Testimony of

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My name is Anne M. Coughlin, and I am the Class of 1948 Research Professor of Law at the University of Virginia School of Law. Before joining the law faculty at the University of Virginia, I was an Associate Professor of Law at Vanderbilt University Law School. I also practiced at private law firms in New York, New York and Washington, D.C., and I served as law clerk to the Honorable Jon O. Newman of the United States Court of Appeals for the Second Circuit and to the Honorable Lewis F. Powell of the United States Supreme Court. My areas of substantive expertise are Criminal Law and Criminal Procedure, including especially the jurisprudence developed under the Fourth, Fifth, and Sixth Amendments to the United States Constitution. I also do research and teach courses on Sex Discrimination and on Feminist Legal Theory, which evaluates, among other things, the laws aimed at eradicating sexual violence in our culture. I am co-author of a Criminal Law casebook, and I have published law review articles on the topics of domestic violence, the historical origins of contemporary rape doctrine, and the regulation of pornography.

When debating the provisions of S. 2520, the Prosecutorial Remedies and Tools Against the Exploitation of Children Today ("PROTECT") Act of 2002, the Committee faces a difficult and sensitive task. It must design a prosecutorial mechanism that balances two significant and potentially conflicting legal imperatives. As I understand it, the Committee aims to develop a penal statute that (1) will protect the nation's children from the serious harms caused by child pornography, but that (2) will not infringe our cherished constitutional liberty to think and speak free of governmental interference, including the right to think and speak about human sexuality. Up until the closing decade of this century, federal and state governments have been, for the most part, able to accommodate each of these imperatives by criminalizing only those pornographic materials that are produced by using real children, as well as (of course) by continuing to outlaw all pornographic materials that are legally obscene. These familiar criminal prohibitions have been scrutinized by the Supreme Court and have been found to be fully consistent with the First Amendment free speech guarantees. See New York v. Ferber, 458 U.S. 747 (1982) (upholding the prohibition of pornographic, but non-obscene, materials produced by using real children), and Miller v. California, 413 U.S. 15 (1973) (defining as obscene those works that, taken as a whole, appeal to the prurient interest, are patently offensive in light of community standards, and lack serious literary, artistic, political, or scientific value).

With the emergence of new technologies capable of producing "virtual" child pornography, however, prosecutors have found themselves facing significant obstacles to winning just convictions in child pornography cases. In 1996, Congress recognized and aimed to ease this law-enforcement burden by passing the Child Pornography Prevention Act ("CPPA"), which added some forms of virtual child pornography to the list of actionable images. Earlier this year, in Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389 (April 16, 2002), the Supreme Court threw out key provisions of the CPPA on the ground that they infringed First Amendment freedoms.

Therefore, this Committee finds itself back at the statute-drawing board, once again faced with the obligation and the opportunity to develop criminal prohibitions that will deter and punish those who sexually abuse children, but without infringing the free-speech rights of adults.

In Free Speech Coalition, the Supreme Court invalidated two specific prohibitions embodied in the CPPA. First, the Court rejected § 2256(8)(B), which criminalized a visual depiction that "is, or appears to be, of a minor engaging in sexually explicit conduct." Second, the Court disapproved § 2256(8)(D), the so-called "pandering" prohibition, which criminalized a visual depiction that is marketed in a manner that "conveys the impression" that the material depicts a minor engaging in sexually explicit conduct. The Court determined that each of these prohibitions was substantially overbroad. In particular, the Court concluded that the prohibitions covered materials (1) that were not regulable under Ferber because they were not the product of child abuse -- as the Court put it, images were criminalized even though they "record[ed] no crime and creat[ed] no victims by [their] production" -- and (2) that were protected by Miller because they were of serious literary, artistic, scientific, or other value. As such, these provisions of the CPPA went far beyond the boundaries established by the Court's First Amendment cases, and the Court refused to sustain them.

So far, Congress has responded to the decision in Free Speech Coalition by offering two pieces of proposed legislation, S.R. 2520 (the PROTECT bill) and H.R. 4623 (the House bill). Each of these bills represents a judgment that Free Speech Coalition permits some room for regulation of virtual child pornography, a judgment that I think is substantially correct. As is so often the case, moreover, each bill embodies a different response to the Supreme Court's criticisms, and each therefore proposes different methods for revising the objectionable provisions of the CPPA. As I amplify below and will do further in my oral testimony before the Committee, I believe that the PROTECT bill is a nuanced and responsible law-enforcement measure. The drafters of the bill have continued to search for legitimate solutions to problems that may hamper federal prosecutors in their effort to shut down the child porn business, and, at the same time, the drafters have made a conscientious and good faith effort to respond directly to the specific First Amendment concerns identified by the Supreme Court in Free Speech Coalition. While it is difficult to offer accurate predictions in this sensitive area -- certainly, guarantees are impossible -- it is likely that, perhaps with some reworking, the PROTECT bill would survive constitutional scrutiny, and it therefore would be available to provide vital assistance to law-enforcement efforts in this area.

By contrast, the House bill seems to be both too broad and too narrow. A key definition contained in the House bill suffers from precisely the same form of overbreadth that killed the CPPA. Indeed, the House bill seems designed to reenact the very definition of child pornography that the Supreme Court so recently struck down on First Amendment grounds. Even more curiously, the House bill incorporates an affirmative defense that exempts from prosecution forms of child pornography that the government should be very interested in regulating and that the government seems likely to be allowed to regulate consistently with the constitutional strictures imposed by the reasoning in Free Speech Coalition.

As I see it, the proliferation of virtual child pornography gives rise to two potential arguments by defense counsel that might unjustly thwart prosecution of those who manufacture, distribute, and

possess child porn. I describe these potential defense claims as unjust not to fault defense lawyers for raising them, nor to discredit the notion that defense counsel should do their utmost to protect the interests of clients accused of violating any criminal prohibition, including the prohibition on child pornography. As the Supreme Court emphasized in Free Speech Coalition, we must jealously guard against governmental infringement of First Amendment freedoms, and defense lawyers always have played and must continue to play an important role in upholding these and other constitutional rights. Rather, I aim here to isolate a class of cases in which the proliferation of virtual child porn is going to make it very difficult, maybe even impossible, for prosecutors to secure convictions that are legally justified and that should be constitutionally permissible.

The two potential defense arguments are the following. First, the defendant might argue that the government could not prove that the child pornography was made using real children, as opposed to virtual ones. As I read the legislative record, there is evidence that defendants have started making this argument, and advances in technology have made it very difficult for prosecutors to negate the claim. The material contains graphic sexually explicit images of real minors, but the prosecution cannot prove beyond a reasonable doubt that real minors were involved. There is a second defense theory that I have not seen mentioned in any materials I have reviewed, but it is one that I expect defense lawyers will start making very soon, if they have not done so already. Under this theory, the defendant's claim will be that he did not possess the guilty knowledge required for conviction because he thought that the images had been produced using virtual children, rather than real ones. Notice how this claim works in tandem with the first one, and notice how plausible this claim appears to be in a world where virtual child pornography (apparently) is increasingly common and is (according to federal prosecutors themselves) almost impossible to distinguish from the "real" thing.

The PROTECT bill provides a mechanism for short-circuiting these claims, and, if carefully drafted, the mechanism is one that can be calibrated to satisfy the Supreme Court's analysis in Free Speech Coalition and thereby accommodate First Amendment rights. In effect, the PROTECT bill enacts a new congressional definition of illegal child pornography. Under this new definition, illegal child pornography would be defined to include not only those sexually-explicit materials that are made with real children, which is the definition that Ferber expressly allows. Rather, the definition of illegal child pornography would be expanded so that it also includes materials (1) that "appear" to depict minors engaged in sexual activity and (2) that "lack[] serious literary, artistic, political, or scientific value." The Committee should expressly notice that it is on the verge of endorsing a new, somewhat expanded, definition of child pornography. The Committee should evaluate the merits and wording of this new definition. And the Committee must consider carefully whether the new definition is one that is authorized, albeit implicitly, by the Miller standard as modified for the child-pornography context by the reasoning of Free Speech Coalition.

There is no doubt that this new, more expansive definition of child pornography will be challenged in the federal courts. Likewise, there is no doubt that the courts will carefully evaluate such challenges precisely because the PROTECT definition does not track the Supreme Court's holdings in the Ferber and Miller cases. At the same time, there is no doubt that the Supreme Court has been willing to allow governmental regulation of child pornography that is

more stringent than the prohibitions authorized under the Miller obscenity standard. As I suggest above, it is plausible to read Free Speech Coalition as offering a modification of the Miller standard, one that is designed for the child porn context and that is sensitive to the specific law-enforcement problems created by the phenomenon of virtual child pornography.

I am much less sanguine about the prospects for the House bill. Indeed, it is difficult to understand how the House bill could be interpreted as an effort to correct the defects in the CPPA that were identified in Free Speech Coalition. Instead, the House bill seems to embody a decision merely to reenact the CPPA all over again. Thus, the House bill offers to define child pornography as encompassing virtual child porn that is "indistinguishable" from porn produced by using actual minors. Of course, this definition was considered and expressly rejected in Free Speech Coalition. In his opinion for the Court in that case, Justice Kennedy heavily criticized the CPPA for banning sexually explicit materials that "appear to depict" minors because, among other things, such materials often possess literary or other significant value. Along the way, Justice Kennedy noticed that the government sought to remedy this defect in the CPPA by arguing that the prohibited speech was "virtually indistinguishable" from the child porn that the government is free to regulate, and he disapproved this proposed understanding of the statute. Nonetheless, the House bill continues to offer this precise definition as the basis for its prohibitions but without any explanation for why this definition would be greeted by the Court as an improvement over the definition it just rejected in Free Speech Coalition on overbreadth grounds.

Even more strange, the House bill proposes to put in place an affirmative defense that could be read to authorize child pornographers who produce and peddle materials that possess no redeeming social value to escape prosecution on the ground that the materials were made without using an actual minor. This proposed affirmative defense is so broad that it might offer a loophole to those who create and sell virtual child pornography that is obscene under the Miller definition. Under the definition of child pornography that would be put in place by the PROTECT bill, however, the affirmative defense would not sweep nearly so broadly. Rather, the affirmative defense included in the PROTECT bill would not be available in cases where the sexually explicit materials either (1) were obscene within the meaning of Miller or (2) constituted illegal child pornography under the new definition derived from Free Speech Coalition. And, as I explained above, it is plausible and, in my judgment, correct to conclude that no affirmative defense should be extended to those cases because they involve materials falling outside the scope of the First Amendment protections.

As was the case with the CPPA, both the PROTECT bill and the House bill are based on empirical findings and deep societal beliefs about the harms that sexually explicit materials inflict on children in our culture. The legislative record contains ample evidence concerning those harms, and I here want only to comment briefly on the rhetoric we use to capture the nature of those harms. The legislative record and the decision in Free Speech Coalition use various terms to identify the harms, including phrases condemning the "sexual abuse" of children, the "sexual exploitation" of children, the "sexual enticement" or "seduction" of children. This nomenclature -- abuse, exploitation, enticement, seduction -- is sensible and balanced, but it does not fully capture the core harm to children that the criminal law here aims to deter and punish. The harm involved in many of these cases is not merely sexual exploitation or seduction or

(even) abuse. Rather, the harm is rape. For many years, the criminal law of every state has defined sex with a child under the age of consent to be a form of rape. (Sex with a minor is rape -- period -- full stop.) To put it bluntly, as our criminal law previously has been inclined to do, the people who use children to make pornographic movies are arranging for children to be raped so that they can record those rapes and then sell the rape recordings to other people. Likewise, the people who use pornographic images to convince children to have sex with them are raping those children. I realize that the fashion these days has been to move towards more neutral rhetoric when describing the sexual activity of children, including especially adolescent sexual activity. Nonetheless, with the category of materials and behaviors at issue here, it seems crucial to recall that the harm we are describing is rape and, emphatically, not seduction.

To be sure, the Supreme Court's Free Speech Coalition decision rejected the notion that virtual child pornography may be banned on the basis of the second kind of harm to which I just alluded. According to the Court's analysis, the criminalization of pornography is not justified based on claims about secondary harms -- no matter how painful -- such as the role pornography plays in inducing children to have sexual intercourse with adults or in feeding pedophiliac desires and behaviors. But Free Speech Coalition creates no obstacle to legislation that targets those painful, if secondary, harms directly, and the PROTECT bill contains several provisions that do just that. Thus, the bill would extend victim shield protections to children who are depicted in child pornography. These protections are analogous to some of the privacy protections that our criminal law and rules of evidence currently extend to the victims of rape, and they are an appropriate, even necessary, part of the law enforcement response to child victims of the crimes punished by this legislation. The PROTECT bill also takes aim at another secondary harm caused by child porn, namely, its use to persuade children that it is acceptable for them to engage in the sexual activities that the porn depicts. In a new provision, the PROTECT bill recognizes that the perpetrators of this particular harm should be stigmatized and punished; hence, the bill proposes to make it a crime to provide minors with child pornography. The bill also would make available a private cause of action to the victims of child pornography. Whatever their merits and potential justifications in other areas, private remedies seem especially appropriate, even necessary, in a context such as this one where injuries are inflicted for the very purpose of creating commodities that profit perpetrator of the harm. Certainly, to the extent that pornographers are making money by the criminal harms they inflict, we should not hesitate to allow victims the right to obtain monetary damages in our civil courts.