PROTECTING CHILDREN THROUGH DEEPFAKE CHILD PORNOGRAPHY: A MORAL, LEGAL, AND PHILOSOPHICAL DISCUSSION ON THE INTERSECTION OF THE EVOLUTION IN LAW AND TECHNOLOGY

Harshita K Ganesh[*]

INTRODUCTION

From 1970 to the early 2000s, Congress passed legislation to protect children from being exploited for pornography. As a result of a media storm surrounding the discussion of child pornography, Congress passed the Protection of Children Against Sexual Exploitation Act of 1977.[1] This was the first piece of national legislation aimed at protecting children by prohibiting child pornography.[2] Much subsequent legislation has been passed with the intention of strengthening protections for children against exploitation for perverse sexual gratification in any form.[3] However, these intentions have not been

[1] Artemus Ward, *Protection of Children against Sexual Exploitation Act of 1977 (1977)*, The First Amendment Encyclopedia (Last Visited Oct. 12, 2022), https://www.mtsu.edu/first-amendment/article/1088/protection-of-children-against-sexual-exploitation-act-of-1977.

[2] *See id.*

[3] Child Protection Act of 1984, Pub. L. No. 98–292, 98 Stat. 204 (1984); Protection of Children Against Sexual Exploitation Act, Pub. L. No. 95–225, 92 Stat. 7 § 2 (1978) (codified at 18 U.S.C. §§ 2251-2253); Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99–628, 100 Stat. 3510 (1986) ("Child Sexual Abuse and Pornography Act of 1986"); Child Abuse Victims' Rights Act, Pub. L. No. 99–500, 100 Stat. 1783, Title I, § 101(b) [Title VII, §§ 701–05 (1986)] and amended by Pub. L. No. 99–591, 100 Stat. 3341–75, Title I, §101(b) [Title VII, §§ 701705] (1986) ("Child Abuse Victims' Rights Act"); Prosecutorial Remedies and Other Tools to

entirely successful in preventing the real-world trafficking of children for the use of child pornography.[4] While the discussion of child pornography intensified through the 1980s to the early 2000s as a result of the increased and widespread use of the internet, there has been some silence in the discussion of this issue from the early 2000s to the late 2010s, reemerging after the release and popularization of deepfake technology.

While scholars have discussed the constitutionality of the ban on child pornography through the prohibition of rapidly-evolving "deepfake" technology,[5] there have been other discussions about the intersection between modern deepfake technology and its potential positive implications from legal, moral, and philosophical perspectives. While the depiction of children engaging in sexual acts "disgusts" the average American[6] and is an uncomfortable subject, there is value in examining the consequences of banning deepfake child pornography, the moral framework within the creation of such bans, as well as what drives the reasoning behind legislative attempts to ban the existence of such content, regardless of how it is created.

This Essay aims to discuss different aspects of deepfake child pornography, challenge possible views towards it, and provide pause for what the goals are in protecting children with regards to the existence of child pornography, whether computer-generated or not. Additionally, it seeks to encourage Americans to think about why this subject evokes such a visceral reaction and what the strategy should be behind protecting children. Part I encapsulates the legislative and judicial history dealing with child pornography. Part II explains deepfake technology, the American morality of child pornography, and the psychopathology of viewers of such material. Part III discusses an inconsistency behind the prohibition of child pornography and a theoretical solution for the inconsistency. While some arguments may

End the Exploitation of Children Act of 2003, Pub. L. No. 108–21, 117 Stat. 650 (2003) (codified as amended at 18 U.S.C. §2252(A)(3) (2006)).

[4] *See generally*, *Current DMST Statistics*, THE REFUGE (last visited Nov 21, 2022), https://therefugedmst.org/dmst-statistics (citing a 846% increase in reported child sex trafficking from 2010-2015).

[5] Bradley Waldstreicher *First Amendment Likely Protects the Creation of Pornographic Deepfakes*, 42 CARDOZO L. REV. 729, 729 (2021).

[6] Bruce Ryder, *The Harms of Child Pornography Law*, 36 U. BRIT. COLUM. L. REV. 101, 101–135 (2003).

seem morally repugnant and uncomfortable, it is imperative to analyze all potential attitudes towards such a controversial topic with the aim of giving protection to the central party to this issue: children.

I. LEGAL APPROACHES AND LEGISLATIVE HISTORY OF CHILD PORNOGRAPHY

After the passage of the 1977 Protection of Children Against Sexual Exploitation Act, states began locally prohibiting the creation or distribution of child pornography.[7] In *New York v. Ferber*, the Supreme Court upheld that states may prohibit the exhibition, sale, or distribution of child pornography, even if that material does not meet the articulated standard for obscenity set out in *Miller v. California*.[8] This decision articulated that the First Amendment does not protect child pornography, even if it is not obscene by the *Miller* standard, because it is linked to the sexual abuse of a child.[9] The *Ferber* approach was further extended in *Osborne v. Ohio*, where the Court upheld a statute making it illegal to possess child pornography within the privacy of one's home.[10] Throughout the 1980s, Congress continued to strengthen and expand federal laws against child pornography by passing the Child Protection and Obscenity Enforcement Act of 1988 and then the Child Protection Restoration and Penalties Enhancement Act of 1990, as a result of the internet boom and newly emerging technology.[11] In 1996, Congress passed the Child Pornography Prevention Act ("CPPA") which banned "virtual child pornography."[12] The CPPA attempted to broaden the ban on online child pornography to include any depiction that "appear[ed] to be" or "convey[ed] the impression" of a minor

---

[7] Ward, *supra* note 2; VA CODE ANN. § 18.2-374.1 (West); UTAH CODE ANN. § 76-5b-201 (West); NEV. REV. STAT. ANN. § 200.730 (West); CONN. GEN. STAT. ANN. § 53a-196d (West); ALA. CODE § 13A-12-192; S.D. CODIFIED LAWS § 22-24A-3; MO REV. STAT. ANN. § 573.035 (West).

[8] New York v. Ferber, 458 U.S. 747, 766 (1982); Miller v. California, 413 U.S. 15, 39 (1973).

[9] *Ferber*, 458 U.S. at 759.

[10] Osborne v. Ohio, 495 U.S. 103 (1990) (this decision went against the earlier decision of the Court in Stanley v. Georgia, 394 U.S. 557 (1969), which held that neither the states nor the federal government may prohibit possession of obscene material in the privacy of a person's home).

[11] Ward, *supra* note 2.

[12] *Id.*; later codified as 18 U.S.C. § 2256.

engaging in sexually explicit content.[13]

However, *Ashcroft v. Free Speech Coalition* struck down portions of the CPPA that banned "virtual child pornography."[14] The Free Speech Coalition ("FSC") brought a suit against the United States on the grounds that the CPPA violated the First Amendment. The FSC, an adult-entertainment trade association, feared 18 U.S.C. § 2256 would threaten the adult film industry and argued that § 2256(8)(B) and (D) were overbroad and vague, halting the production of works protected by the First Amendment.[15] The Government argued that speech prohibited by the CPPA was virtually indistinguishable from material that may be banned under *Ferber* due to its link to a visual depiction of child abuse.[16] However, contrasting the speech in *Ferber*, the CPPA prohibited speech that records no crime, for example, computer-generated images, and creates no real victims by its production.[17] Furthermore, the Court reasoned that virtual or computer-generated child pornography is not "intrinsically related" to the sexual abuse of children.[18] The Supreme Court ultimately deemed both provisions in the statute to be unconstitutionally overbroad since the statute does not take into account how the work was produced or whether any actual children were harmed during the production of such materials.[19] The Court took issue with the fact that the statute went beyond established judicial precedent by criminalizing all virtual media that did not use real children engaging in sexual activity, even if it did not meet the legal definition of obscenity.[20] As a result, § 2256(8)(D) has been removed

---

[13] Artemus Ward, *Ashcroft v. Free Speech Coalition (2002)*, THE FIRST AMENDMENT ENCYCLOPEDIA (Last Visited Oct. 12, 2022), https://mtsu.edu/first-amendment/article/4/ashcroft-v-free-speech-coalition.

[14] *Id.*

[15] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 234 (2002). *See also* § 2256(8)(A), which bans "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct."; § 2256(8)(D), which additionally bans material that "conveys the impression it depicts a minor engaging in sexually explicit conduct.".

[16] *Ferber*, 458 U.S. at 760.

[17] Yaman Akdeniz, INTERNET CHILD PORNOGRAPHY AND THE LAW. NATIONAL AND INTERNATIONAL RESPONSES 106 (Ashgate Publishing 2008).

[18] Id.

[19] *Ashcroft*, 535 U.S. at 235.

[20] *Id*. at 236. *See Ferber*, 458 U.S. at 766 (1982); *see also Miller*, 413 U.S. at 39.

from the statute to remedy the issue of ambiguity and broadness in the statute, and § 2256(8)(B) has been rephrased.[21]

Since the modification of the CPPA in 2018, there have been no federal cases referring to the use of deepfake technology in child pornography. The cases that contest the verbiage of "computer-generated image" revolve around the employment of superimposition of a real child's face onto an adult's body engaged in sexually explicit conduct.[22] Despite the fact that there have not been any federal cases brought as a result of employing the use of deepfake technology in child pornography, that does not exclude the possibility of its existence and the possibility of this becoming yet another reason for the revision of § 2256(8).

After the codification of the CPPA, new sentencing provisions were established to deal with how to punish those who view, distribute, and create child pornography using real children. However, after 2008, there has not been any new federal legislation put in place to regulate or address deepfake technology for the creation of child pornography.[23] A handful of states have enacted protections and prohibitions related to the use of deepfake technology in general, though.[24] Technology has advanced rapidly since the original passage of the CPPA with artificial intelligence software becoming more widely accessible to the public and significantly more user-friendly which is why it is crucial to

---

[21] *Compare* 18 USC § 2256(8)(B) (2018), which states "Such visual depiction is a digital, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicitly conduct," *with* 18 USC §2256(8)(B) (2003), which states "such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct."

[22] *See* United States v. Mecham, 950 F.3d 257, 264–67 (2020) (holding morphed child pornography, such as superimposing faces of actual children on pornographic photos of adults to make it appear that minors were engaged in sexual activity, did not enjoy First Amendment protection); *c.f.* People v. McKown, 180 N.E.3d 909, 924 (Ill. App. Ct. 2021) (holding the creation of a collage using a picture of an existing child superimposed on adults engaged in sexual conduct was not protected by the First Amendment).

[23] *Citizen's Guide to U.S. Federal Law on Child Pornograph*, THE DEP'T OF JUSTICE, https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-pornography.

[24] Prajakta Pradhan, *AI Deepfakes, The Goose is Cooked?,* University of Illinois Law Review (Oct. 4, 2020), https://illinoislawreview.org/blog/ai-deepfakes/.

reevaluate past analyses surrounding the subject.[25]

II. CHILD PORNOGRAPHY AND SEX OFFENDERS IN THE UNITED STATES

When discussing the possible consequences of allowing deepfake technology in child pornography, it is important to understand deepfake technology as well as the psychopathology of child pornography consumers. In this discussion, it is important to take note that deepfake technology is not synonymous with superimposition. Even though deepfake technology can use superimposition, here the discussion revolves around the creation of a child that does not exist.

The psychopathology behind a typical consumer of child pornography versus a contact sex offender contradicts what some might believe. Attributable to popular media's discussion surrounding child pornography, some Americans believe that viewers of child pornography are more likely to seek out an actual child to satisfy their urges when simply viewing the material is not enough to satisfy their sexual needs. While some studies support such a claim, there are studies that contradict those findings.[26] This Part will discuss what deepfake technology is as well as the psychopathology of viewers of child pornography.

A. What is Deepfake Technology?

Since the development of the internet and its widespread use during the digital revolution, distribution and creation of adult entertainment quickly moved to the internet. As artificial intelligence technology developed, adult filmmakers used it to cater to the tailored needs of

[25]Marcus Baram, *How Deepfakes Evolved So Rapidly in Just a Few Years,* FAST COMPANY (Oct. 8, 2019), https://www.fastcompany.com/90414479/how-deepfakes-evolved-so-rapidly-in-just-a-few-years.

[26] *Compare* Ian A. Elliot, Anthony R. Beech, *Understanding Online Child Pornography Use: Applying Sexual Offense Theory to Internet Offenders*, Aggression and Violent Behavior, Vol. 14, 180–193 (2009), *with* Angela W. Eke, Michael C. Seto & Jennette Williams, *Examining the Criminal History and Future Offending of Child Pornography Offenders: An Extended Prospective Follow-up Study*, Law and Human Behavior, Vol. 35 (Dec 2011), 466, 466478.

consumers.[27] The CPPA's reference to "virtual child pornography" is about the use of computer imaging to superimpose what appears to be actual existing children engaging in sexually explicit conduct.[28] In popular culture, similar conduct—the use of artificial intelligence to create a distorted, yet highly convincing, video or image of something that did not actually occur—is now referred to as "deepfake."[29] This technology learns people's facial expressions and movements by extracting information from large quantities of data points.[30] Once these data points have been analyzed, the developed algorithm from the program will position that subject's facial expressions onto another's body, leading the viewer to believe that what they are viewing actually happened, when in reality that is not the case.[31] However, nowadays deepfakes have the capability not only to impose photographs in a video, but also create realistic human photographs as a result of artificial intelligence software studying other human photographs.[32]

In 2017, a group of Reddit users were responsible for creating synthetic pornographic videos of female celebrities using this artificial intelligence technology.[33] While Reddit was quick to shut this account down and attempted to remove the content, the technology was already released, and the damage had been done.[34] The use of deepfake technology to create nonconsensual pornographic images is concerning

---

[27] *What is a Deepfake?*, The Economist (Aug. 7, 2019),
https://www.economist.com/the-economist-explains/2019/08/07/what-is-a-deepfake?utm_medium=cpc.adword.pd&utm_source=google&ppccampaignID=17210591673&ppcadID=&utm_campaign=a.22brand_pmax&utm_content=conversion.direct-response.anonymous&gclid=Cj0KCQjwhY-aBhCUARIsALNIC04RkfglNXWpcMaRvJyj1NdV_o8TQHSQipRIehLXg2Fd_DC42x1LWWsaAoMSEALw_wcB&gclsrc=aw.ds.
[28] *Ashcroft*, 535 U.S. 234, 237 (2002).
[29] *See* Bradley Waldstricher, *Deeply Fake, Deeply Disturbing, Deeply Constitutional: Why the First Amendment Likely Protects the Creation of Pornographic Deepfakes*, 42 CARDOZO L. REV. 729, 732 (2021).
[30] *See id.*
[31] *See id.*
[32] *See* Stamatis Karnouskos, *Artificial Intelligence in Digital Media: The Era of Deepfakes*, 1 IEEE TRANSACTIONS ON TECH. AND SOC'Y 138, 139 (2020).
[33] THE ECONOMIST, *supra* note 28.
[34] *See* Gamage, *et al.*, *Are Deepfakes Concerning? Analyzing Conversations of Deepfakes on Reddit and Exploring Societal Implications* 19 (May 5, 2022) (Chi. Conference on Human Factors in Computing Systems) https://doi.org/10.1145/3491102.3517446.

and implicates several ethical issues when it depicts real people. However, the use of more sophisticated deepfake technology to create children that do not actually exist in pornography poses a different question: where should society draw the line between moral and immoral behavior when consumers know the actors do not, in fact, exist?

B. Child Pornography in the United States

Recent scientific research on the psychopathology of a sex offender contradicts the public's perception of sex offenders.[35] Over the past few decades, Americans have become more accepting of pornography and sex in mainstream media but have also supported increasing the age of consent to engage in sexual activity.[36] The general American view on child pornography is an extension of societal and cultural views on sex offending and child sexual abuse.[37] Public policy within this realm can be influenced by emotion rather than pure empirical evidence.[38]

In the United States, "child sexual abuse is a topic that evokes a visceral disgust in all reasonable people."[39] As a result, a majority of Americans support punishment for the viewing, creation, and distribution of child pornography, in addition to rehabilitation resources to decrease what the public believes to be a high rate of recidivism.[40] Additionally, a large majority of Americans are aware that the consumption and distribution of such content is illegal.[41] The awareness of the illegality of the content can be linked to the widespread moral repugnance towards the sexual abuse of children and the fact that the visual depiction of morally repugnant behavior is being distributed for pleasure.[42]

However, there is a stark contrast in the American attitude towards

---

[35] *See* Steel *et al.*, *Public Perceptions of Child Pornography and Child Pornography Consumers*, 50 ARCHIVES ON SEXUAL BEHAV. 1173, 1173 (2022).

[36] *See id.* at 1174; *see also* Milton Diamond, *Pornography, Public Acceptance and Sex Related Crime: A Review*, 32 INT'L J. OF LAW AND PSYCH. 304, 304–14 (2009).

[37] Steel *et. al.*, *supra* note 23, at 1174.

[38] *See id.*

[39] *Id.* (quoting Ryder, B., *The Harms of Child Pornography Law*, 36 UNIV. OF B.C. LAW REV. 101–35 (2003)).

[40] *See id.*

[41] *See id.*

[42] *See id.*

computer-generated deepfake child pornography. Approximately ninety-two percent of Americans believe that viewing computer-generated child pornography is not morally blameworthy of punishment.[43] Notably, at the time of the study, viewing computer-generated children was illegal and the participants were aware of its illegality, yet 92.3% of the respondents in the study still endorsed it as an acceptable activity.[44]

The American perception and stereotype of those who are in possession of child pornography is that they are mentally ill or have a sickness with regards to the sexual attraction to the actions or actors involved.[45] However, psychological research depicts a more nuanced answer.[46] Psychopathological comorbidities amongst viewers of child pornography have ranged from as high as forty percent to as low as five percent, meaning a fraction of the viewers of child pornography suffered from two or more forms of psychopathological issues.[47] Additionally, there is a public concern that the possession and viewing of child pornography, even computer-generated child pornography, will lead the consumer to become a contact offender eventually.[48]

In 2005, a study was conducted to examine whether child pornography offenders (i.e. those who viewed child pornography and were caught viewing and possessing such materials) would later commit contact sexual offenses.[49] The study examined and monitored the criminal records of 201 adult male, child pornography offenders.[50] After tracking the database over the course of a thirty-month period, seventeen percent of the sample had offended again in some form.[51] The

---

[43] *See* McCabe, K. A., *Child Pornography And The Internet*, 18 SOCIAL SCI. COMPUT. REV. 73, 73–76 (2000), https://doi.org/10.1177/ 089443930001800105.

[44] *See* Beth Catherine Kliethermes, Perceptions of Computer-Generated Child Pornography (Jan. 2015) (M.A. theses and dissertations, University of North Dakota) (on file with the author) at 11, 41 (stating that there is a high support for the illegality of computer-generated child pornography). Additionally, the viewing of computer-generated child pornography is still illegal today because of 18 U.S.C. §2256(8)(B), (8)(D) .

[45] Steel *et al.*, *supra* note 36, at 1173.

[46] *See id.*

[47] *See id.*

[48] *See* Kliethermes, *supra* note 45, at 12.

[49] *See id.* at 13.

[50] *See id.*

[51] *See id.*

examiners found that the child pornography recidivism rate (i.e. individuals whose new offense was again a child pornography offense) for this particular sample was approximately six percent, and four percent were charged with a new contact sexual offense.[52] It was determined that criminal history was found to be a significant factor in reoffending.[53]Additionally, compared to those without a prior criminal record, those viewing or possessing child pornography with prior criminal records were significantly more likely to offend in some criminal form, whether sexually or generally.[54] In a 2011 study investigating whether possessors and viewers of child pornography would cross over to contact sexual offending,[55] results showed that 3.4% of online possessors and viewers reoffended with another child pornography offense and only two percent of online offenders reoffended with a contact sexual offense.[56] The results of this study emphasize the fact that having a mental illness and acting on the mental illness are two different concepts.[57] These studies contradict public belief and show that viewers and possessors of child pornography are low-risk transgressors of a sexual contact offense. [58]

III. A Solution to the Incompatible Principles of Child Pornography

There is an incompatible principle and goal that has emerged through the codification of the CPPA and the discussion surrounding the decision of *Ashcroft v. The Free Speech Coalition*. There is the concept that the government, in creating this legislation, wanted to punish the existence of such content. This is evident in 18 U.S.C. § 2256(8)(B)'s use of the phrase "is, or appears to be" and § 2256(8)(D)'s "conveys the impression," of a child engaging in sexually explicit conduct.[59] The use of such phrases proves to be boundless, with the

---

[52] *See id.*
[53] *See id.*
[54] *See id.*
[55] *See* Kliethermes, *supra* note 45, at 13.
[56] *See id.*
[57] *See id.*
[58] *See id.*
[59] 18 U.S.C. §2256(8)(B), (8)(D).

intention to censor any material that could be deemed controversial.[60] Despite the removal of § 2256(8)(D), the language in § 2256(8)(B) has simply been rephrased by stating, "such visual depiction is a digital image, computer image, or computer-generated image that is indistinguishable from, that of a minor engaging in sexually explicit conduct."[61] The government has a similar goal of protecting children from abuse, much like society; however, their method is through the removal of material that depicts minors engaging in sexual conduct.[62]

The purpose behind punishing the viewing of such material is to incarcerate the viewer before he can sexually abuse a child himself.[63] The psychological theory behind sexual gratification through pornography relies on the principle that once a certain stimulus is not enough to gratify the viewer, the viewer will seek more extreme visual stimuli to reach that same level of excitement as a result of the change in their arousal threshold.[64] In order for the viewer to feel the excitement that was felt while viewing the lower level of visual stimuli, they will require more graphic material to cross that threshold to feel the same rush of dopamine as before.[65] However, this theory when discussed in the context of child pornography, not regular nonviolent pornography, is more nuanced since there are several other factors that play a part in understanding whether or not a viewer of child pornography will transgress into contact offending.[66] For instance, for viewers of child pornography, a large determining factor in predicting whether a viewer will begin contact offending is whether or not they have emotional self-

---

[60] *See Ashcroft*, 535 U.S. 234, 237 (2002).

[61] §2256(8)(B).

[62] Akdeniz, *supra* note 18, at 96.

[63] *See* Steel *et al.*, *supra* note 23, at 1180 (arguing that the general public believes that viewing child pornography is what leads to victimization); *see also* United States v. Cruikshank, 667 F. Supp. 2d 697, 700 (S.D.W.Va. 2009); United States v. Phinney, 599 F. Supp. 2d 1037, 1045 n.10 (E.D. Wis. 2009) (noting that while this correlation "is always lurking in the background in these cases," no assumptions about future offending should be made without a reliable basis). *But see* U.S. v. Hilton, 167 F.3d 61, 68-69 (1st Cir. 1991).

[64] *See generally* Bryant Paul & Daniel G. Linz, *The Effects of Exposure to Virtual Child Pornography on Viewer Cognitions and Attitudes Toward Deviant Sexual Behavior*, 35 COMMC'NS RSCH. 3 (2008).

[65] *Id.* at 34.

[66] *See generally id.; see also* Steel *et. al.*, *supra* note 23, at 1178–80; Elliot, *supra* note 27, at 183.

regulation and their ability to control impulses.[67] While science is useful and should be incorporated into federal sentencing guidelines, currently, in the eyes of the American legal system, that is not the case.[68] In America's criminal system, there is a predetermined assumption associated with viewers of child pornography, which is that the viewers not only have contributed to the child sexual exploitation market but that viewing the material will also incentivize the viewer's need to transgress into contact offenses. If the legislative intent was to prevent viewers of child pornography from contact offending, this contradicts the purpose of the legal system. The American legal system is not predicated on punishing those who are yet to act or who may potentially act. The system can only punish people for the crimes they have committed, not the ones they have thought of committing.[69]

Watching a scene from a B-grade horror movie that depicts a brutal murder may provide an adrenaline rush to a viewer, but the viewing of that scene depicting a violent, illegal act does not warrant the arrest of the individual. The individual may wonder how "exciting" it would be to commit a murder; however, the legal system will not prosecute the individual under the *assumption* that just because the individual viewed a murder scene, he is more likely to commit a murder in the future.

In the context of the creation and distribution of child pornography, creators and distributors of such content should be punished when a real child is used. This supports the common goal of protecting children, as the Supreme Court noted in *Feber*, and the government's interest in criminalizing possession of these materials because the materials produced by child pornographers "permanently record the child victim's abuse."[70] While viewing the material provides a market incentive to produce the material, the attempt to punish consumers who are viewers proves to be futile and ineffective since there are millions of viewers and websites that publish such content, and even when they

---

[67] Elliot, *supra* note 27, at 182–83.

[68] *See* Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric*, 22 STAN. L. & POL'Y REV. 545, 569–70 (2011).

[69] This is not referring to criminal laws on attempt; this is only discussing imaginative thoughts, not including actual planning and action on those thoughts.

[70] Akdeniz, *supra* note 18, at 96 (citing New York v. Ferber, 458 U.S. 747, 759 (1982)).

are taken down, new websites materialize just as quickly.[71] There are more viewers than creators, just as there are more viewers of mainstream films than directors of films. If the distributors and creators are punished for using real children, the viewing of content becomes more difficult as the supply decreases, providing a more effective solution in eliminating child sex trafficking.[72] With the increase in the globalization of the sex trade, the current criminal system in place is only driving the market further underground.[73] Outlawing even the use of certain technology—such as advanced deepfake—forces creators and distributors to use actual children to feed the high demand.[74] Additionally, as a result of the high risk associated with using real children, the creators and distributors are forced into driving the market further underground, thereby expanding it into a more global industry (by forcing the material to be created outside the United States to avoid American criminal penalties), and as a result more difficult to prosecute.[75]

In theory, the goal behind preventing the viewing of pornographic content depicting children is to stop the distribution of such material, in turn preventing the creation of such, and as a result, protecting children from sexual abuse. In other words, the goal is to end the sexual abuse of children for the creation of such material as opposed to the existence of the material itself.[76] Without the use of modern deepfake technology, the only way to meet the market demand of the material is by using real children. Modern deepfake technology has progressed to a point close

---

[71] *See* Kathryn C. Seigfried-Spellar, *Distinguishing The Viewers, Downloaders, And Exchangers Of Internet Child Pornography By Individual Differences; Preliminary Findings*, 11 DIGIT. INVESTIGATION 88, 253 (2014).

[72] *See* Akdeniz, *supra* note 18, at 106.

[73] *See* Julia Foreman, *Can We End the Shame?Recent Multilateral Efforts to Address the World Child Pornography Market*, 23 VAND. J. TRANSNAT'L L. 435, 439–41 (1990) (citing S. Rep. No. 537, 99th Cong., 2d Sess. 29–35 (1986)).

[74] *See* Foreman, *supra* note 73, at 437–41.

[75] *See id.*

[76] *See* Janet Lawrence, *The Peril of Paroline: How the Supreme Court Made it More Difficult for Victims of Child Pornography*, 2016 BYU L. REV. 325, 329 (2016) (stating that the creation of child pornography with the use of actual children not only causes a child to be sexually abused, but also creates a "memorialization" of the sexual abuse).

to "indistinguishability,"[77] which would serve to prove that if it was legal to use modern deepfake technology, "[f]ew pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice."[78]

A similar analogy is the production of snuff films.[79] Popular culture is accepting towards the depiction of violence in Hollywood films and mainstream media as evidenced by the fact that over sixty percent of television programs contain some violence, and about forty percent contain heavy violence.[80] However, society deems the existence of snuff films to be morally blameworthy enough for criminal punishment after a homicide transpired and that person's death was filmed for the purposes of distribution and gratification. The same can be said of the creation and distribution of child pornography.[81] Similarly, the filming of actual children engaging in sexual conduct will never be ethical since children are unable to consent and are, in fact, victims of sexual abuse.[82] However, the use of deepfake technology to create the illusion of a child that does not exist bypasses the issue of the memorialization of a real child's abuse. Furthermore, and more importantly, it avoids the need for a real child to be subjected to such abuse. If such content is created without the use of an actual child, or even an actual person, no sexual abuse of a child has transpired. As a result, there is an intersection between the government's goal to punish and the theoretical goal to protect children from sexual abuse for the use of child pornography.

CONCLUSION

This Essay does not endorse the consumption of child pornography nor does it encourage the creation of child pornography. The goal of this piece is to provide a theoretical argument about the perception of the illegality of deepfake child pornography with the intention of helping lawmakers, scholars, and laymen reflect on their opinions regarding

---

[77] "Indistinguishability" here is used to mean that a fake, A.I.-generated child is indistinguishable from a real human child.

[78] United States v. Kimler, 335 F.3d 1132, 1142 (10th Cir. 2003).

[79] NEIL JACKSON ET AL., SNUFF: REAL DEATH AND SCREEN MEDIA 49 (2016).

[80] *See generally* L. Rowell Huesmann, *The Impact of Electronic Media Violence: Scientific Theory and Research*, 41 J. OF ADOLESCENT HEALTH 6 (2007).

[81] Lawrence, *supra* note 76, at 329; *see also Kimler*, 335 F.3d at 1142.

[82] *See* Lawrence, *supra* note 76, at 328–30; *Kimler*, 335 F. 3d at 1141–42.

such an uncomfortable topic. It is to encourage American lawmakers and the general public to think about why this subject evokes such a visceral reaction and what the strategy should be behind protecting children. In order to successfully do that, it is essential to understand the driving force behind legislation prohibiting such content and whether that harmoniously interacts with the goal of protecting children. By dissecting and examining our emotional reactions towards such a sensitive topic, space is created for legal scholars and scientists to examine the science behind the minds of child pornography viewers and implement this science effectively in our criminal penal code. The subjects that evoke the strongest emotions are the subjects we must evaluate logically the most. While the answer may not be so straightforward as to allow the use of deepfake technology, it is worthwhile to explore both sides of the argument in relation to ethics, technology, and moral philosophy to examine whether this is truly representative of American values and the interest in protecting children.