NO FACE, NO CASE: THE REGULATION OF AI-GENERATED CHILD PORNOGRAPHY

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I. INTRODUCTION

In early 2024, a Florida man made national headlines when he was arrested for the possession of child pornography of a type local law

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enforcement had not yet encountered.[1] Allegedly, the fifty-one-year-old man took a photograph of a young girl in his neighborhood, and then used artificial intelligence ("AI") to remove her clothes and reposition her to appear as if she was engaged in sexual activity.[2] According to the lead detective, "[i]f you just looked at it briefly, you would think it's a real photograph."[3]

In September 2023, the National Association of Attorneys General ("NAAG") sent a letter to Congress to alert Washington to this unique use of AI that subjects children to exploitation.[4] Signed by the Attorneys General of fifty-four states and territories, the bipartisan letter addressed concerns that AI will provide new opportunities to generate Child Sexual Abuse Material ("CSAM").[5] Recognizing the state's interest in protecting its vulnerable citizens, the NAAG is concerned, should AI-generated child pornography remain unaddressed, current and future prosecutions in this area will be difficult and uncertain, or creators of this material will go unprosecuted.[6]

The four co-sponsors of the letter highlighted three issues pertaining to child safety presented by the advancement in AI technology.[7] First, AI-generated child pornography subjects prior child abuse victims to further harm where their photographs are used in "deepfake"[8] scenarios, or

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[1] John Shainman, *Martin County Man Used Artificial Intelligence To Create Child Pornography, Detectives Say,* WPTV, https://www.wptv.com/news/treasure-coast/region-martin-county/martin-county-man-used-artificial-intelligence-to-create-child-pornography-detectives-say (Apr. 3, 2024, 6:12 PM).

[2] *Id.*

[3] *Id.*

[4] Letter from Miss. Att'y Gen. Lynn Fitch; N.C. Att'y Gen. Josh Stein; Or. Att'y Gen. Ellen F. Rosenblum; S.C. Att'y Gen. Alan Wilson to President Pro Tempore Patty Murray; Speaker of the House McCarthy; Senate Leaders Chuck Schumer and Mitch McConnell; and House Leaders Steve Scalise and Hakeem Jeffries, NAT'L ASSOC. ATTORNEYS GEN., *Re: Artificial Intelligence and the Exploitation of Children* 1 (Sept. 5, 2023), https://www.naag.org/wp-content/uploads/2023/09/54-State-AGs-Urge-Study-of-AI-and-Harmful-Impacts-on-Children.pdf [hereinafter NAAG Letter].

[5] *Id.*

[6] *Id.* at 2.

[7] *Id.* at 2–3.

[8] To better understand this area, it is important to understand the terminology used. The term "deepfake" is one becoming so prevalent in the media that Merriam-Webster in 2018 added it to the dictionary, defining it as media "convincingly altered and manipulated to misrepresent someone as doing or saying something that was not actually done or said." *Deepfake*, *MERRIAM-WEBSTER*, https://www.merriam-webster.com/dictionary/deepfake (last updated Apr. 14, 2024).

digitally altered using AI.[9] Second, AI has the capability to alter the likeness of a real child in a harmless photograph, like one taken from social media, and turn it into sexually explicit material.[10] Lastly, AI allows for the creation of digital images depicting a completely fictitious child, allowing for the digital creation of an image of a completely fictitious child[11] engaged in sexual activity.[12]

This Note will address the inadequacies of current federal statutes and case law that leave novel forms of child pornography in a state of dubious legality. Part I will demonstrate how Supreme Court precedent endorses statutory prohibitions on child pornography, notwithstanding the First Amendment's freedom of speech. Part II provides a framework for understanding the current statutory framework criminalizing child pornography, and its deficiencies now visible in the age of AI. Finally, Part III offers suggestions as to how the federal judicial and legislative branches can respond to the NAAG's concerns by ensuring child pornography generated by AI is treated the same as child pornography already prohibited by law.

II. CHILD PORNOGRAPHY IS UNPROTECTED SPEECH

The First Amendment prohibits Congress from passing laws which abridge the freedom of speech.[13] As are many substantive rights, an

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The "deep" in deepfake refers to the way AI systems use machine learning to develop algorithms through which it can create real-looking images once prompted by the user. *What the Heck is a Deepfake?*, UVA INTERNET SECURITY, *https://security.virginia.edu/deepfakes* (last visited Apr. 22, 2024). Through this deep machine learning, clever AI models can create fake images so accurate that an ordinary viewer would accept it as real. *Id.* In a CSAM context, AI can create deepfakes by gauging the internet for real photos of abused children, then manipulating those into new pictures showing the children in different sexual positions. NAAG Letter, *supra* note 4 at 2-3.

[9] NAAG Letter, *supra* note 4, at 3.

[10] *Id.*

[11] Even if a depiction of child pornography is completely made up, and the child does not actually exist, this type of pornography is still harmful to society. *Id.* First AI-generated images of child pornography are often based on images of children who have already been abused. *Id.* Second, even if a real child is not depicted, the image may resemble an otherwise unvictimized child, subjecting him and his family to potential social and emotional harm. *Id.* Third, even if the generated image does not resemble a real child, its existence props up the market for child exploitation by normalizing child sexualization. *Id.* Lastly, images of fictitious children are just as easy to generate as deepfakes, with widely accessible AI tools available to the general public. *Id.*

[12] *Id.* at 2–3.

[13] U.S. CONST. amend. I.

individual's right to the freedom of speech is not absolute.[14] Laws that prohibit certain types of expressions raise concerns for First Amendment proponents, but it is difficult to argue that at least some types of expression should not be protected, like child pornography. The Supreme Court has held laws that criminalize child pornography constitutional, recognizing that child pornography is not protected speech.[15] The government may restrict certain types of speech that fall outside of the protection of the First Amendment, but the standards by which the speech is classified remain subject to the First Amendment's guarantees.[16] For the purpose of this Note, the two relevant exceptions to the freedom of speech are (1) obscenity[17] and (2) circumstances where the government has a compelling interest in protecting minors.[18]

A. "I Know It When I See It"

In the past 100 years, the definition of obscenity has continuously evolved as the Supreme Court has decided numerous factually uncomfortable cases while adapting to the ever-shifting ideals and sensibilities of both the bench and society at large.[19] *Chaplinsky v. New Hampshire* created the foundation for the twentieth century's understanding of obscenity, holding that material is not a constitutionally protected expression when it is of "such low social value that any possible benefit derived is outweighed by the social interest in order and morality."[20] In 1957, only fifteen years after *Chaplinsky*, the Supreme Court in *Roth v. United States* defined obscenity as material "which deals with sex in a manner appealing to prurient interest."[21] Under this rationale, the Court affirmed a conviction under a federal statute prohibiting the mailing of obscene materials, where the defendant, an owner of a bookstore, circulated graphic advertisements for

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[14] Miller v. California, 413 U.S. 15, 23 (1973).

[15] New York v. Ferber, 458 U.S. 747, 756 (1982).

[16] *Id.* at 19–20.

[17] *Miller,* 413 U.S. at 24.

[18] *Ferber,* 458 U.S. at 756–57.

[19] *Miller,* 413 U.S. at 20 (Justice Burger described the history of the Court's obscenity decisions as "somewhat tortured."); *See, e.g.,* Jacobellis v. Ohio, 378 U.S. 184, 191 (1964) ("The...proper standard for making this determination [of obscenity] has been the subject of much discussion and controversy."); *Ferber,* 458 U.S. at 754 ("*Roth* was followed by 15 years during which this Court struggled with 'the intractable obscenity problem.'").

[20] Roth v. United States, 354 U.S. 476, 485 (1957) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

[21] *Id.* at 487. The Court defined prurient as "material having a tendency to excite lustful thoughts." *Id.* at 486 n.20.

erotic books, photographs, and magazines to non-consenting adults in the hopes they would become customers.[22]

In 1963, the manager of an Ohio movie theater put on two showings of a French film titled "*Les Amants*."[23] He was later convicted for two counts of possession and exhibition of an obscene film in violation of state law.[24] The Supreme Court was tasked with determining whether the state court properly found that the film was obscene, and thus not subject to the protection of the First Amendment as applied to the states through the Fourteenth Amendment.[25]

The Court recognized motion pictures generally are within the "ambit" of the freedom of speech and expression but applied its previous holdings to determine a finding of obscenity negates what would otherwise be protected speech.[26] Since the issue of obscenity relates to a constitutional question, the Court dismissed the State's arguments that the jury's factual finding of obscenity should stand, and that taking the matter out of the jury's hands amounted to "censoring" from the bench.[27] Instead, the Court reserved its authority to make an "independent constitutional judgment" as to whether the film was protected speech.[28]

In reversing the state court's decision, Justice Brennan writing for the majority held the film was not obscene based on the Court's standard articulated in *Roth.*[29] As further support for its authority, the Court made clear that it "explicitly refused to tolerate a result whereby 'the constitutional limits of free expression in [this] [n]ation would vary with state

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[22] *Id.* at 480, 487.

[23] *See* Jacobellis v. Ohio, 378 U.S. 184, 185–86 (1964).

[24] *Id.* at 185.

[25] *Id.*

[26] *Id.* at 187 (first citing Joseph Burstyn v. Wilson, 343 U.S. 495 (1952); then citing Roth v. United States 354 U.S. 476 (1957)).

[27] *Id.* at 187, 190 (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)).

[28] *Id.* at 190.

[29] *Id.* at 195-6. *Roth* defined obscenity as material "which deals with sex in a manner appealing to prurient interest." *Roth,* 354 U.S. at 487. The *Jacobellis* Court interpreted the "community contemporary standards" articulated in *Roth* according to its original appearance in *United States v. Kennerly*, where Justice Learned Hand's references to "community" suggest not local and state governments, but "society at large." *Jacobellis,* 378 U.S. at 192-3 (citing United States v. Kennerly, 209 F. 119, 121 (S.D.N.Y. 1913)). Under this understanding of community, Justice Hand acknowledged that surely the definition of obscenity would adopt "a very meaning from time to time." *Id.* at 193.

lines."[30] In concurring with the majority's finding that "*Les Amants*" was not obscene, Justice Stewart, disappointed by their reluctance to adopt a more exacting test, likewise declined the opportunity to formulate a definition for obscenity other than what falls under "hard-core pornography," of which he famously wrote, "I know it when I see it."[31]

The Supreme Court took up another obscenity case five years later in *Stanley v. Georgia*, where a search of the defendant's home led to the discovery of several film reels.[32] A police officer viewed the films, determined they were obscene, and arrested the defendant.[33] Georgia law proscribing obscene matter defined obscenity as "if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion."[34] The issue on appeal was not whether the films were obscene[35], but whether the Georgia statute's blanket prohibition on the knowing possession of obscene materials complied with the guarantees of the First Amendment.[36]

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[30] *Id.* at 194–45 (quoting Pennekamp v. Florida, 328 U.S. 331, 335 (1946)) At first glance, this reasoning seems to support the State's argument regarding the separation of powers. However, the Court was referring to its plenary authority to answer constitutional questions. *See Pennekamp,* 328 U.S. at 335 (asserting the Supreme Court's jurisdiction to review constitutional questions, including those arising under the First Amendment as applied to the states through the due process clause of the Fourteenth Amendment. "Were it otherwise[,] the constitutional limits of free expression in the Nation would vary with state lines.).

[31] *Jacobellis,* 378 U.S. at 197 (Stewart, J., concurring).

[32] Stanley v. Georgia, 394 U.S. 557, 566–67 (1969). The search was conducted pursuant to a valid warrant upon probable cause of Defendant's alleged "bookmaking activities." *Id.* at 558. Little evidence of bookmaking was found. *Id.* Law enforcement discovered three reels of film and used Defendant's projector and screen to view them. *Id.* The state officer determined they were obscene, seized them, and charged Defendant with "knowing possession of obscene matter" under Georgia law. *Id.*

[33] *Id.* at 558–59. The Georgia statute was extremely broad:

"Any person who shall knowingly bring or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print any obscene matter with intent to sell, expose or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony[.]" *Id.* at 558 n.1.

[34] *Id.* at 558 n.1.

[35] *Id.* at 559 n.2.

[36] *Id.* at 559.

The Court recognized that while states retain police power to govern public morals, for the First Amendment's purpose to be upheld, a state "has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[37] Invalidating the state law, the Court rejected the State's justification that the mere possession of obscene material may lead to antisocial or criminal behavior,[38] finding it improper for such a drastic intrusion against the rights guaranteed by the First Amendment.[39] Yet, the Court hinted this rule may be inapplicable where there is proof of potential for future danger, such as becoming accessible to the eyes of children or intruding upon the sensibilities of the general public, as in the mail distribution case.[40]

In *Miller v. California*, decided in 1973, the Supreme Court created the modern test for obscenity.[41] There, the defendant sent unsolicited brochures advertising illustrated books titled "*Intercourse*," "*Man-Woman*," "*Sex Orgies Illustrated*," "*An Illustrated History of Pornography*," and a film entitled "*Marital Intercourse*."[42] The brochures contained pictures and drawings "very explicitly" depicting groups of men and women engaging in sexual activity with genitals prominently displayed.[43] The jury convicted the defendant under a California law prohibiting the knowing distribution of obscene matter.[44]

In upholding the conviction, the Supreme Court formulated the new test for determining whether speech is obscene.[45] Obscene speech can be regulated without violating the First Amendment if (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (2) the work depicts or describes the sexual conduct as defined by the applicable law, and (3) the work lacks serious literary, artistic, political, or scientific value.[46] All three

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[37] *Id.* at 565.

[38] *Id.* at 566–67.

[39] *Id.* at 565–66.

[40] *Id.* at 567.

[41] Miller v. California, 413 U.S. 15, 24 (1973).

[42] *Id.* at 18.

[43] *Id.*

[44] *Id.* at 16. The California law defined obscenity as whether the "average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." *Id.* at 16 n.1.

[45] *Id.* at 24.

[46] *Id.* at 23–24.

elements must be met to exempt the material from First Amendment protection.[47] Importantly, the majority contends that whether material is obscene is a question for the trier of fact, given the traditional adversary system in criminal prosecutions whereby lay jurors are permitted to draw upon the standards of their "community."[48] This reasoning suggests the majority interpreted community in the sense that a defendant is afforded the right to an impartial jury—which in most cases is comprised of fellow local community members.[49] Thus, the *Miller* majority departed from the Court's earlier decisions in *Roth* and *Jacobellis* that obscenity should be determined upon a national standard.[50]

A prurient[51] depiction of sexual conduct must have "serious literary, artistic, political, or scientific value" to be constitutionally protected speech.[52] As a result, a medical book with pictures of human reproductive organs, is not obscene, because it has an educational and scientific purpose.[53] Recognizing the First Amendment's function of assuring the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people,"[54] the Court in *Miller* held "the public portrayal of hard-core sexual conduct for its own sake," coupled with the brochure's commercial nature, is inconsistent with the policy reasons behind the right to free speech.[55] The jury was instructed that in evaluating whether the material "affronts contemporary community standards of decency," they should apply what they perceive to be such standards of "the State of California."[56] The new obscenity test was satisfied in *Miller* because the defendant was convicted by a jury of his peers who found that the material met the statutory definition of obscenity[57] and was without redeeming social value.[58]

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[47] *Id.* at 24.

[48] *Id.* at 30.

[49] *See* U.S. CONST. amend. VI.

[50] *See Miller,* 413 U.S. at 30.

[51] *See supra* text accompanying note 21 (defining prurient).

[52] *Miller,* 413 U.S. at 26.

[53] *Id.*

[54] *Id.* at 34–35 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

[55] *Id.* at 35.

[56] *Id.* at 31.

[57] *See id.* at 30–31.

[58] *See id.* at 36–37.

Justice Douglas, writing for the dissent, favored preservation of free speech.[59] He worried that the majority's test was too vague,[60] resulting in a standard that allows conviction even when the defendant had no "fair warning" that what they did was criminal.[61] Echoing the concerns of Justice Stewart in *Jacobellis*, Justice Douglas wrote

> The Court has worked hard to define obscenity and concededly has failed. In *Roth v. United States,* it ruled that "[o]bscene material is material which deals with sex in a manner appealing to prurient interest." Obscenity, it was said, was rejected by the First Amendment because it is "utterly without redeeming social importance." The presence of a "prurient interest" was to be determined by "contemporary community standards." That test, it has been said, could not be determined by one standard here and another standard there, but "on the basis of a national standard." [Justice Stewart] in *Jacobellis* commented that the difficulty of the Court in giving content to obscenity was that it was "faced with the task of trying to define what may be indefinable."[62]

It appears Justice Douglas would have been in favor of a standard that more clearly and conclusively defines what constitutes prohibited speech in the realm of obscene material, rather than forcing courts to apply a test that yields inconsistent results as juries across the country can apply their own "contemporary community standards."[63]

Conversely, the majority noted requiring states to apply the standards of the national community would be an exercise in futility because "this [n]ation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all fifty states in a single formulation, even assuming the prerequisite consensus exists."[64] As to Justice Douglas' perspective, the majority asserts that if the inability to define regulated materials with "ultimate, god-like precision" removes the government's ability to regulate, the resulting reality is pornography may be exposed limitlessly to juveniles, passersby, and the consenting adult alike.[65] The majority seems to agree the test is not perfect, but better than nothing.[66] Whereas in *Jacobellis* only ten years earlier Justice Stewart acknowledged that the standard for obscenity is purposefully vague, because such

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[59] *See id.* at 39–40 (Douglas, J., dissenting).

[60] *Id.*

[61] *See id.* at 42.

[62] *Id.* at 37–38 (alteration in original) (citations omitted).

[63] *See id.* at 43–44 ("To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process.").

[64] *Id.* at 30 (majority opinion).

[65] *Id.* at 27–28.

[66] *See id.*

a definition may be "indefinable," the *Miller* decision represents the shift of the Court's interpretation of obscenity law.[67]

Justice Brennan's dissent in *Miller*, joined by Justice Stewart, echoes concerns that state statutes abridging the freedom of speech may be unconstitutionally overbroad.[68] The dissenters assert that the First Amendment is so "transcendent[ly] valu[able]" to society that a defendant raising a First Amendment defense should be permitted to demonstrate the statute could have been "drawn with the requisite narrow specificity" to address the conduct the government seeks to prohibit.[69] While Justice Brennan and Justice Stewart came down differently in *Jacobellis* as to the method of determining obscenity, their dissent in *Miller* suggests they both favor federal judicial review as to state obscenity statutes. If the proper forum for judicial review of state statutes that infringe upon the freedom of speech is in federal court, the Supreme Court has the final say over what qualifies as "obscene."

B. Child Pornography Perpetuates Child Sexual Exploitation

In response to Justice Brennan's dissent in *Miller*, the majority noted that the challenge of defining obscenity should not deter the Court from addressing the issue.[70] The majority's analysis relies on its former holdings that the government has a legitimate interest in protecting the sensibilities of minors.[71] The government's interest in "safeguarding the physical and psychological well-being" of children is compelling because our democracy's future success relies on them becoming mature, well-rounded members of society.[72] If the freedom of speech and expression were truly limitless, society would have no way of shielding minors, or any other objecting party, from offensive and obscene images.[73] Sexual exploitation and memorialized depictions of children no doubt lead to physical and psychological harm to victims.[74]

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[67] *Id.* at 197 (J. Stewart concurring).

[68] *Miller,* 413 U.S. at 47.

[69] *Id.* (quoting Gooding v. Wilson, 405 U.S. 518, 521 (1972)).

[70] *See id.* at 29–30.

[71] *Id.* at 18–19.

[72] New York v. Ferber, 458 U.S. 747, 756–57 (1982).

[73] *See Miller,* 413 U.S. at 30.

[74] *Ferber*, 458 U.S. at 761.

In *New York v. Ferber*, the Supreme Court considered for the first time a statute "directed at and limited to depictions of sexual activity involving children."[75] The defendant was convicted of violating a New York statute that criminalized the use of a child in a sexual performance and the promotion of child sexual performances.[76] The defendant, who owned an adult bookstore, sold two films to undercover officers, that "almost exclusively" depicted young boys masturbating.[77] Notably, the statute did not require a finding of obscenity as New York was among the minority of states that split from the federal child pornography statutes.[78] The New York Court of Appeals reversed the conviction, holding the law violated the defendant's First Amendment rights.[79] The appellate court reasoned the statute's failure to require a finding of obscenity renders it an unconstitutional interference with free speech, but also recognized that a state's interest in protecting the welfare of minors "may transcend First Amendment concerns."[80] Nonetheless, the defendant's conviction was reversed based on other deficiencies unrelated to the statute.[81]

When the case reached the Supreme Court, the issue on appeal was whether a state's prohibition on traditionally unprotected speech, regardless of fitting within *Miller*'s definition of obscenity, violates the First Amendment, even when the law aims to prevent the sexual abuse of children.[82] The Court conceded that *Miller* represented a middle ground between the state's interest in protecting the "sensibilities of unwilling recipients" and the risk of opening the door to government censorship, but ultimately decided that in regulating child pornography, states are entitled to greater leeway in enacting laws to that effect.[83]

First, the Court found the state's interest in protecting minors' physical and psychological well-being compelling because a democratic society requires the "healthy, well-rounded growth of young people into full maturity as citizens."[84] The Court also relied on the statute's legislative history

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[75] *Id.* at 753.

[76] *Id.* at 750–51. The law defined promote as "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same." *Id.* at 751.

[77] *Id.* at 751–52.

[78] *Id.* at 752.

[79] *Id.*

[80] New York v. Ferber, 458 U.S. 747, 752–53 (1982).

[81] *Id.*

[82] *Id.* at 753.

[83] *Id.* at 754–56.

[84] *Id.* at 757–58 (quoting Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).

indicating a dramatic rise in the sexual exploitation of children prompted New York legislators to act.[85]

Second, the Court reasoned the distribution of child pornography is intrinsically related to sexual abuse of children.[86] Not only does it permanently memorialize the child's participation and subject the child to future harm as it is circulated, but it is also one of the few measures the government can take to control the *production* of child pornography.[87] "The most expeditious if not the only practical method [of solving the child sexual exploitation crisis] may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product."[88]

Third, the Court dispelled the notion that the First Amendment has ever been read to extend immunity to speech used in violation of a criminal statute.[89] Fourth, the Court found the societal value in live child sexual performances and any resulting recordings are "exceedingly modest, if not *de minimis*."[90] Finally, the Court found the content-based classification of speech prohibited by the statute is so deeply tied to the welfare of children engaged in its production that the balance of competing interests remove such material from First Amendment protection.[91] The majority's opinion relies heavily on the statute banning the distribution of materials depicting the sexual performance of a child, suggesting the state's compelling interest is in actual and future victims of child sexual abuse.[92] Decided in 1982, it is unlikely the majority contemplated a reality in which child pornography could be created with technology, rather than an actual child.[93] After *Ferber*, the question arises: can a state, or even Congress, ban the distribution of materials depicting a sexual performance by a fictious child?

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[85] *Id.* at 757 ("[There] has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. *The public policy of the state demands the protection of children from exploitation through sexual performances.*") (emphasis added).

[86] New York v. Ferber, 458 U.S. 747, 759 (1982).

[87] *Id.* at 760.

[88] *Id.*

[89] *Id.* at 761–62.

[90] *Id.*

[91] *Id.* at 763–64.

[92] New York v. Ferber, 458 U.S. 747, 764 (1982).

[93] *Id.* at 757–60.

According to the Eighth Circuit, the answer is yes.[94] In *United States v. Anderson*, where the defendant created a morphed image of his eleven-year-old stepsister by editing a real photo depicting a man and woman engaged in sexual intercourse.[95] He digitally superimposed the child's face over the woman's face and sent the picture to the child's Facebook inbox with a message "that said in substance: 'This is what we will do.'"[96] He was later charged under federal law with distribution of child pornography, distribution of child pornography to a minor, production of child pornography, and enticement of a minor to engage in sexual activity.[97]

The defendant argued the image he made was constitutionally protected speech, reasoning any psychological and reputational effects suffered by the minor whose image was used does not constitute a compelling interest under the *Ashcroft* rationale.[98] In *Ashcroft v. Free Speech Coalition*, the Court declined to recognize a compelling state interest in the "indirect" harms of virtual child pornography, such as its potential use in seducing minors and its effect on the market for real child pornography, finding the causal link to be contingent and indirect.[99] The *Ashcroft* Court held this type of indirect harm is not sufficient to revoke First Amendment protection because the potential for harm—sexual exploitation of a real child—does not necessarily follow from the speech.[100] As such, the Court ruled child pornography prosecutions require "proof that the images seized are those of an actual child."[101]

The *Anderson* court rejected the defendant's argument, reasoning the "contingent and indirect" harms contemplated in *Ashcroft* were based on "unquantified potential for subsequent criminal acts."[102] Instead, the court held the damage from the morphed image is felt directly by the minor stepsister, recognizing a compelling state interest in protecting minors from the harms associated with morphed, sexualized images.[103] Although the defendant sent the picture directly to the victim and it was not made available to third parties, the court recognized that the compelling interest

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[94] United States v. Anderson, 759 F.3d 891, 893 (8th Cir. 2014).

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.* at 896.

[100] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250 (2002).

[101] Jasmine V. Eggestein & Kenneth J. Knapp, *Fighting Child Pornography: A Review of Legal and Technological Developments*, 9 J. DIGIT. FORENSICS, SEC. & L. 29, 33 (2014).

[102] *Anderson,* 759 F.3d at 896.

[103] *Id.*

is implicated regardless of the authenticity of the child pornography or the initial size of its audience.[104] The relevant inquiry is the harm suffered to the victim.[105] The exploitation and psychological harm is glaringly apparent in *Anderson*, as the defendant targeted the victim through her Facebook account, and the morphed image clearly suggested her involvement in sexual intercourse.[106]

III. CURRENT CHILD PORNOGRAPHY LAWS ARE OUTDATED IN THE AGE OF ARTIFICIAL INTELLIGENCE

If the government finds its interest in protecting children from sexual exploitation compelling, it should restrict the market for AI-generated child pornography because the pornography itself is a form of exploitation.[107] It is for this reason the legality of AI-generated child pornography must be explicitly spelled out by Congress if it truly wishes to protect minors. The *Ashcroft* decision, by requiring proof the child depicted in the pornography exists, presented a large problem for prosecutorial agencies in their endeavors to apprehend pedophiles and child molesters.[108]

Like their *Ferber* predecessor, the members of the *Ashcroft* Court envisioned a technological environment in which graphic editing software, modern encryption, peer-to-peer networking, cloud computing services, anonymous hosting platforms, social media, and more would facilitate a 2023 finding of 20,254 AI-generated images posted to a dark web forum in a one-month period.[109] Of those images, 11,108 were labeled as likely to be criminal depictions of child sexual abuse.[110]

Technological and legal developments regarding the methods and means of creating and distributing child pornography have progressed at completely different rates.[111] Photoshop 1.0 debuted in 1990, and 3G

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[104] *Id.* at 893, 896.

[105] *Id.* at 896.

[106] *Id.* at 893, 895–96.

[107] Eggestein & Knapp, *supra* note 101, at 30.

[108] *Id.* at 33.

[109] INTERNET WATCH FOUND, *How AI is Being Abused to Create Child Sexual Abuse Imagery*, AI-CSAM REPORT 6 (Oct. 2023), iwf-ai-csam-report_public-oct23v1.pdf. *See generally* Eggestein & Knapp, *supra* note 101, at 30–33 (detailing the market explosion of child pornography since the 1980s, brought on by the evolution of the technological environment).

[110] INTERNET WATCH FOUND., *supra* note 109, at 6.

[111] Eggestein & Knapp, *supra* note 101, at 31 (depicting a timeline of "major technological and legal events affecting digital child pornography.").

mobile phones entered general public use in the early 2000s.[112] The following decade delivered widely accessible virtual private networks (VPNs), advanced encryption systems, and cloud computing, making it easy for one to keep their internet activity private.[113] Augmented reality platforms hit the market in the early 2010s,[114] and as of this Note, the phrase "free AI generator" yields nine hundred million results on Google.[115] The ways and potential for which artificial child pornography can be created and distributed continue to grow as technology continues to advance and AI models get "smarter."[116] Yet, the last amendment to the federal code section addressing child pornography was in 2018 and largely focused on civil remedies available to victims of child pornography.[117] The rate at which new technologies become available renders the current framework untenable and outdated.

A. Current Statutory Framework

Child pornography is statutorily defined as a visual depiction in the form of "photograph, film, video, picture, or computer or computer-generated image or picture . . . of a minor engaging in sexually explicit conduct."[118] A visual depiction falls under this statutory definition where (1) its "production . . . involves the use of a minor engaging in sexually explicit conduct;" (2) is a "digital . . . computer-generated image that is, or is indistinguishable from . . . a minor engaging in sexual conduct;" or (3) it "has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct."[119] "Indistinguishable" means "an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct."[120] An "identifiable minor" is a person who was either "a minor at the time the . . . depiction was created" or "whose image as a minor was used in creating,

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[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] Search for "Free AI Generator", GOOGLE, https://www.google.com/search?client=safari&rls=en&q=free+ai+generator&ie=UTF-8&oe=UTF-8 https://www.google.com/https://www.google.com/ (last visited Apr. 29, 2024).

[116] *See* INTERNET WATCH FOUND., *supra* note 109, at 10 (describing how AI systems use deep learning to scour "huge datasets scraped from the internet").

[117] Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 115 Pub. L. No. 299, 132 Stat. 4383.

[118] 18 U.S.C. § 2256(8).

[119] 18 U.S.C. § 2256(8)(A)–(C).

[120] 18 U.S.C. § 2256(11).

adapting, or modifying the visual depiction".[121] To be identifiable, the minor must be "recognizable as an actual person by [their] face, likeness, or other distinguishing characteristic".[122] Classifying a person appearing in a visual depiction as an identifiable minor does not require a showing of proof of the minor's actual identity.[123]

Under current federal law, it is a crime to knowingly possess or access with intent to view any "book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography."[124] The statute provides an affirmative defense if "the alleged child pornography was produced using actual [people] engaging in sexually explicit conduct and [they were] adult[s] at the time of production" or "was not produced with any actual minor or minors."[125] The affirmative defense is not available to child pornography produced without using any actual minors, if the visual depiction has been "created, adapted or modified to appear that an *identifiable* minor is engaging in sexual conduct."[126]

Thus, the affirmative defense is still available if the visual depiction is a digital or otherwise computer-generated image that "is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct."[127] In contrast to the "identifiable" language that precludes the use of the affirmative defense, an "indistinguishable" depiction means virtually indistinguishable from an actual minor engaging in sexually explicit conduct, "such that an ordinary person would conclude the depiction is of an actual minor."[128]

B. Virtual Child Pornography Prosecutions

Child pornography prosecutions may become difficult if a defendant found in possession of AI generated child pornography argues that the images don't fall under the federal virtual pornography prohibition

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[121] 18 U.S.C. § 2256(9)(A)(i)(I)–(II).

[122] 18 U.S.C. § 2256(9)(A)(ii) (exemplifying that a distinguishing characteristic includes a "unique birthmark or other recognizable feature").

[123] 18 U.S.C. § 2256(9)(B).

[124] 18 U.S.C. § 2252A(a)(5)(B).

[125] 18 U.S.C. § 2252A(c) (the minors do not truly exist, and their depictions were produced artificially).

[126] 18 U.S.C. § 2252A(c)(2) (notes of decisions citing United States v. Hoey, 508 F.3d 687, 693 (1st Cir. 2007)).

[127] 18 U.S.C. § 2256(8)(B).

[128] 18 U.S.C. § 2256(11).

because the depicted minor is *indistinguishable* from an actual minor engaged in sexual activity, rather than identifiable. A case regarding the use of highly sophisticated artificial intelligence generated child pornography has not yet reached the Supreme Court. Other recent state and federal cases however, offer insight as to how a defendant might be successful in such a prosecution. In *Jones*, the defendant was convicted with possession of child pornography under Wyoming law, which proscribed visual depictions of explicit sexual conduct "involving a child or virtually indistinguishable from a child."[129] The defendant argued the statute was unconstitutional in light of the *Ashcroft* decision, which found the federal statute criminalizing child pornography of "virtual" children was overbroad.[130]

In dicta[131], however, the *Ashcroft* decision contemplated whether the government has a compelling interest sufficient to exempt First Amendment protection from child pornography where real children were not involved.[132] One of the government's arguments was eliminating the market for pornography produced using real children requires that virtual images are also prohibited, to remain consistent with the compelling government interest established by *Ferber*.[133] The government reasoned that artificially-generated child sexual images are indistinguishable from real ones, occupy the same market, and are exchanged in the same way.[134] The Court was not overly dismissive of that proposition but ultimately concluded if artificially-generated images were truly indistinguishable from real ones, the illegal images would be driven from the market because "[f]ew pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice."[135]

While upholding the conviction, the *Ashcroft* court rejected the State's market-deterrence argument as "somewhat implausible."[136] The *Jones* court could have taken the opportunity to address whether

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[129] Jones v. State, 173 P.3d 379, 381, 386 (Wyo. 2007).

[130] *Id.* at 383–84, 86.

[131] From obiter dictum, meaning "a comment by a judge in a decision or ruling which is not required to reach the decision, but may state a related legal principle as the judge understands it. While it may be cited in legal argument, it does not have the full force of a precedent (previous court decisions or interpretations) since the comment was not part of the legal basis for judgment. The standard counter argument is: 'it is only dictum (or dicta).'" *Dicta,* LAW.COM, https://dictionary.law.com/Default.aspx?selected=514 (last visited Dec. 12, 2024).

[132] *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 254 (2002).

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

Wyoming's "virtually indistinguishable from a child" statute furthered a compelling government interest and thus is constitutional. Unfortunately, the justices declined to reach the issue because the defendant had already admitted the images were of real children and the State had produced evidence that likewise established such.[137]

In *United States v. Majeroni*, the defendant was charged with possession of child pornography under the virtual child pornography statute.[138] The jury was instructed that in order to convict, they must find the images were of actual children.[139] In doing so, the defendant was convicted.[140] On appeal, the defendant claimed there was insufficient evidence on the record to conclude the images were of actual children.[141] However, the Court upheld the conviction because the defendant neither at trial nor on appeal offered any sort of technical evidence to suggest the depicted minors were not real children.[142] Similar cases remain sparse as technological capabilities for creating virtual child pornography continue to advance, while law enforcement detection and subsequent prosecutions struggle to keep up.[143]

Under *Majeroni,* a defendant could find success by proving the depicted scene was artificially created, and the child does not truly exist.[144] First, the defendant would need to offer evidence to show the pornography was artificially created.[145] Second, the defendant would characterize the depicted child as indistinguishable from an actual minor engaged in sexual activity[146], rather than identifiable.[147]

Because the government need not prove the child's identity, the defendant's evidence the pornography was artificially created could be

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[137] Jones v. State, 173 P.3d 379, 381, 388 (Wyo. 2007)

[138] United States v. Majeroni, 784 F.3d 72, 75 (1st. Cir. 2015).

[139] *Id.* at 77.

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] David L. Hudson, Jr., *Miller Test,* FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV., http://firstamendment.mtsu.edu/article/miller-test (Feb. 18, 2024) ("Federal obscenity prosecutions have waned in the last decade, but state obscenity prosecutions continue in ... the 'myth of obsolete obscenity.'").

[144] *Majeroni*, 784 F.3d at 77.

[145] *Id.*; *see also* Ashcroft v. Free Speech Coal., 535 U.S. 234, 254 (2002).

[146] *See supra* Part II(A).

[147] *Id.*

enough to persuade a jury to acquit, even if the image is a morphed iteration of a prior instance of actual child sexual abuse.[148] Thus, the intent of *Ferber* in protecting children from sexual exploitation and of *Anderson* in recognizing that indirect effects felt by victims and would-be victims is a compelling government interest could potentially become moot once the affirmative defense is triggered. Another concerning reality of the current state of federal child pornography laws is if a defendant simply denies the image is child pornography, and the government is unable to rebut the presumption.

IV. ANALYSIS: JUDICIAL AND LEGISLATIVE OPPORTUNITY TO REGULATE CHILD PORNOGRAPHY

For the government to truly achieve its compelling interest in protecting children, two possible solutions, if taken together, could lead to more successful prosecutions to combat spread of AI-generated child pornography. First, courts should instruct juries to apply a national standard in determining obscenity to ensure child pornography can be regulated with consistency across the country. Second, Congress should amend the current statutory framework to encompass AI-generated child pornography. Tightening restrictions on child pornography will serve the government's compelling interest in protecting children from future sexual exploitation.[149]

A. Courts Should Apply a National Standard in Obscenity Cases

The test for obscenity set forth in *Miller* is unworkable in light of advances in technology and the fact very few communities remain completely isolated.[150] The test initially set forth in *Jacobellis* correctly interpreted Judge Learned Hand's concept of "contemporary community standards" to mean the standards of society at large.[151] The benefit in formulating a test that aims to reflect societal sentiment ensures the test remains functional despite the passage of time, rather than its application from locale to locale.[152] Acknowledging that "contemporary community standards" is certainly an abstract definition, Judge Hand reasoned "vague

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[148] *See supra* note 8 and accompanying text (defining deepfake).

[149] *See* Eggestein & Knapp, *supra* note 101, at 41–42, 44.

[150] It may have been unworkable since inception, by relying on *Roth,* which likewise mischaracterized Judge Hand's concept of contemporary community standards. *See Jacobellis*, 378 U.S. at 191.

[151] *See supra* note 29 and accompanying text.

[152] Jacobellis v. State of Ohio, 378 U.S. 184, 193 (1964).

subject-matter is left to the gradual notions about what is decent."[153] Instead of asking jurors to determine whether material applies to the prurient interest according to what they perceive to be the standards of the local community, courts should compel them to base their determinations on the standards of society as a nation.[154]

The new test for obscenity should replace *Miller's* interpretation of "contemporary community standards" for its original meaning intended by Judge Learned Hand.[155] However, the language used by *Miller* should remain the same. Obscene speech can be regulated without violating the First Amendment if (1) "'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . [(2)] whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and [(3)] whether the work . . . lacks serious literary, artistic, political, or scientific value."[156] Then, the judge should instruct the jury to apply the "contemporary community standards" of the nation *at large* to determine if the material appeals to the prurient interest.

Under either interpretation of "contemporary community standards," it is unlikely any member of the *Miller* Court, envisioned a national society equipped with such scientific abstractions such as the internet or social media.[157] An obscenity standard based on the ideals of a local jury, rather than a national standard, is even more untenable today than it was in 1973. The geographical and social boundaries that influenced the *Miller* Court are far less restrictive today. For example, what may be socially acceptable in California might be considered obscene in South Carolina, but today's modern technological society enables residents of both states to consume the same content and interact with each other, forming an online "community."

Now that it is possible, and in fact common, for individuals to have an "online presence," one can live in any given neighborhood without sharing the identity of the type of local community contemplated by *Miller*.[158] The speed, distance, and scale by which information can now be

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[153] *Id.* at 192–93.

[154] *See id.* at 191–93.

[155] *See supra* notes 29, 66–67 and accompanying text.

[156] Miller v. California, 413 U.S. 15, 24 (1961).

[157] *See id.*

[158] *What is an Online Presence*, JUSTIN WELSH, https://www.justinwelsh.me/glossary/what-is-an-online-presence (lasted visited Oct. 30, 2024).

shared was unimaginable when *Miller* was decided. In contrast to the unsolicited pornographic mailings at issue in *Miller,* pornography—especially child pornography—is now primarily consumed over the internet, where users can view and share content with the click of a button.[159] Like-minded perpetrators can pool their resources on incredibly niche online platforms accessible by anyone who dares to visit them, subjecting the child victim to perpetual revictimization and stoking the market for child sexual exploitation.[160]

Further, even in 1964, *Jacobellis* reasoned obscene materials could cross local community lines in a variety of forms, such as mailings, books, or films.[161] The *Jacobellis* decision expressed alarm at "the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency."[162] In determining obscenity, a national standard for "contemporary community standards" is appropriate for the modern age because the American public no longer lives in geocentric bubbles.[163] By evaluating an image's obscenity based on a national standard rather than a local one, future defendants around the country will be put on notice of the outer limits of their First Amendment freedoms, while resulting in uniform prosecutions. Most importantly, the government's compelling interest in protecting children from the harms associated with sexual exploitation will be upheld.

B. Congress Should Amend the Federal Statute to Criminalize AI-Generated Child Pornography

In 2024, a fourteen-year-old girl in New Jersey was called to the counselor's office and informed some of her classmates had used a "nudify"

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[159] *See also Miller*, 413 U.S. at 17–18; Michal Privara & Petr Bob, *Pornography Consumption and Cognitive-Affective Distress*, J. NERV. MENT. DIS. (July 28, 2023), https://pmc.ncbi.nlm.nih.gov/articles/PMC10399954/#:~:text=Recent%20research%20focused%20on%20pornography,2016;%20Wright%2C%202013).

[160] John Sciamanna, *Child Sexual Abuse is More Accessible Today Because of the Internet*, CHILD WELFARE LEAGUE OF AMERICA, https://www.cwla.org/child-sexual-abuse-is-more-accessible-today-because-of-the-internet/ (last visited Oct. 31, 2024).

[161] Jacobellis v. Ohio, 378 U.S. 184, 193–34 (1964).

[162] *Id.* at 193 (quoting Manual Enterprises, Inc., v. Day, 370 U.S. 478, 488 (1962)).

[163] *See* Jon Bateman et al., *How Social Media Platforms' Community Standards Address Influence Operations*, CARNEGIE ENDOWMENT FOR INT'L PEACE (April 1, 2021) https://carnegieendowment.org/research/2021/04/how-social-media-platforms-community-standards-address-influence-operations?lang=en#platform-policies/?lang=en.

program to generate a fake, naked image of her, based off a regular, clothed image.[164] The girl's family attorney and the police told them there couldn't do anything because no law had clearly been broken.[165] The chief legal officer for the National Center for Missing and Exploited Children is acutely aware of this problem, lamenting that "[w]e just continue to be unable to have a legal framework that can be nimble enough to address the tech."[166] Congress can and should definitively address AI-generated child pornography, restricting its spread and providing clarity to prosecutors. This Note proposes two possible legislative solutions.

1. Amend 18 U.S.C. § 2256(8) and Create a New Statutory Definition Encompassing All Forms of Virtual Child Pornography

South Dakota recently became the first state to strengthen its child pornography laws by amending its applicable definitions to include depictions created by AI.[167] The updated law creates a clear definition for computer generated pornography, subject to the same criminal penalties as regular child pornography.[168] The first two categories of computer generated child pornography under the South Dakota definition are similar to the first two categories of the federal statutory definition of child pornography.[169] The last category goes the furthest by including any visual depiction of "an individual indistinguishable from an actual minor created by the use of artificial intelligence or other computer technology capable of processing and interpreting specific data inputs to create a visual depiction."[170]

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[164] Nicholas Kristof, *The Online Degradation of Women and Girls That We Meet With a Shrug*, N.Y. TIMES (Mar. 23, 2024) https://www.nytimes.com/2024/03/23/opinion/deepfake-sex-videos.html. (stating one journalist reports that "[w]ith just a single good image of a person's face, it is now possible in just half an hour to make a 60-second sex video of that person.").

[165] *Id.*

[166] *Id.*

[167] Jack Dura, *Bills Go to Noem to Criminalize AI-generated Child Sexual Abuse Images, Xylazine in South Dakota,* ASSOCIATED PRESS, https://shorturl.at/eijt0 (Feb. 5, 2024, 6:05 PM).

[168] S.D. CODIFIED LAWS § 22-24A-2(5) (2024).

[169] *See* 18 U.S.C. § 2256(8)(A)–(C); *see also* discussion *supra* Part II(A). Under the South Dakota law, computer generated child pornography is "any visual depiction of (a) [a]n actual minor that has been created, adapted, or modified to depict that minor engaged in a prohibited act; (b) [a]n actual adult that has been created, adapted, or modified to depict that adult as a minor engaged in a prohibited act[.]" S.D. CODIFIED LAWS § 22-24A-2(5)(a)–(b) (2024).

[170] S.D. CODIFIED LAWS § 22-24A-2(5)(c) (2024).

This is in contrast to Congress's version, last amended in 2008:[171] "child pornography means any visual depiction, including any . . . computer or computer-generated image or picture . . . of sexually explicit conduct, where . . . such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct."[172] The South Dakota law makes it clear any use of artificial intelligence to create what looks like child pornography is prohibited.[173] The federal statute uses outdated terminology and takes for granted that in modern times, computers are just one of the many electronic devices most Americans use on a daily basis.[174] 18 U.S.C. 2256(8) should be amended by removing all "computer-generated" language. Then, to make clear all depictions of child pornography are criminal, Congress should create a new definition for computer-generated child pornography specifically addressing artificial intelligence, modeled after the South Dakota statute.[175]

2. Replace All Instances of "Identifiable" in 18 U.S.C. § 2256 with "Indistinguishable"

Child pornography offenses, and the prosecution of them, are subject to needless confusion because the current law is overly nuanced. The distinction in 18 U.S.C. § 2256 between "indistinguishable" and "identifiable," and its applicable provisions are ineffective in curbing the market for child pornography because some AI models are so advanced that the average viewer would believe the image to be authentic.[176] There is little value in debate as to whether the child depicted is indistinguishable or identifiable if the societal goal is to protect children from sexual exploitation and suppress any memorialization that may arise from it.

The new definitions set forth in the South Dakota law make no mention of identifiability, using only the term "indistinguishable".[177] This is the best practice. As artificially generated child pornography cases make their way to the courts, one could imagine an instance where a defendant charged with possession of AI-generated child pornography argues the depicted minor is "identifiable" rather than "indistinguishable," because the

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[171] Claudia Ratner, Note, *When "Sweetie" Is Not So Sweet: Artificial Intelligence and Its Implications for Child Pornography,* 59 FAM. CT. REV. 386, 392–93 (2021).

[172] 18 U.S.C. § 2256(8)(c).

[173] *See* S.D. CODIFIED LAWS § 22-24A-37(c) (2024).

[174] *Id.*

[175] S.D. CODIFIED LAWS § 22-24A-2(5) (2024).

[176] *See* 18 U.S.C. §§ 2256(9)(A)–(B), (11).

[177] S.D. CODIFIED LAWS § 22-24A-2 (2024).

minors depicted don't truly exist. Since there is no requirement the minor's identity be proven whether they appear "identifiable" or "indistinguishable" from an actual minor, the distinction is useless. Replacing "identifiable" with "indistinguishable" in the federal statute would solve the affirmative defense problem introduced in Part II and ensure that child pornography of all types remains decidedly illegal.

V. CONCLUSION

As Oliver Wendell Holmes once said, "[i]t cannot be helped, it is as it should be, that the law is behind the times."[178] Even so, the time to implement measures to fight the sexual exploitation of children is now. As of this Note, images generated by AI to depict child sexual activity remain in a legal gray area. If federal courts continue to apply the *Miller* interpretation of community standards, the whims of a jury in a first-of-its-kind child pornography deepfake case may very well find acceptable what the rest of the country deems obscene. If the government still agrees our democracy relies on the well-being of future generations, it should act swiftly and proactively in light of the massive increase in production and consumption of virtual and AI-generated child pornography.

[178] SUZY PLATT & LIBRARY OF CONGRESS, RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 192 (1989).