does not include compensation based upon any proportion of the receipts arising from promotion of the sexual performance, and that person was in no way responsible for acquiring the material for sale, rental, or exhibition.

12.1-27.2-06. Proof of age of minor.

When it becomes necessary under this chapter to determine whether a minor participated in a sexual



performance, the trier of fact may base its determination on personal inspection of the minor, inspection of a photograph or motion picture of the sexual performance, testimony by a witness to the sexual performance as to the age of the minor based upon the minor's appearance, expert testimony based upon the appearance of the minor in the sexual performance, or any other method authorized by law or by rule.



(CONTINUED)

03/27 SENATE SENT TO GOVERNOR
04/01 SENATE SIGNED BY GOVERNOR 0329 0:00

SJ1821
SJ2019

SB 2390

SEN. OLSON, KILANDER, SATROM
REP. SHAW, RYDELL, CONMY

A BILL FOR AN ACT TO CREATE AND ENACT A NEW CHAPTER TO TITLE 12.1 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO THE PROHIBITION OF SEXUAL PERFORMANCES BY CHILDREN; AND TO AMEND AND REENACT SECTION 14-10-06 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO CONTRIBUTING TO THE DEPRIVATION OF A MINOR.

01/21 SENATE	INTRODUCED, FIRST READING, REFERRED JUDICIARY	SJ 252
01/30 SENATE	COMMITTEE HEARING 02/06 9:00	
02/14 SENATE	REPORTED BACK AMENDED, AMENDMENT PLACED ON CALENDAR Y 000 N 000	SJ 735
02/15 SENATE	AMENDMENT ADOPTED, PLACED ON CALENDAR	SJ 741
02/18 SENATE	ENGROSSED	SJ 778
	SECOND READING, PASSED AS AMENDED, YEAS 053 NAYS 000	SJ 790
02/20 HOUSE	RECEIVED FROM SENATE	HJ1144
02/21 HOUSE	INTRODUCED, FIRST READING, REFERRED JUDICIARY	HJ1280
03/08 HOUSE	COMMITTEE HEARING 03/12 8:00	
03/14 HOUSE	REPORTED BACK AMENDED, AMENDMENT PLACED ON CALENDAR Y 011 N 000	HJ1896
03/15 HOUSE	AMENDMENT ADOPTED, PLACED ON CALENDAR	HJ1905
03/18 HOUSE	SECOND READING, PASSED AS AMENDED, YEAS 101 NAYS 000	HJ1970
03/18 SENATE	RETURNED TO SENATE (12)	SJ1504
03/21 SENATE	CONCURRED	SJ1645
	SECOND READING, PASSED AS AMENDED, YEAS 052 NAYS 000	SJ1645
03/25 SENATE	ENROLLED	SJ1734
	SIGNED BY PRESIDENT	SJ1734
03/26 HOUSE	SIGNED BY SPEAKER	HJ2325
03/26 SENATE	SENT TO GOVERNOR	SJ1804
03/28 SENATE	SIGNED BY GOVERNOR 0327 0:00	SJ1909

SB 2391

SEN. KILANDER, SATROM
REP. HAMERLIK, SCHNEIDER

A BILL FOR AN ACT TO ESTABLISH A HEALTH CARE DATA COUNCIL FOR THE COLLECTION, ANALYSIS, AND PUBLIC DISTRIBUTION OF INFORMATION REGARDING THE COSTS AND PRICES CHARGED FOR HEALTH CARE SERVICES IN NORTH DAKOTA; TO PROVIDE A PENALTY; TO PROVIDE FOR AN APPROPRIATION; AND TO PROVIDE AN EXPIRATION DATE.

01/21 SENATE	INTRODUCED, FIRST READING, REFERRED SOCIAL SERVICES & VETERANS AFFAIRS	SJ 252
01/31 SENATE	COMMITTEE HEARING 02/07 9:45	
02/18 SENATE	REPORTED BACK AMENDED, AMENDMENT PLACED ON CALENDAR Y 000 N 000	SJ 823
02/19 SENATE	AMENDMENT ADOPTED, PLACED ON CALENDAR	SJ 858
02/20 SENATE	ENGROSSED	SJ 888
	SECOND READING, PASSED AS AMENDED, YEAS 035 NAYS 015	SJ 913
02/22 HOUSE	RECEIVED FROM SENATE	HJ1296
02/27 HOUSE	INTRODUCED, FIRST READING, REFERRED INDUSTRY, BUSINESS AND LABOR	HJ1411
03/08 HOUSE	COMMITTEE HEARING 03/12 8:30	
03/14 HOUSE	REPORTED BACK, DO NOT PASS, PLACED ON CALENDAR Y 013 N 002	HJ1897
03/15 HOUSE	LAID OVER ONE LEGISLATIVE DAY	HJ1905
03/19 HOUSE	SECOND READING, FAILED TO PASS, YEAS 017 NAYS 080	HJ2025

1985 SENATE JUDICIARY

SB 2390

The Judiciary Committee met on February 5, 1985, with all members present.

SB 2300 Page 28, side 1

Archie Shaw appeared as one of the sponsors of this bill and stated that there is much sentiment in favor of this bill, considering what has transpired around the country, and he feels this bill could do something in North Dakota.

Senator Olson stated that this has been known as the "kiddie porn" statute. He went through the bill step by step telling what this does in the area of crimes. There is a statute on the books but it does not refer to children and it is a class A misdemeanor, and this would make it a class C felony. He passed out copies of statutes showing what other states have. This bill speaks to the profit motive, and exploiting children in addition to what there is in the law.

Jail Hagerty passed out a sheet which is attached. She feels this bill is important and supports it, as states attorney of Burleigh County, and speaking for the peace officers association. She states it deals with photos being taken and other matters. She might suggest that they delete lines 14 and 15 on page 1. She states that Bob Hay and Bud Myers support this bill.

Attached is a letter from Mark R. Boehning, states attorney of Slope County at Amidon. He would like an amendment to this bill which he strongly supports, and that is that it would make it an offense for anyone dealing in exploiting children for sexual photos or whatever for their own pleasure also, as the bill reads that it would be for commercial reasons. He feels there is something really wrong with someone taking pictures of young persons for the jollies he gets out of it. He told of an incident in his county where this law is badly needed, and he wants to get rid of the loophole. Senator Christensen asked if he would like to prosecute for photos, and he said he would. He said in the case in his county the girls involved did not realize they were doing anything wrong, and the fellow who enticed them into the lewd photos should be convicted. Senator Olson said in drawing up this bill they want to be sure it is constitutional.

G.H. Knutson, worker and member of the organization Decency Through Law, spoke and had a handout which is attached. He feels pornography is very dangerous and can be more damaging than the sexual act, and taking photos as described could have a lifetime affect on a child. He stated that according to a figure he has 38% of the females in the United States will be sexually abused in some way by the time they reach 13 years of age, and one and one half million will be exploited for prostitution. He told of the statistics in New York City in these cases, which is astronomical. He stated that the number of inmates in the state pen of those who have been tried and convicted of sexual abuse against children is an alarming figure, with many cases of incest. He is in favor of this bill without any changes.

Miss Melchior appeared state she is from Bismarck, and is a member of the Catholic Daughters, and she is in favor of this bill. She feels that there should be strict law to stop what is happening to the children. She told of sexual offenses involving a personal matter of the situation in the family of her sister's where the father had sexually abused them, and it had not happen once but time again. She also showed a clipping from the Bismarck paper two years ago, which is attached, telling of the House of Representatives killing a bill which was after it had been passed by the senate.

Miss Beck, representing the National Organization for Women, and a member of the national women's caucus, appeared in support of this bill, and her testimony is attached.

Mr. Klund appeared in favor of this bill, stating he has a bachelors degree in counseling, masters degree in religion and masters degree in history, and states that things like this have not did not happen years ago. He would like to amend the bill on page 2, line 34, by deleting the rest of the bill, so as to make no excuses. He thinks what is happening now is a great tragedy when children were sacrificed for god, but what we need now is justice, mercy, and

Senator Klund asked Bill and Mark as states attorneys if they feel there is a workable way of helping these abusers without making them up, through counseling, so there would not be breaking the family together, and they both responded that they did and there has been success with it, but not always, and it is a careful matter.

There was a motion.

Senator Klund moved the bill, seconded by Senator Redlin and the vote was unanimous nay, and the vote was

Senator Klund moved the bill, seconded by Senator Redlin and Senator Olson, and the vote was unanimous nay, and the vote was unanimous nay.

Senator Klund will carry the bill.

Pearl Berget, Clerk

COMMITTEE -- SENATE JUDICIARY

BILL NO: SB 2390

SUBJECT: _____

SPONSOR: _____

HEARING DATE: 12 35

ACTION TAKEN: Report on amendment

FLOOR CARRIER: Maixner

COMMITTEE VOTE:

CHRISTENSEN

1 _____ MAIXNER

*Amendment
to be amended*

1 _____ OLSON

1 _____ REDLIN

HOLMBERG

1 _____ LASHKOWITZ

STENEHJEM

1 _____ J. MEYER

____ ayes _____ nays _____ absent

REPORT OF STANDING COMMITTEE
SENATE

373

REPORT OF STANDING COMMITTEE

MADAM PRESIDENT: Your Committee on JUDICIARY to
which was (r#)referred SB 2390 has had the same under
consideration and recommends that the same

- (DO NOT PASS) (and BE PLACED ON THE CONSENT CALENDAR)
- BE PLACED ON THE CALENDAR WITHOUT RECOMMENDATION
- BE AMENDED AS FOLLOWS and when so amended, recommends the
same (DO PASS DO NOT PASS):

(see attached)

- and be rereferred to the Committee on _____
 - statement of purpose of amendment
- SEN. John M. Olson Vice Chairman
OLSON

SB 2390 was placed on the sixth order of business on
the calendar for the succeeding legislative day.

_____ was rereferred to the Committee on _____

OM
RBC
2-13-85
2:30p

On page 1, line 3, after the word "children" insert the words
"; and to amend and reenact section 14-10-06 of the
North Dakota Century Code, relating to contributing
to the deprivation of a minor"

On page 3, after line 14, insert the following new section:

"SECTION 2. AMENDMENT. Section 14-10-06 of the
North Dakota Century Code is hereby amended and reenacted
to read as follows:

14-10-06. Unlawful to encourage or contribute to
the deprivation or delinquency of minor-Penalty.

1. Any person who by any act willfully
encourages, causes, or contributes to the delinquency
or deprivation of any minor is guilty of a Class A
misdemeanor.

2. Any person who by any act willfully encourages,
causes, or contributes to the deprivation of a child
less than sixteen years of age by causing that child to
engage in sexual conduct as defined under Section 1
of this Act, in any play, motion picture, photograph,
dance, or other visual representation is guilty of
a class C felony.

And renumber the lines and pages accordingly

1985 HOUSE JUDICIARY

SB 2390

3/12/85

Tape 61 side 2
SB 2390

Gail Hadenry, Burleigh County States Attorney, testified in support of the bill. Although it does a good job in giving penalties to work with, there is a requirement in the bill that the performance be exhibited to someone else, like taking pictures and distributing them to others. That is the reason for the amendment on page 3.

Senator John Olson, one of the bill's sponsors, testified. (See attached written information.) This statute deals with the harm that comes to minors. The bill is needed because we want to prohibit the manufacture of this kind of material. Also to join with other states in the protection of these children. It is not a major problem in North Dakota, but it will be soon. It is our responsibility to deal with child pornography in one way or another.

Chairman Conmy suggested putting it back to a class C felony.

Sen. Olson said he had no problem with that. He feels it should be in a higher category.

Marie Englehard testified in support of the bill. She feels it is time to do something more stringent. She knows of children that have been involved in this type of thing and what happens to them as adults.

Rep. Cleveland moved to amend page 1 line 18. Rep. Lindgren seconded the motion. A voice vote was unanimous.

Rep. Cleveland moved to amend class C felony to class B on page 2 line 7 of the engrossed bill, and line 14 of the engrossed bill. Also to change line 19 to class C felony. Rep. Kretschmar seconded the motion. Motion carried 12 yeas, 0 nays and 2 absent.

Rep. Cleveland moved a Do Pass as amended. Rep. Ulmer seconded the motion. Motion carried 11 yeas, 0 nays and 3 absent. Rep. Ulmer is assigned to carry the bill on the floor.

JUDICIARY COMMITTEE

FILE NO: 2390

SUBJECT: _____

SPONSOR: _____

HEARING DATE: 3-12-85

ACTION TAKEN: Do Pass as amended.

FLOOR ASSIGNMENT: Rep. Ulmer

COMMITTEE VOTE: Amendments

<u>7</u>	Conmy	<u>7</u>
—	Wentz	—
<u>7</u>	Cleveland	<u>7</u>
<u>7</u>	Dairymple	<u>7</u>
<u>7</u>	Eckroth	<u>7</u>
—	Keller	—
<u>7</u>	Kretschmar	<u>7</u>
<u>7</u>	Lindgren	<u>7</u>
<u>7</u>	Murphy	<u>7</u>
—	Schmidt	<u>7</u>
<u>7</u>	Shockman	<u>7</u>
<u>7</u>	Solberg	<u>7</u>
<u>7</u>	Ulmer	<u>7</u>
<u>7</u>	Williams	<u>7</u>

REPORT OF STANDING COMMITTEE

MR. SPEAKER: Your Committee on Education to which was
(re)referred SB #2390 has had the same under consideration and
recommends by a vote of 11 YEAS, 0 NAYS, 3 ABSENT
AND NOT VOTING that the same

- (DO NOT PASS) (and BE PLACED ON THE CONSENT CALENDAR)
- BE PLACED ON THE CALENDAR WITHOUT RECOMMENDATION
- BE AMENDED AS FOLLOWS and when so amended, recommends the same (DO PASS/~~DO NOT PASS~~):

(see attached)

- and be rereferred to the Committee on _____
- statement of purpose of amendment

REP. _____, Chairman
Rep. [unclear]

130 was placed on the 5th order of business on
the calendar for the succeeding legislative day.

_____ was rereferred to the Committee on _____

HOUSE AMENDMENTS to ENGROSSED SB 2390 JU 3/12/85

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On page 1 of the engrossed bill, line 19, delete the word "transmute" and insert in lieu thereof the word "transmit"

On page 2 of the engrossed bill, line 7, delete the letter "C" and insert in lieu thereof the letter "B"

On page 2 of the engrossed bill, line 14, delete the letter "C" and insert in lieu thereof the letter "B"

On page 2 of the engrossed bill, line 19, delete the words "A misdemeanor" and insert in lieu thereof the words "C felony"

And renumber the lines and pages accordingly

1985 TESTIMONY

Sb 2390

300 JUN 1982
5B 2390
3-1d-85

NEW YORK, Petitioner

v.

Paul Ira FERBER.

No. 81-55.

Argued April 27, 1982.

Decided July 2, 1982.

Bookstore proprietor was convicted under a New York statute prohibiting persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicted such a performance, and he appealed. The Appellate Division of the New York Supreme Court affirmed, and appeal was taken. The New York Court of Appeals, 52 N.Y.2d 674, 439 N.Y.S.2d 863, 422 N.E.2d 523, reversed, holding that statute violated the First Amendment as being both underinclusive and overbroad, and the State filed a petition for certiorari. The Supreme Court, Justice White, held that: (1) child pornography is not entitled to First Amendment protection provided the conduct to be prohibited is adequately defined by applicable state law, as written or authoritatively construed; (2) New York statute was not constitutionally underinclusive; and (3) New York statute was not substantially overbroad.

Reversed and remanded.

Justice Blackmun concurred in the result.

Justice O'Connor filed a concurring opinion.

Justice Brennan, with whom Justice Marshall joined, filed an opinion concurring in the judgment.

Justice Stevens filed an opinion concurring in the judgment.

late[s] clearly established statutory or constitutional rights of which a reasonable person would have known". *Harlow v. Fitzgerald*, —

1. Obscenity ⇐2

States are entitled to a greater leeway in regulation of pornographic depictions of children.

2. Constitutional Law ⇐90.1(1)

Child pornography is not entitled to First Amendment protection, provided the conduct to be prohibited is adequately defined by applicable state law, as written or authoritatively construed. U.S.C.A. Const.Amend. 1.

3. Obscenity ⇐1, 13

Under test for child pornography, which is separate from obscenity standard enunciated in *Miller*, a trier of fact need not find that the material appeals to prurient interest of the average person, it is not required that sexual conduct be portrayed in a patently offensive manner and the material at issue need not be considered as a whole. U.S.C.A.Const.Amend. 1.

4. Constitutional Law ⇐90.1(1)

Distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances by children retain First Amendment protection. U.S.C.A.Const.Amend. 1.

5. Obscenity ⇐12

As with obscenity laws, criminal responsibility may not be imposed under child pornography laws without some element of scienter on part of the defendant.

6. Constitutional Law ⇐90.1(1)

Obscenity ⇐2.5

New York statute prohibiting persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicted such a performance, which listed the forbidden

U.S. —, —, 102 S.Ct. 2727, 2738, 72 L.Ed.2d — (1982). The Court today leaves in doubt the reach of its decision.

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'Kiddie porn' measure easily killed in House

By MARCIA HARRIS
Triune Staff Writer

In short order Thursday, the North Dakota House of Representatives dispensed with a "kiddie porn" bill that had passed the Senate 48-0.

The House killed the bill on a 74-24 vote. Sen. Harold Christensen, R-Minot, had sponsored the bill.

Rep. Patrick Conmy, R-Bismarck, spoke against the bill in the House. There was no floor debate on the matter.

Conmy said the bill merely rearranges language contained in present law, without making any substantial changes.

Conmy told the assembly that the Senate version of the bill, prior to amendments by the House Judiciary Committee, would have prevented the showing of the public television show *Brideshead Revisited*, because that eight-part series contained one scene of simulated sexual intercourse.

Another section of the bill, as sent over by the Senate, could have

prevented the sale of a certain issue of *Newsweek Magazine*, which depicted a painting of a nude on the cover.

That issue "did create quite a stir in some areas, including the sponsor's area," Conmy noted.

Conmy also referred to the "Anti-Blue Lagoon Section" of the bill, which would have outlawed material that has a minor as a participant or observer of obscene material. The Senate Judiciary Committee removed a section of the bill that would allow such material for scientific, educational, medical or other legitimate purposes. The House committee put that section back in, before recommending that the entire bill be killed.

Following the vote, Conmy said,

"Bills like that are dangerous. In drafting them, they have to attempt to define things broadly. Then, it affects so many other things, it creates a possibility of censorship."

"Everything in here is covered in other sections of our present obscenity law. To our knowledge, no attempt at prosecution has been made in this area under our law, so we have no reason to believe our laws are inadequate," he said.

Proof Porn Hurts
From Fort Wayne
from Sentinel, Oct. 2, 1982

In the editor:

The Sept. 22 issue of The News-Sentinel carried a story concerning a man who pled guilty in Allen Superior Court to child molesting and contributing to the delinquency of a minor.

For the story: "William D. Mooney admitted taking two 12-year-old girls to his apartment last Nov. 15, giving them beer and fondling them. Police said Mooney picked up the two girls and a 15-year-old boy at a local service station and drove them to his apartment. Mooney provided the group with marijuana and beer and showed the pornographic magazines, according to police."

We invite the response of those who defend the "right" to distribute and exhibit obscene materials in Fort Wayne, as well as those who profess to find no connection between pornography and sex crimes.

EXECUTIVE BOARD
Fort Wayne Citizens
for Decency through Law

'Kiddie Porn' Trade
Rising, Study Reports

From Police Times:

The use of young children as pornography "stars" is increasing across the nation, despite five years of concerned efforts to curtail the trade, according to a new study by the U.S. General Accounting Office.

The new "sexploitation" underground is employing advanced video techniques and complicated mail-drop delivery schemes to thwart detection and prosecution, according to the GAO report, prepared for the House Committee on Education and Labor.

The report, "Sexual Exploitation of Children—A Problem of Unknown Magnitude," is based on information from top officials in 22 states. The GAO says it was not possible to give an exact figure on the number of children and teenagers being swooped up by the burgeoning exploitation rings, but it quotes individual regional authorities whose estimates run into the tens of thousands.

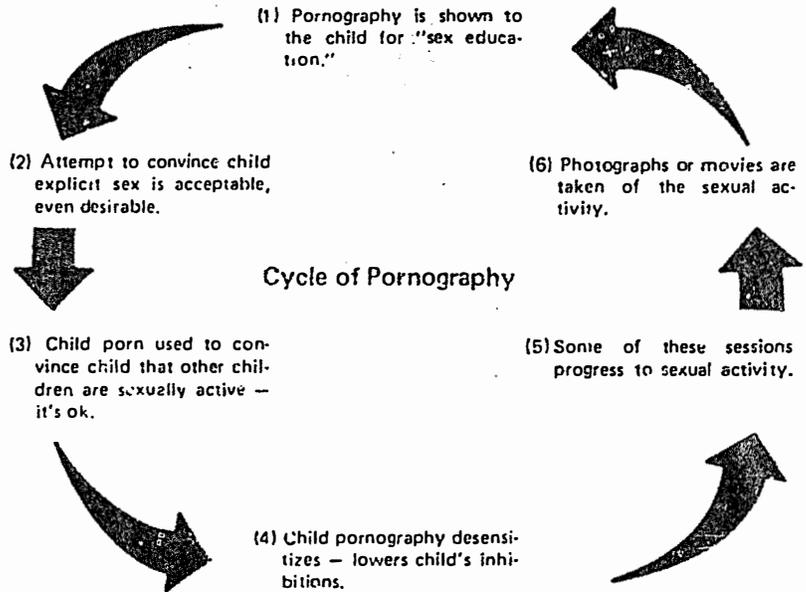
"During their sexual activity with children," the report says, the kiddie porn enthusiasts "take photographs and



Understand the Role of Pornography

How Does Sexual Abuse Begin? Continue?

One of the most common questions asked about child sexual abuse is: "How does it begin?" This child pornography diagram helps to explain one process in which child sexual abuse victims are seduced either within or outside the family.



This chart has been excerpted from the pamphlet "We can! Combat Child Abuse"; by Shirley J. O'Brien, published September 1982 by the College of Agriculture Cooperative Extension Service, The University of Arizona, Tucson, Arizona. Copies are available through CDL at a price of \$1.00 per copy.

movies which they use for later sexual fantasies." These video cassettes and color photographs are then duplicated and "swapped" or sold to others throughout the country who are also amassing private libraries of recorded sexual crimes with children.

Evidence indicates that thousands of such kiddie porn producers have linked up in "clubs," which form a loose-knit network stretching from coast to coast. The report indicates that some retail outlets continue to deal in the new kiddie porn—but only with "favored customers."

Law enforcement officials reported a flourishing black market for child pornography in Los Angeles, an "immediate and major" problem in New York, a "voluminous mail-order business" in such materials in Texas and the willingness of some parents to allow their children to be used as child porn "models" in Illinois. In both New York and Los Angeles, police reported that persons seeking actual sexual contacts with children were the main patrons of the kiddie porn market.

Office of States Attorney

SLOPE COUNTY

Amidon, North Dakota

Mark R. Boening

Special Assistant Attorney General

February 4, 1985

(701) 879-61

(Tuesday)

(701) 225-9

(Mon Wed F)

(701) 579-4

(Thursday)

Ms. Gail Magerty
Burleigh County States Attorney
Courthouse, 415 E. Thayer
Bismarck, ND 58501

Mailing Address:

P.O. Box 120
Dickinson, ND 58505

RE: Sexual Performances by Children

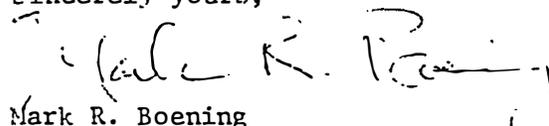
Dear Gail:

Thank you for forwarding to me a copy of Senate Bill No. 2390 relating to the prohibition of sexual performances by children. I support the intent of the statute, but do not believe the statute as drafted would necessarily have applied to the Defendant in my case. The problem lies in the definition of "performance". Pursuant to the legislative draft, exhibition before an audience would seem to be a necessary element of performance. In my case, the Defendant exhibited the pictures to no audience, but viewed them himself.

I enclose for your information copies of 18 USCS Sections 2251, 2252 and 2253. This is the Federal Sexual Exploitation of Children's Statute. Also enclosed is a proposal which I have based on the federal statute incorporating Senate Bill 2390's definition of promote and expanding the federal definition of "producing".

Both the current legislative proposal Senate Bill 2390 and the Federal Statute seek to outlaw "kiddie pornography". It would be nice if we had a statute that outlawed such conduct by an individual who was not seeking to profit by it, but gets his own kicks out of this type of activity.

Sincerely yours,


Mark R. Boening

MRE:mrz
Enclosure

CHAPTER 110. SEXUAL EXPLOITATION OF CHILDREN

Section

- 2251. Sexual exploitation of children
- 2252. Certain activities relating to material involving the sexual exploitation of minors
- 2253. Definitions for chapter

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Amendments:

1978. Act Feb. 6, 1978, P. L. 95-225, § 2(a), 92 Stat. 7, added this chapter analysis.

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

(c) Any person who violates this section shall be fined not more than \$10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than \$15,000, or imprisoned not less than two years nor more than 15 years, or both.

(Added Feb. 6, 1978, P. L. 95-225, § 2(a), 92 Stat. 7.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Short titles:

Act Feb. 6, 1978, P. L. 95-225, § 1, 92 Stat. 7, provided: "This Act may be cited as the 'Protection of Children Against Sexual Exploitation

Act of 1977". For full classification of this Act, consult USCS Tables volumes.

Other provisions:

Severability. Act Feb. 6, 1978, § 4, 92 Stat. 9, provided: "If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.". For full classification of this Act, consult USCS Tables volumes.

RESEARCH GUIDE

Law Review Articles:

Preying on playgrounds: the sexploitation of children in pornography and prostitution. 5 Pepperdine L Rev 809, 1978.

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale or distribution for sale, any obscene visual or print medium, if—

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct; or

(2) knowingly receives for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any obscene visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, if—

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct;

shall be punished as provided in subsection (b) of this section.

(b) Any person who violates this section shall be fined not more than \$10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than \$15,000, or imprisoned not less than two years nor more than 15 years, or both.

(Added Feb. 6, 1978, P. L. 95-225, § 2(a), 92 Stat. 7.)

§ 2253. Definitions for chapter

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of sixteen years;

(2) "sexually explicit conduct" means actual or simulated—

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- (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or anal-anal, whether between persons of the same or opposite sex;
 - (B) bestiality;
 - (C) masturbation;
 - (D) sado-masochistic abuse (for the purpose of sexual stimulation); or
 - (E) lewd exhibition of the genitals or pubic area of any person;
- (3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising, for pecuniary profit; and
- (4) "visual or print medium" means any film, photograph, negative, slide, book, magazine, or other visual or print medium.
- (Added Feb. 6, 1978, P. L. 95-225, § 2(a), 92 Stat. 8.)

DISTRICT COURT

PROPOSAL BASED ON FEDERAL STATUTE

Section 1. Sexual Exploitation of Children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct shall be guilty of a Class C Felony.

(b) Any parent, legal guardian, or other person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexual explicit conduct for the purpose of producing any visual or print medium depicting any such conduct shall be guilty of a Class C Felony.

Section 2. Certain Activities Relating to Material Involving the Sexual Exploitation of Minors.

(a) Any person who-

- (1) Knowingly promotes any obscene visual or print medium, if-
 - (A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and
 - (B) such visual or print medium depicts such conduct

shall be guilty of a Class C Felony.

Section 3. Definitions for Chapter

For the purposes of this chapter, the term-

- (1) "minor" means any person under the age of sixteen years;
- (2) "sexually explicit conduct" means actual or simulated-
 - (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or anal-anal, whether between persons of the same or opposite sex;
 - (B) bestiality;
 - (C) masturbation;
 - (D) sado-masochistic abuse (for the purpose of sexual stimulation);or
 - (E) lewd exhibition of the genitals or pubic area of any person;
- (3) "producing" means producing, directing, manufacturing, issuing, publishing, advertising, or creating; and
- (4) "visual or print medium" means any film, photograph, negative, slide, book, magazine, or other visual or print medium.
- (5) "promoting" means procuring, manufacturing, issuing, selling, giving, providing, lending, mailing, delivery, transferring, transmuting, publishing, distributing, circulating, disseminating, presenting, exhibiting, advertising, transporting, or receiving.

|

TESTIMONY OF SENATOR MAC SCHNEIDER (DISTRICT 42 - GRAND FORKS)

SENATE BILL 2265 - HOUSE JUDICIARY COMMITTEE - MARCH 25, 2013

Mr. Chairman, members of the committee, my name is Mac Schneider and I represent Grand Forks' District 42 in the North Dakota Senate. I am the prime sponsor of Senate Bill 2265, which seeks to repeal an antiquated and ambiguous affirmative defense to the crimes listed in chapter 12.1-27.2 of the Century Code dealing with sexual performances by children.

Chapter 12.1-27.2, in essence, outlaws the production, promotion, and possession of child pornography. See N.D.C.C. § 12.1-27.2-02; N.D.C.C. § 12.1-27.2-03; N.D.C.C. § 12.1-27.2-04; N.D.C.C. § 12.1-27.2-04.1. However, N.D.C.C. § 12.1-27.2-05 lists three affirmative defenses to the crimes against children in this chapter. The affirmative defense subject to repeal under Senate Bill 2265 is listed in subsection 3, which provides "an affirmative defense to prosecution" where:

The defendant had no financial interest in promoting a sexual performance by a minor, other than employment in a theater, which employment does not include compensation based upon any proportion of the receipts arising from promotion of the sexual performance, and that person was in no way responsible for acquiring the material for sale, rental, or exhibition.

This statutory language, which was enacted during the 1985 legislative session and has remained substantively unchanged since that time, is now acting as an impediment to the effective prosecution of those who "promot[e] a sexual performance by a minor" where the motivation for commission of the crime is satisfaction of their own prurient interests rather than a "financial interest[.]" N.D.C.C. § 12.1-27.2-05(3).

Specifically, the office of the Grand Forks County State's Attorney recently reviewed a case in which an individual recorded a nude child using his computer. As is all too common, the video was then posted on the internet for his gratification and that of others. Because the individual did not sell the video or seek to make money off of it, he "had no financial interest in promoting" this "sexual performance[.]" Id. Accordingly, the individual was able to avail himself of the above affirmative defense to prosecution and the Grand Forks County State's Attorney declined to charge the individual.

I have attached to my testimony an email from Haley Wamstad, an assistant state's attorney in Grand Forks who is familiar with the facts of this particular case. In this email, Ms. Wamstad says, quite aptly, that this defense "no longer makes sense" and questions if it ever did. I have reviewed the language of the affirmative defense and agree: It is ambiguous at best and, at worst, flat out harmful to effective enforcement of laws that are designed to protect kids.

Perhaps the language seeks to provide an affirmative defense to the hypothetical person who is working for a wage at a theater (i.e., he has "no financial interest . . . other than employment in a

theater") and unwittingly promotes a sexual performance by a minor as part of his job (i.e., he is just taking tickets for an hourly wage, doesn't get "any proportion of the receipts[,] and had nothing to do with "acquiring the material for sale, rental, or exhibition.").

However, the comma after "minor" could give rise to a contrary interpretation in which the clause "[t]he defendant had no financial interest in promoting a sexual performance by a minor" stands alone as the affirmative defense. Thus, under this interpretation, if you have "no financial interest in promoting a sexual performance by a minor" but still undertake "employment in a theater" under the circumstances listed in that subsection, you would not be able to avail yourself of the affirmative defense of having "no financial interest in promoting a sexual performance by a minor[.]"

I have no doubt that members of the committee could poke holes in either one of these interpretations, but doing so would merely reinforce the need for repeal of this affirmative defense since the rule of lenity "requires ambiguous criminal statutes to be construed in a defendant's favor." State v. Laib, 2002 ND 95, ¶ 15, 644 N.W.2d 878.

Very simply, no one who preys on children should be able to avail himself of an ambiguity in the Code as a means to escape culpability. Senate Bill 2265 was advanced with this goal in mind.

Before I conclude, I would like to share with you an excerpt from an article that ran recently in the New York Times entitled "The Price of a Stolen Childhood." The article notes that in 2009, police "logged . . . almost 10 million" I.P. addresses in the United States that offer "child-pornography pictures or videos via peer-to-peer file sharing[.]" These illicit channels provide a mechanism for child porn to go "viral," like some sort of heinous YouTube video. This has a real impact on real victims who become well-known through the repeated viewing of their victimization. As recounted in the article:

Late that spring, Nicole got a series of messages on Myspace from a man who said he had been looking for her for five years. He asked, "Want me to come visit u?" When Nicole blocked him, he wrote to one of her friends on Myspace, telling her that Nicole was a "porn star" — and sending two images. "That's when I fully realized what it meant for these pictures to be out there," Nicole said. "I couldn't get away from it, not really. I started getting paranoid and having nightmares."

That concludes my testimony. I would be happy to stand for any questions.

From: Haley Wamstad <haley.wamstad@gfcounty.org>
Date: January 18, 2013, 9:24:40 AM CST
To: "Schneider, Mac J." <macschneider@nd.gov>
Subject: 12.1-27.2-05(3)

Dear Senator Schneider,

I am writing regarding an amendment to N.D.C.C. 12.1-27.2-05(3) relating to an affirmative defense to the crime of sexual performance by a minor. More specifically, it is my opinion that subdivision 3 of this section should be eliminated. Subdivision 3 provides an affirmative defense if the perpetrator did not receive financial gain from the creation of child porn. Our office reviewed a case in which an individual was involved in directing the creation of child porn. This individual recorded a child nude on his computer and then posted that video on the internet. This video was made for the individual's own satisfaction and that of others on the internet. The individual, however, did not sell the video or receive any financial gain from its production or distribution. As a result, our office had to decline charging this individual for this act because N.D.C.C. 12.1-27.2-05(3) provides an affirmative defense if the defendant did not receive any financial gain.

I'm not sure of the intention of this defense when the law was enacted, but it no longer makes sense (if it ever did) - it is like the current law is saying it is okay to make child porn, just don't make any money off of it. Today, with the use of technology and the internet, defendants often participate in a "sharing" of materials. These websites allow for an individual to see another person's porn if they share the porn they have. Therefore, the individual is not receiving a financial gain from the sharing of his production, but receives an incentive to share his production in order to see that of others.

Thank you for your consideration of this very important amendment.

Haley L. Wamstad
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NOTICE REGARDING ELECTRONIC SERVICE OF DOCUMENTS: I do not accept e-service of documents at this individual e-mail address. If you are e-serving a document upon anyone in the States Attorney's Office, please use the office e-mail address: sasupportstaff@gfcounty.org. Thank you.

The New York Times

January 24, 2013

The Price of a Stolen Childhood

By EMILY BAZELON

The detective spread out the photographs on the kitchen table, in front of Nicole, on a December morning in 2006. She was 17, but in the pictures, she saw the face of her 10-year-old self, a half-grown girl wearing make-up. The bodies in the images were broken up by pixelation, but Nicole could see the outline of her father, forcing himself on her. Her mother, sitting next to her, burst into sobs.

The detective spoke gently, but he had brutal news: the pictures had been downloaded onto thousands of computers via file-sharing services around the world. They were among the most widely circulated child pornography on the Internet. Also online were video clips, similarly notorious, in which Nicole spoke words her father had scripted for her, sometimes at the behest of other men. For years, investigators in the United States, Canada and Europe had been trying to identify the girl in the images.

Nicole's parents split up when she was a toddler, and she grew up living with her mother and stepfather and visiting her father, a former policeman, every other weekend at his apartment in a suburban town in the Pacific Northwest. He started showing her child pornography when she was about 9, telling her that it was normal for fathers and daughters to "play games" like in the pictures. Soon after, he started forcing her to perform oral sex and raping her, dressing her in tight clothes and sometimes binding her with ropes. When she turned 12, she told him to stop, but he used threats and intimidation to continue the abuse for about a year. He said that if she told anyone what he'd done, everyone would hate her for letting him. He said that her mother would no longer love her.

Nicole (who asked me to use her middle name to protect her privacy) knew her father had a tripod set up in his bedroom. She asked if he'd ever shown the pictures to anyone. He said no, and she believed him. "It was all so hidden," she told me. "And he knew how to lie. He taught me to do it. He said: 'You look them straight in the eye. You make your shoulders square. You breathe normally.'"

When she was 16, Nicole told her mother, in a burst of tears, what had been going on at her father's house. Her father was arrested for child rape. The police asked Nicole whether he

took pictures. She said yes, but that she didn't think he showed them to anyone. A few months later, while her father was out on bail, Nicole was using a computer he gave her to work on a presentation for Spanish class when she came across a file with a vulgar name that she couldn't open. She showed it to her mother and stepfather, and they brought the computer to the police.

A search detected five deleted video files of child pornography, two of them showing Nicole and her father. In the spring of 2006, he was charged with a new crime — producing the videos — and he fled the country. At this point, the police didn't realize that Nicole's father had also distributed the images.

Months later, the police said they had no leads on her father, so Nicole went on television to ask the public for any tips that might help them find him. A police officer in Toronto involved in tracking child pornography around the world saw the broadcast and recognized Nicole as an older version of the girl in the notorious videos. The Toronto officer set off an alert that reached the police in Nicole's hometown, informing them that she was the victim in a major pornography-distribution case.

The alert brought the local detective to Nicole's house on that December day, to confirm that she was in fact the girl in the pictures that circulated around the globe. "It was the worst moment of my life," Nicole said of seeing the pictures of herself. "In a way, I didn't remember it being that bad with my father — and then I saw that it was. Knowing that other people, all over, had seen me like that, I just froze. I could hear my mother crying, but I couldn't cry."

Nicole's appearance on TV produced a tip that eventually led the police to arrest her father in Hong Kong. But by going public, she had inadvertently exposed her identity to thousands of men who for years had collected her images. On one Web site with an American flag design, on a thread that continued for four years, commenters described in detail the acts of rape and bondage Nicole had experienced. One called the videos "legendary." Another called her "an eager participant" because her father instructed her to smile and talk in the videos. "The fact remains that she is the most searched for, sought after and downloaded ever," a third commenter wrote. "There are hours of video out there. It's just too bad there are not more willing like her."

For Nicole, knowing that so many men have witnessed and taken pleasure from her abuse has been excruciating. "You have an image of yourself as a person, but here is this other image," she told me. "You know it's not true, but all those other people will believe that it's you — that this is who you really are."

Until the 1970s, magazines with titles like *Lolita* were rife with sexual images of minors and routinely sold alongside adult pornography at red-light bookstores. In 1978, Congress made child pornography illegal, and four years later, the Supreme Court upheld a state law banning its sale. The court's decision changed the market along with the law. "The commercial distributors started to go out of business," said Kenneth Lanning, a retired F.B.I. agent who consulted on child pornography cases for decades. For a time, distribution and production plummeted. But then came the Internet. By the mid- to late 1990s, Lanning said, "there was a way for people seeking it to find each other and send images."

A decade later, the Justice Department interviewed veteran experts like Lanning for a 2010 report, and concluded that "the market — in terms of numbers of offenders, images and victims" — was growing to a degree described as "overwhelming" and "exponential." In the early-Web year of 1994, only 61 defendants were sentenced in federal court for child-pornography offenses; in 2011, 1,880 were, a 30-fold increase. The federal definition of child pornography extends to young people up to age 18, but the 2010 report noted that it had become more common for images to involve young children, as well as violence and sadism.

Precise numbers of child-pornography viewers are hard to come by. Unicef estimates that there are at least hundreds of thousands of Web sites with child pornography worldwide. Child-pornography consumers are even more likely to swap with one another via hidden networks. Using a tool developed at the University of Massachusetts, Amherst, in 2009, police have logged close to 22 million public I.P. addresses offering child-pornography pictures or videos via peer-to-peer file sharing, which allows users to download content from one computer to another; almost 10 million of the I.P. addresses were located in the United States. Many of the users shared only a single illegal image, perhaps downloaded inadvertently, but others offered collections of hundreds or thousands of pictures.

To gain access to a group of downloaders, a recent arrival may have to prove himself by delivering new material. Often this involves digitally altering an existing image, but in some cases, it can also mean seducing children to create new pictures to trade. The most desired series zoom around the Internet. "A lot of these guys have a collector's mentality," Lanning said. The pictures Nicole's father took became must-haves and went viral.

For Nicole, knowing that her photos were circulating was an unrelenting burden. It was hard to concentrate at school and hard to forge new friendships. She stayed close to just a few friends from her church. Her family is deeply Christian — "I've found comfort in my faith," she says — and she was home-schooled for a few years as a younger child. Her friends from church were the only ones she told about her father. "Everyone else I held at arm's length," she told me when we met this summer at her lawyer's office. Nicole speaks

deliberately and carefully, and on that day she was wearing an outfit that matched her coral nail polish and perfectly applied makeup. “But other kids found out after my father was charged. I remember walking down the hallways and thinking I could hear people saying, ‘There’s the girl who was raped by her dad.’ ”

In her junior year, Nicole transferred to a community college with a program for students who wanted to earn an associate’s degree while finishing high school. “At the time I’d have said I went for academic reasons, but looking back, it was also to isolate myself,” she said.

Late that spring, Nicole got a series of messages on Myspace from a man who said he had been looking for her for five years. He asked, “Want me to come visit u?” When Nicole blocked him, he wrote to one of her friends on Myspace, telling her that Nicole was a “porn star” — and sending two images. “That’s when I fully realized what it meant for these pictures to be out there,” Nicole said. “I couldn’t get away from it, not really. I started getting paranoid and having nightmares.”

The man was arrested and went to prison, but Nicole couldn’t avoid the knowledge that other men were still looking at the sexual photos of her young self. Later that year, she got a letter from the Victim Notification System at the Justice Department. Congress had passed a law in 2004 mandating that crime victims receive notice every time a suspect is arrested or has a court appearance. The letter was addressed to Nicole’s mother and stepfather because she hadn’t yet turned 18; it informed them that a man in California had been arrested for possessing a pornographic photo of her. “It just sat there on the counter for days,” Nicole remembered. “We didn’t really know where to put it.” More arrests followed and more letters — piles of them. “We stacked them in a laundry basket in a walk-in closet so I wouldn’t have to see them,” Nicole said. “Then there were more baskets, and we had to move them to the garage. It was really hard for me. I was still scared of my father, but I knew him. These other people, they were strangers, and there were so many of them.”

The piles of letters would eventually connect Nicole with another young woman who had also been abused and then lead them both to court. Back in April 1998, in one of the first investigations into Internet trafficking of child pornography, the F.B.I. started tracking an AOL user, with the handle HAZMAT029, who was posting on an AOL bulletin board service. HAZMAT029 sent 80 illegal pictures to another user, BMR169, along with e-mails that included the message: “do me a favor. get a peice [sic] of paper and wright HI HAZ on it and take a pic of her in nothing but stockings pulled down below her [genitals].” BMR169 e-mailed back pictures of a young girl, her shorts and underwear pulled to the side, sitting on a gray carpet in front of a wooden dresser. Next to her, a note read, “HI HAZ.”

The F.B.I. traced BMR's AOL account to a suburban house in a small town, and in October of that year, a team of agents arrived with a search warrant. In a basement bedroom, they found the gray carpet and the dresser. They also seized a computer full of illegal images, including pictures that showed the same girl being forced to give oral sex and being raped. The man the F.B.I. suspected was BMR wasn't home, so the agents showed the face of the child in the photos to his wife and his adult son. Did they recognize the girl?

They did. As they spoke, one of the agents looked out the window of the house and saw the girl playing in the yard across the street. "It's something I'll never forget," he told me.

Amy, as she's called in the court documents, was BMR's 9-year-old niece. Shown sanitized versions of the pictures, Amy denied that her uncle had abused her. She said he told her she was special and took her to buy treats like beef jerky, and she didn't want anything bad to happen to him. "How is he?" she asked her parents in the weeks after his arrest. "Is he going to be mad at me?"

Over months of therapy, Amy began to talk about the abuse. "My mind has everything in it," she told her therapist, according to court records I read with her permission. She remembered her uncle trying to have sex with her — it hurt, and she pulled away. And she remembered, at his direction, chatting with men over the Internet about the photos he sent them.

Amy's uncle pleaded guilty to one count of rape and two counts of child sexual abuse in state court and was sentenced to the minimum for each one, adding up to 12½ years in prison. In federal court, he pleaded guilty to one count of production of child pornography and received a 12-year sentence. Amy's current lawyer, James Marsh, says her parents were told the state and federal penalties would run consecutively, but instead, her uncle was allowed to serve the two at the same time.

Amy was given a diagnosis of depression and post-traumatic stress disorder the year her uncle was sentenced, but she also asked to stop going to therapy — she told her parents that she didn't want to talk about the abuse anymore. Her mother, who worked in health care, and her father, a tradesman, blamed themselves for trusting Amy's uncle with her. For years Amy's mother barely spoke to Amy's aunt, who remained married to her husband, even though the sisters continued to live across the street from each other.

As Amy grew up, she tried to push aside what had happened to her. Every few months, in middle school and high school, her parents would ask if she wanted to talk about it, and each time she would say no. "I was always thinking about it, but I wasn't ready to deal with how I felt," she says now. Amy threw herself into her social life, going out and drinking in

the hills behind her house. Even to the friends who knew, it almost seemed as if the abuse hadn't happened.

When she was 17, Amy received her first crime-victim notice from the Justice Department. "My mom said it was a mistake, because I was still a minor — the letter should have been addressed to her and my dad," she said. "But it had my name on it, and I never got mail, so I wanted to open it. My parents took me into their room and said we needed to have a talk." Amy's parents had never told her that her uncle had distributed images of her to other men. "It had been so long by then, eight years," she said. "They didn't know how to tell me."

Amy's parents took her to see Marsh, who had started the public-interest Children's Law Center in Washington. At their first meeting, he explained to Amy that the letters meant her pictures had been traded countless times online. "I just felt so full of shame," Amy said. "I started wondering, Has he looked at them? He said he hadn't, and that made me feel better. But then I thought, Who has?"

Marsh researched legal remedies for Amy. Combing through his casebooks, he found a provision in the Violence Against Women Act that he had never heard of before: it gave the victims of sex crimes, including child pornography, the right to restitution or compensation for the "full amount" of their losses. Enumerating what those losses could be, Congress listed psychiatric care, lost income and legal costs and concluded, "The issuance of a restitution order under this section is mandatory."

The provision for restitution, enacted in 1994, had yet to be invoked in a case of child-pornography possession. The basis for such a claim wasn't necessarily self-evident: how could Amy prove that her ongoing trauma was the fault of any one man who looked at her pictures, instead of her uncle, who abused her and made the pornography?

Marsh suggested that Amy see a forensic psychologist, Joyanna Silberg, who evaluated Amy and said she would need therapy throughout her life and could expect to work sporadically because of the likelihood of periodic setbacks. Silberg attributed these costs — Amy's damages — to her awareness of the ongoing downloading and viewing. "Usually, we try to help survivors of child sexual abuse make a very strong distinction between the past and the present," Silberg, who has given testimony on Amy's behalf for restitution hearings, told me. "The idea is to contain the harm: it happened then, and it's not happening anymore. But how do you do that when these images are still out there? The past is still the present, which turns the hallmarks of treatment on their head."

Marsh put together a lifetime claim for Amy totaling almost \$3.4 million. With the crime notices arriving in the mail, Marsh started tracking men charged with possession of her pictures. He looked, in particular, for wealthy defendants. He planned to use the concept of joint and several liability to argue that each defendant should be on the hook for the full amount of his client's damages — that is, for millions of dollars. Joint and several liability is often used in pollution cases: when several companies dump toxic waste in a lake over time, a plaintiff can go after the company with the deepest pockets, and a judge can hold that single company responsible for the entire cost of the cleanup — with the understanding that it's up to that polluter to sue the others to pay their share.

In July 2008, Marsh learned about the arrest of Alan Hesketh, a former vice-president of Pfizer, who was charged with trading nearly 2,000 child-pornography photos online — among them four pictures of Amy. Marsh filed one of his first requests for restitution with the prosecution. Hesketh pleaded guilty, and his sentencing was scheduled for later that year.

At the time of the Hesketh case, Amy was struggling. She was 19 and living with her boyfriend. She had enrolled at a local community college, but she drank too much to concentrate on studying. The crime-victim notices had stirred up the past for her, and she wasn't in regular therapy. "The last class I went to, there was this PowerPoint slide, something about child sexual abuse, and I thought, I can't do this," she told me as she sat in her kitchen smoking a cigarette. "It just brought everything back." Amy dropped out after that, without telling her parents. "I told myself I would just take a year off," she continued. "But you know, statisticwise, once you leave school, the chances you'll finish go down about 80 percent."

Amy has a quick intelligence — she's a college dropout who can rattle off her own odds of going back — and asks lots of questions. She has focused her curiosity on the legal strategy that Marsh has pursued for her. When Hesketh was sentenced, Amy decided she would be there. "I kind of wanted to face my fear," she told me. She also wanted to prove a point: Hesketh was arguing, through his lawyer, that he had committed a victimless crime — a common defense in cases of child-pornography possession. "I thought, I want him to look at me and know that I'm not a picture; I'm a person," she said.

In a federal courthouse in Bridgeport, Conn., in October 2008, Amy sat on the opposite side of the courtroom from Hesketh's family. The judge opened the proceedings by acknowledging that there was a victim in the courtroom. Amy listened as Hesketh's grown children asked the judge for mercy for their father. "His kids kept saying he was the best grandfather ever," she said. "And I was like: 'But you *know*. You know what he did.' "

Then Hesketh took the stand. As Amy remembers it, he said, “ ‘I’m so sorry.’ ” Earlier, he said that “he hadn’t hurt anyone,” Amy told me. “Now he totally flipped around. I felt like I’d made an impact. It was like, ‘He knows now.’ ”

Hesketh was sentenced to 6½ years. Four months later, in an unprecedented move, the judge advised Hesketh to settle the restitution claim and he agreed to pay \$130,000.

Not long after, Amy found out she was pregnant. She wasn’t sorry — at the time she had faith in her boyfriend, whom she had told about the abuse and the photos. But he was a heroin user and dealer, and he went to jail two months after their son was born. Amy started seeing another man who she says had a jealous streak and broke her nose, twice. He also broke her infant son’s leg, she told me. She took the blame when he threatened her, and she had to give up custody to her mother for six months.

As she recalled this time in her life, she took out her phone and scrolled through her photos until she found a close-up of her beaten face: lip split, one eye half-closed, nose swollen and cheek yellow with bruises. The young woman next to me had clear skin and bright eyes, and I had just watched her charm a police officer into calling us a cab. The girl in the photo was expressionless.

Amy stared at the picture on her phone. “That was my normal,” she said.

Six months after Hesketh’s sentencing, Marsh went after another child-pornography defendant, Arthur Staples, a 65-year-old sheriff’s deputy in Virginia, who had chatted online with an undercover detective and expressed an interest in young children. Staples sent one image of a young girl (not Amy), and he was caught with more than 600 pictures on his computer, including hers. Staples agreed not to appeal any sentence or restitution judgment. The judge sentenced him to 17½ years, and made the unusual move of ordering him to pay all of Amy’s claim. To Marsh’s surprise, Staples turned out to have \$2 million in assets. He has since paid \$1.2 million to Amy. (Marsh says the government let Staples’s wife keep part of the estate.) While Amy has been turned down for restitution by some courts, which have stated that there was not enough proof that any one man who viewed her pictures was responsible for the harm she has suffered, she has won more than 150 cases, totaling \$1.6 million. Most of the amounts aren’t large: \$1,000 or even \$100, paid out in checks as small as \$7.33.

Nicole has also been pursuing restitution. Her lawyer, Carol Hepburn, did her own research and got in touch with Marsh when she learned about the claims he was bringing for Amy. The two lawyers now collaborate on ideas and strategy, though they represent their clients

separately. Since receiving her first check for \$10,000, Nicole has collected more than \$550,000, mostly in small amounts from 204 different men. So far only a few other child-pornography victims have gone to court for restitution. Many may not know there is a legal remedy; others don't know their images have circulated.

The restitution checks gave Nicole a lift when they started to trickle in, but, like Amy, she had trouble with the transition into adulthood. In the fall of 2008, Nicole was attending a one-year bible college and working at an ice-cream shop. At work she felt increasingly self-conscious around male customers. Had they seen her pictures? Were they like the man who stalked her on Myspace — were any of them coming to the store because they knew? That spring, Nicole testified at her father's sentencing. She asked the judge to give him a long punishment, and her father was sent to prison for 50 years. Her roommates, one of whom was a friend from her childhood church, supported her. "But I didn't have a counselor there, and that was tough," she said. "I called my parents and said: 'I have to quit my job, and I need to come home. I feel like I'm going crazy.'"

During her first few weeks at home, Nicole slept all day in her childhood bedroom and stayed up late watching sitcoms like "Sabrina" and "The Nanny." Finally, she started counseling and was able to get a job doing administrative work at a nuclear-waste site. That June, she testified at the sentencing hearing of four child-pornography defendants caught with her images, hoping to gather strength from speaking out. Instead, the experience made her feel exposed.

More than a year later, in the fall of 2010, she left for a four-year college away from home. She was worried about being on her own, but she wanted to try. "I push myself," she told me. "I don't like to say something is too much for me." Like Amy, however, she took a psychology course, about child development, that brought up unbearable memories. During lectures, she began going blank. "All of a sudden class would be over, and I would be like, 'What happened?'" she said. She started skipping class for fear of continuing to disassociate.

Nicole, who wasn't in counseling at the time, failed all but two of her courses that spring. "I just totally broke down," she said. "I'd come home and sit in the same position and stare into space, and then I'd look at the clock, and it was six hours later." Nicole talked about this period of her life with Hepburn and me over dinner one night last summer. She showed us a tattoo on her right wrist: a heart sheltered by wings that she got after her father's sentencing. She also learned to make tattoos, and she took out her phone to show us a picture of the first one she created, an anchor with a rope curled around it. "My cousin is a tattoo artist, and he taught me," she said. "We grew up together, and he was a very easy

person to hang out with during that bad time. I'd go over to his place, and he'd be drawing, and he said, 'You're into design, you could do this.' When I tried I felt this release of emotions. We started drawing for hours to music — Tom Petty, Cake, everything. You have to learn how to go smoothly and keep the same pressure on the line the whole time. I drew anchors over and over again on grapefruit. I'd been numb for months, and now I could feel again. I actually felt joy.”

In the fall of 2011, Nicole transferred to a campus closer to her family. She made her way through her course work by avoiding subject matter that upset her and by allowing for her own limitations. “I had to accept that, because I have this extra stressor, I get overwhelmed by things that other people can do,” she said.

Nicole decided to spare herself going to court, so she wasn't in El Paso, in September 2011, for the sentencing of Luis Enriquez-Alonso, a student at the University of Texas. He agreed to plead guilty after being caught with thousands of illegal videos and images, including Nicole's, on his computer. At the hearing, Enriquez-Alonso and his parents listened while the prosecutor read into the record a statement Nicole wrote about what it is like to know men are looking at her pictures: “After all these years and going to different counselors, I still haven't learned the trick to let my mind rest,” Nicole wrote. “When I do sleep, my dreams are vivid and I remember them for weeks. A common theme is finding myself naked in front of a crowd of people or in an enclosed space and I can't escape or run away fast enough.”

That day, without a court order, Enriquez-Alonso's family handed over a check for \$150,000, along with an expression of remorse. “That really touched me,” Nicole said, “that his family wanted to make sure that I was taken care of, that I could get all the counseling I need. Most of the time when I get restitution, there's no story behind it. I feel like they're forced to give the money. In this case, they wanted to do it, and there were words behind it, kind words.” Enriquez-Alonso, who faced a maximum of 10 years in prison, is serving 5.

Study after study links child sexual abuse to psychological trauma, addiction and violent relationships in adulthood. There is almost no research, however, that deals with the specifics of Amy and Nicole's experiences: What additional harm comes from knowing that pictures of your childhood exploitation are circulating widely?

The Supreme Court actually addressed this question in its 1982 decision upholding child-pornography bans. “ ‘Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution,’ ” Justice Byron White wrote, quoting from a book about

abused children. “ ‘Because the child’s actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place.’ ”

David Finkelhor, a sociologist who directs the Crimes Against Children Research Center at the University of New Hampshire, sees the moral weight of the Supreme Court’s proclamation, but not the empirical proof. “The evidence doesn’t yet tell us to what extent the experience of being a pornography victim aggravates the experience of the sexual abuse itself,” he told me. “How do you separate it out?”

Courts have disagreed on this question. In at least a dozen cases, defendants have appealed restitution decisions and mostly won. In five of those cases, federal appeals courts have expressed skepticism that Amy and Nicole should receive more than nominal restitution. Two other appeals courts have allowed the young women to recover from individual defendants as members of the group of viewers but, so far, only for amounts of \$10,000 or less. (Amy collected a far greater sum from Arthur Staples because he waived his right to appeal.)

Last spring, the legal battle was focused on the U.S. Court of Appeals for the Fifth Circuit, which covers Texas, Louisiana and Mississippi. One panel of three judges upheld full restitution to Amy of millions of dollars from a Texas man. Based on that decision, a second three-judge panel affirmed a separate \$529,000 restitution order for Amy against a New Orleans defendant, but voiced its fundamental disagreement with the original ruling. To address the dispute, 15 Fifth Circuit judges gathered last May for a hearing in New Orleans. James Marsh and Carol Hepburn were there along with Amy; Nicole chose not to go. Amy knew this was the most significant hearing to date, and she wanted to show the judges that she was real, just as she had shown Alan Hesketh.

At the lectern to argue her side was Paul G. Cassell, a former federal judge who teaches law at the University of Utah. Cassell is a staunch conservative (he challenged the right to a Miranda warning before the Supreme Court), and Marsh and Hepburn, both Democrats, were surprised at first to be allied with him. But as a leading advocate for victims’ rights, Cassell sees in Amy’s claims a chance to lay the groundwork for broader change.

For 30 years, the victims’-rights movement has fought for a larger role for victims in criminal prosecutions. Victims have gained the right to make statements in court about the impact a crime has had on them, which judges can take into account in determining punishment. Restitution remains an ambitious next step. The standard context is crime involving financial loss — a bank robber ordered to return stolen money to the bank or an embezzler who must repay the employer he defrauded. Cassell sees Amy and Nicole’s cases

as a route to expand the idea. "I'd like to pursue the concept of total restitution for all victims, for whatever crimes and losses a defendant has caused," Cassell told me. "This is a good opportunity to show how it can work."

In the courtroom, Cassell linked the defendants to the network for child-pornography distribution. "What the defendants have done is collect images of an 8-year-old girl being bound, raped and sodomized," he said. "If you participate in a market, you become responsible for that market." The lawyer for the New Orleans defendant disagreed. She argued that there was no proof that her client, in particular, had harmed Amy — no way to show that his viewing of her images caused damage. She also called the restitution order for \$529,000 "grossly disproportionate to his culpability relative to other people who have abused Amy."

Michael Rotker, the lawyer for the department, told the court that the problem with the restitution awards was that there was no statutory authority for joint and several liability — nothing in the law, as Congress wrote it, which allowed a victim to recover a large award from one defendant who could then seek to recoup those losses by suing other defendants. Instead, Rotker argued, each defendant could be held responsible only for a small and roughly equal fraction of the whole. He offered this hypothetical example: if 200 men were convicted of possessing Amy's images, and her claim for damages totaled \$3 million, then a judge would have discretion to order a defendant to pay restitution of \$15,000 to \$30,000.

As the lawyers spoke, Amy's eyes filled with tears. "Some of it was hard to listen to," she told me later. "But my therapist said to think of it as a store, with different compartments you can take out and put back. She said, 'When you were a little girl, you had to compartmentalize to deal with everything you went through.' So I can still do that now, and sometimes it's good, I guess."

At one point in the proceedings, Judge Emilio Garza stopped Cassell, not to challenge him, but to pick up on his theme. "It seems to me that we're in this brave new world, where not only was there an actual rape, but I'm going to suggest to you there is a continuing digitized rape," the judge said. "Possession of the digitized recording of the rape contributes to the system, contributes to the economic benefit of those who produced this thing."

The judges would not announce their decision for several months, but at the end of the hearing, Amy focused on what Garza said that day. "To hear that from a judge — I couldn't believe it," she told me. "It was so relieving. It was like he really got it. He understood."

Just six weeks after Amy got home from New Orleans, her uncle was released from prison after completing his concurrent 12-year sentences. Amy says she was greatly relieved when

her aunt told her that she wouldn't allow him in the house. Instead, he was paroled nearby. When Marsh texted to give her the address, Amy happened to be only a few blocks from it. "I almost dropped the phone," she said. "Oh, my God, it was just so weird. I thought, He's got binoculars, he's looking for me. I thought the worst." Marsh reminded her that if her uncle contacted her, he would go back to prison. And also that she was an adult now and safe from her uncle's pedophilia.

Last month, while standing in line at Wal-Mart with her brother and a friend, Amy saw a man who she thought was her uncle looking at her. "I wasn't positive because I haven't seen him for so long," she said. "But as soon as I made eye contact, I didn't breathe." Was she being paranoid? She couldn't tell. The man seemed to follow them out of the store. As they got into her car, the man stopped to light a cigarette, and she thought he was staring at them. "It was very, very scary," she said.

Today, a sentence like the one Amy's uncle received — with no additional prison time for a federal conviction for pornography production and distribution — is extremely rare. The penalties for distributing or receiving pornography have become harsher. Receiving one illegal photo carries a mandatory minimum penalty of five years. The number of images a defendant downloads increases the punishment, as does his use of a computer. Now that large volumes of data stream with a click, the average recommended prison term for possession has jumped to 10 years, even if a defendant has no criminal record and there is no evidence that he produced or distributed porn. Because some child sexual abuse cases still end in relatively low penalties in state court, there's a paradox: defendants who look at sexual pictures of children can spend more years in prison than people who abuse children but don't have pornography of them.

The United States Sentencing Commission held hearings last February to discuss whether the punishment for child-pornography offenders has become both disproportionate and unfair — with people who committed similar crimes receiving vastly different penalties, based on the subjective decisions of judges. Restitution was discussed even though the prevailing view is that technically it isn't considered part of punishment. Its purpose is to "make the victim whole," as the legal phrase goes. "Simply put, an innocent victim should not suffer financial losses from a crime — the defendant should make good on those losses," Cassell said.

But Douglas Berman, an Ohio State University law professor who writes a frequently cited [blog](#) about sentencing, argues that the commission could rethink the role of restitution. In some cases, restitution could be considered commensurate to prison time — and courts could recommend shorter sentences for child-pornography collectors who agree to

compensate victims based on their ability to pay. Berman thinks the key to making this leap is adopting the point of view of the victim. “Victims are shrewder than most prosecutors about the diminishing returns of long incarceration,” he said. “They want perpetrators to serve some time. They want these men’s lives disrupted, and they want the deterrence that helps protect other people. But they’re often wise enough to realize that there’s not much gain in deterrence from a 5 or 10 year sentence to 15 years. If victims are saying that restitution is as, or more, important to them than five extra years, I very much think the sentencing commission and Congress should listen.”

When I asked Amy about such a trade-off, she supported it. Nicole had mixed feelings: she liked the idea of greater incentives for restitution, but she wasn’t sure about giving up longer punishments, given how easy it would be for someone to leave prison and go back to downloading child pornography. Cassell says that using restitution in this way could have value. “If it makes the perpetrators internalize how they’ve hurt the victims — if it makes them see there are real victims — then you deter them from doing this again when they get out,” he said.

Berman also favors a proposal that has been discussed at the Justice Department: a general compensation fund that would systematically collect restitution from child-pornography offenders and pay it out to victims like Amy and Nicole based on the harm they suffered and the costs they’ve incurred because of it. A compensation fund could give more victims the financial means to put their lives back together. And it could force more defendants to reckon with the children in the pictures and with their own role in supporting a market that depends on abuse.

Restitution has allowed Amy and Nicole to get the counseling they need, but receiving large sums can be complicated. When Amy received her \$130,000 check from Alan Hesketh, she went on shopping sprees at the mall, splurging at stores like Abercrombie & Fitch. She had never been able to earn a steady paycheck, and the money was a sudden windfall. By the time the \$1.2 million check came last spring, she was more considered. She didn’t want to stand out in her small town. Last summer, she bought a modest three-bedroom house a few miles from her childhood home, where her mother and brothers still live.

Amy has also discovered that she likes giving money away — to her mother for a new deck, to a close friend who wanted kitchen cabinets she couldn’t otherwise afford. It’s her way of dealing with the discomfort of having resources that people around her don’t and repaying those who helped her along the way. “I used to be a mooch to my friends, asking, ‘Could I bum a cigarette?’ I was a smoker who couldn’t afford a pack,” she told me. “So now, if you’re my friends or family, and you need something, I’ve got your back.”

Nicole's relationship to her restitution money is different, partly because she has received smaller checks. She used a bit to travel, and to buy a car. She has primarily paid for her education. Though school can still be difficult for her — during her last semester of college, Nicole continued to miss classes and assignments because she was disassociating — she graduated in December with an A on her final paper and plans to apply to a master's program in counseling for the fall. At the moment, she's taking time off, renting a house with a friend and having a serious romantic relationship. Eventually, her plan is to earn a Ph.D. in clinical psychology.

Some researchers worry that restitution runs the risk of perpetually casting the people it seeks to help in the role of victim. "There is some research showing that kids who have been abused benefit from being relieved of the victim identification when cases resolve faster," says David Finkelhor, the University of New Hampshire sociologist. But Amy and Nicole say that receiving money doesn't trouble them in that way. Nicole talked about feeling vindicated by the restitution payments. "I didn't feel ambivalent about the money, not at all," she said. When I asked Amy if she thought that the checks were tainted by their tie to the pornography, she said, "No — I don't think about it that way." She added: "O.K., I didn't work for this money. I mean, I didn't put in 12-hour days for years straight. But I earned it, kind of. Even if I didn't *earn* it."

Amy and I talked about this last summer when I visited her at her new house. Her young son greeted me, pretending to be a monster. They had two new puppies that followed us as she showed me around, pointing out a couple of paintings that I watched her buy in New Orleans (she had asked Marsh how much she could spend). In the basement, Amy flicked on track lights that the previous owner installed over the bar. A door led to the garage, which housed a gleaming car she bought for \$15,000.

For more than two years, Amy has been living with the man she started dating after she left the one who broke her nose. They knew each other from high school, and she feels sure about him: he has a full-time job and a long-term plan that includes getting married and then having a baby. When Amy found out her uncle was out of prison, her boyfriend helped calm her down; he said she had nothing to fear now, and she decided he was right.

While I was visiting, I gave Amy a ride to see her therapist — "I don't know what I'd do without her, I feel so much better being in therapy" — and on the way back, we stopped at her mother's house. Amy took me out on the half-rebuilt deck and pointed through the pine trees to the entrance to the basement of the house where her aunt still lives and where her uncle had taken her.

“I haven’t passed through that door since I was 9,” she said. “One day I will. Me and my therapist talked about it. I’m not there yet, but I’ll get there. I’ll be able to go in and be like, ‘Yeah, I can do this.’ ”

In October, the Fifth Circuit ruled in Amy’s favor, in a 10 to 5 decision. The court also accepted the theory of joint and several liability, finding that this means of allocating shared responsibility can ensure “that Amy receives the full amount of her losses, to the extent possible, while also ensuring that no defendant bears more responsibility than is required for full restitution.” Victims and the Justice Department can keep track of how much has been recovered, and courts can set a payment schedule based on an individual defendant’s ability to pay. “Ultimately, while the imposition of full restitution may appear harsh, it is not grossly disproportionate to the crime of receiving and possessing child pornography,” Judge Garza wrote for the court. “Defendants collectively create the demand that fuels the creation of the abusive images.” Garza sent Amy’s award of \$529,000 back to the lower court because it did not provide for restitution “in full” — in other words, it was too small.

The Fifth Circuit’s decision creates a clear split among the appeals courts over how to interpret Congress’ provision of restitution for sex-crime victims — a split that only the Supreme Court can resolve. Cassell and Marsh have asked the justices to do that, and the court could hear a restitution case as early as next fall.

For Amy, Supreme Court review is a heady prospect. “If I win, that will set everything up for other people like me, and that would be so amazing,” she said. “I don’t even think there are words for it. To help people know that they’re not powerless, that would be such a good feeling.”

Nicole worries about the public exposure that a Supreme Court case would bring. But she shared Amy’s hope that it would help other victims. The National Center for Missing and Exploited Children has a database of more than 5,000 child-pornography victims. The center estimates that 12 percent of them have had their photos distributed across the Internet. That means hundreds of young people, in their teens and early 20s, could have potential claims for restitution. “I need the help I’m getting, especially the counseling,” Nicole said. “I want other people to get it, too.” Restitution can’t undo the damage of the past. It can’t actually make her or Amy whole. Still, Nicole says, “it can help give us the tools to heal.”

Emily Bazelon is a senior editor at Slate. Her book “Sticks and Stones: Defeating the Culture of Bullying and Rediscovering the Power of Character and Empathy” is out this month.

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