Headline: Protecting the Child Victims Of Porn
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By William V. Roth

Although one expects a criminal defense lawyer to zealously defend his client, Lawrence Stanley has no license to mislead as he did in his Jan. 30 Outlook article regarding the prosecution of his client in the child pornography case of United States v. Knox. As a chief sponsor of the recently passed Roth-Grassley amendment to the Senate crime bill, which denounced the Justice Department's new, narrow interpretation of the federal child pornography statutes in that case, I feel compelled to respond.

First some facts. The Justice Department successfully prosecuted Stephen Knox for possession of child pornography. The 3rd Circuit upheld the conviction on appeal. In March 1993, the Justice Department's initial Supreme Court brief urged affirmance. The video tapes at issue depicted girls as young as 10 who, although not nude, were posed provocatively with the camera frequently zooming in on the children's genital areas for extended periods. Catalogues advertising the tapes showed they were designed to pander to pedophiles with descriptions such as "bathing suits on girls as young as 15 that are so revealing it's almost like seeing them naked (some say even better)."

In September 1993 the new solicitor general reversed the Justice Department's earlier position. He filed a new brief in the Knox case, arguing that the 3rd Circuit was wrong and that the conviction of Knox should be vacated. Most disturbing, the new Justice Department brief introduced a new requirement for what qualifies as child pornography - that the material "must depict a child lasciviously engaging in sexual conduct (as distinguished from lasciviousness on the part of the photographer or viewer)." The Justice Department's new interpretation of the law focuses on the acts of the child rather than on the actions of the pornographer. But this ignores the fact that children can, for example, be photographed in a lascivious manner while they are sleeping. Moreover, this new definition undermines the standards for child pornography set forth in United States v. Dost, a case accepted by most federal courts and included in the Justice Department's standard jury instructions used by prosecutors in child pornography cases. The Dost test includes, as one element, "whether the visual depiction is intended or designed to elicit a sexual response in the viewer."

Contrary to Stanley's claim, the solicitor's new standard does threaten to undermine federal prosecutions of child pornography laws by requiring that the depicted child act lasciviously rather than simply that the depiction itself be lascivious. While the actions of the child may be relevant in a child pornography case, there is no good reason in law or policy to require that the child's action be a sine qua non of prosecution, as the solicitor now asserts. No court supports this new, narrow interpretation.

On Nov. 18, 1993, Assistant Attorney General Sheila Anthony wrote to me asserting that not a single prosecution or investigation "of which we are aware" would be terminated because of the new standards adopted in the Knox brief. As it turned out, the emphasis was on "aware." At my request, a subsequent survey of the 93 U.S. attorneys' offices conducted by the Justice Department turned up at least 10 pending investigations with facts similar to the Knox case.

But my concern goes beyond the facts of the Knox case, because under the new Justice Department standard even totally nude depictions of children may not be prosecuted unless the child herself is acting lasciviously. According to the former head of the department's Child Exploitation and Obscenity Unit, this new requirement could well

undermine many or even most of the department's prosecutions. Since the solicitor general's brief sets the standard for all federal prosecutors, it is not enough for President Clinton to announce that he supports the Senate's position on child pornography, (as he did in his letter to the attorney general on Nov. 10, 1993) while his attorney general continues to endorse the solicitor's brief. On Dec. 23, 1993, for example, the department filed a motion with the court of appeals urging a new trial for Knox "because appellant has never been tried under the interpretation of the statute now urged by the government."

No, the solicitor's brief must be disavowed and federal prosecutors must be instructed that they will continue to enforce the law as most courts had interpreted it before the flip-flop brief in the Knox case muddied the waters.

I know what Congress intended when we passed the Child Protection Act of 1984. We intended to stamp out the business of child pornography in this country and to stop the sexual exploitation of our children by pornographers and pedophiles. Contrary to the assertions of Lawrence Stanley, the Senate was not stampeded to pass the Roth-Grassley Amendment. With the pornographers and the prosecutors now on the same side, the Senate recognized that someone had to defend the children.

The writer is a Republican senator from Delaware.

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