

# THE FIRST AMENDMENT AND CHILD EXPLOITATION: TOWARDS A HUMAN-DIGNITY APPROACH

## *Note*

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# THE FIRST AMENDMENT AND CHILD EXPLOITATION: TOWARDS A HUMAN-DIGNITY APPROACH

## Note

*Content Warning: This Note contains discussion of Child Sexual Abuse Materials (CSAM) and child sexual exploitation.*

## INTRODUCTION

In October 2023, New Jersey's Westfield High School garnered national attention when explicit images of female students as young as fourteen circulated among the student body.<sup>1</sup> The materials were newsworthy not only because of their upsetting content but also because they exhibited a key difference from traditional explicit materials: none of the subjects had ever been photographed in an explicit setting.<sup>2</sup> Instead, another student created the images using Artificial Intelligence (AI).<sup>3</sup> The use of technology to create "deepfake" videos and photographs has grown dramatically in the past year, and services designed to turn innocent images into nonconsensual pornography are abundant.<sup>4</sup> These services can be used to create child pornography, commonly referred to as Child Sexual Abuse Material (CSAM).<sup>5</sup> Unsurprisingly, policymakers have responded with multiple proposals. Congressman Tom Kean, whose district includes Westfield High, introduced federal legislation that would require clear labeling of materials created using generative AI.<sup>6</sup> New Jersey State Senator Kristin Corrado has introduced legislation that would criminalize the distribution, possession, and storage of deceptive audio or visual media depicting children and would punish offenders in the same manner as those who engage with traditional child pornography.<sup>7</sup>

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1. Jackie Lieberman, *Westfield High School Principal Addresses Parents After Word of Fake Photos*, TAPINTO WESTFIELD (Oct. 20, 2023, 4:35 PM), <https://www.tapinto.net/towns/westfield/articles/westfield-high-school-principal-addresses-parents-after-word-of-fake-photos> [https://perma.cc/JBC2-HG6Q].

2. Haleluya Hadero, *Teen Girls Are Being Victimized by Deepfake Nudes*, ASSOCIATED PRESS, <https://apnews.com/article/deepfake-ai-nudes-teen-girls-legislation-b6f44be048b31fe0b430aeece1956ad38> [https://perma.cc/DF4K-3Y57] (Dec. 2, 2023, 3:37 PM).

3. Lieberman, *supra* note 1.

4. *See* Hadero, *supra* note 2.

5. *What Is Child Sexual Abuse Material (CSAM), RAPE, ABUSE, & INCEST NAT'L NETWORK* (Aug. 25, 2022), <https://www.rainn.org/news/what-child-sexual-abuse-material-csam> [https://perma.cc/Q8PL-KH7P].

6. Jackie Lieberman, *Kean Introduces AI Bill in Response to Images of Westfield Students*, TAPINTO WESTFIELD (Nov. 27, 2023, 4:46 PM), <https://www.tapinto.net/towns/westfield/sections/law-and-justice/articles/kean-introduces-ai-bill-in-response-to-fake-nude-images-of-westfield-students> [https://perma.cc/4YLA-RS37].

7. Jay Edwards, *Senator Corrado Introduces Legislation Prohibiting Non-Consensual "Deepfake" Pornography*, WRNJ (Mar. 7, 2023), <https://wrnradio.com/senator-corrado-introduces-legislation-prohibiting-non-consensual-deepfake-pornography/> [https://perma.cc/3XLS-BL7L].

States have addressed the issue of morphed CSAM, or pornography combining innocent depictions of children with pornographic materials, in a variety of ways.<sup>8</sup> Some states fail to address morphed CSAM entirely, banning only images that involve the physical abuse of a child.<sup>9</sup> The federal government proscribes materials that are indistinguishable from traditional child pornography and those that depict identifiable minors who “appear” to be engaged in sexual activity.<sup>10</sup> Some states have criminalized the use of a real child’s image in pornographic materials altogether,<sup>11</sup> while others fail to distinguish between these two kinds of materials, leading to an ambiguity as to what materials are proscribed by statute.<sup>12</sup> In this Note, I argue that these diverging approaches represent different understandings of the interests implicated by morphed CSAM.

States that fail to address morphed CSAM see the harm of child pornography *only* as that arising out of physical sexual abuse. Like in *New York v. Ferber*,<sup>13</sup> the harm of CSAM is the perpetuation of actual child abuse. For many years, this justification was sufficient to proscribe almost all forms of CSAM. Now that pornographic materials can be made without the presence of an actual child, however, there is a stark practical divide between frameworks based on this understanding and those that view the harm more broadly.<sup>14</sup>

One broader approach is to proscribe all materials that are indistinguishable from traditional child pornography. This approach seems to look to the reputational and psychological harm that accompanies a convincing representation of sexual conduct, as well as the difficulty of combating child sexual abuse if a defendant can argue the child in question was depicted by computer.<sup>15</sup> The third and final approach, which prohibits the depiction of *any* identifiable minor in such materials, reflects the broadest and most complete understanding of the harm imposed by morphed CSAM. By depicting, however clumsily, an actual child for the prurient interest, child pornographers violate the child’s basic human dignity, risk the imposition of serious psychological harm on the child, and risk reputational harm resulting from having one’s image nonconsensually associated with sexually explicit materials.<sup>16</sup> Under this framework, the state has an interest in preventing this harm regardless of the

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8. See discussion *infra* Part II.

9. See, e.g., *State v. Zidel*, 940 A.2d 255, 265 (N.H. 2008).

10. 18 U.S.C. § 2256(8)(B)–(C).

11. See, e.g., MD. CODE ANN., CRIM. LAW § 11-207 (West, Westlaw through all legislation from the 2024 Regular Session of the General Assembly).

12. See, e.g., ALASKA STAT. § 11.61.127 (2020).

13. *New York v. Ferber*, 458 U.S. 747, 759 (1982).

14. See discussion *infra* Parts II and III.

15. See discussion *infra* Section III.B.

16. See discussion *infra* Section III.C.

quality of the image and regardless of whether the child actually learns of its existence.<sup>17</sup>

In this Note, I argue that the First Amendment allows states to prohibit all pornographic materials involving the use of an identifiable minor because of the human-dignity violations that accompany morphed CSAM. Unlike purely virtual depictions, which are protected under *Ashcroft v. Free Speech Coalition*, these materials “implicate the interests of real children,”<sup>18</sup> and I argue that they are harmful enough to proscribe as a matter of public policy. Part I of this Note introduces the history of First Amendment jurisprudence on child pornography and obscenity and argues that the harm identified by the Court plays a significant role in whether and how the state may regulate child pornography. Part II of this Note provides an overview of the federal PROTECT Act and various state laws on the topic of morphed CSAM and discusses the ambiguities that many state statutes create. Finally, Part III argues that divergent state approaches to morphed CSAM reflect fundamentally different understandings of the harm posed by child pornography. When statutes are ambiguous, it is unclear what harm the state attempts to prevent. I argue that the harm of morphed CSAM is the inherent violation of human dignity that comes from any use of a real minor’s image for sexual gratification. While the PROTECT Act has strong language proscribing this conduct, the scope of the legislation is limited to materials that use or affect interstate commerce.<sup>19</sup> While this approach captures the vast majority of morphed CSAM, the possibility of materials that do not implicate interstate commerce remains.<sup>20</sup> This limitation, combined with limited resources for federal enforcement, means that state legislatures must step in to address this growing problem.

## I. HISTORY OF THE FIRST AMENDMENT’S CHILD PORNOGRAPHY EXCEPTION

In *New York v. Ferber*, the Supreme Court held that child pornography involving the sexual exploitation of actual minors was outside the scope of First Amendment protection, even if the materials in question are not obscene under the standards set out in *Miller v. California*.<sup>21</sup> In upholding New York’s prohibition on the dissemination of child pornography, the Court reasoned that preventing the sexual exploitation of children constitutes a compelling state

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17. See discussion *infra* Section III.C.

18. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 242 (2002).

19. 18 U.S.C. § 2251(A).

20. For instance, a collage of two photographs taken and printed in a single state could evade prosecution depending on how the Court construes Section 2251(a) of the PROTECT Act. Anecdotally, the author of this Note began researching this topic after a conversation with a victim who was told that her situation did not implicate interstate commerce clearly enough for federal prosecutors to take her case. Her abuser remains unpunished.

21. *New York v. Ferber*, 458 U.S. 747, 765 (1982).

interest.<sup>22</sup> The distribution of child pornography is inherently related to the sexual exploitation of children because the materials produced constitute a permanent record of the children's participation.<sup>23</sup> This harm is exacerbated by the circulation of the images.<sup>24</sup> Moreover, to prevent the demand for production of these materials, which inherently involves sexual exploitation, the state has an interest in closing the distribution network for those materials.<sup>25</sup> The market for such materials provides an economic motive for their continued production,<sup>26</sup> and the value of permitting such performances and photographs is "exceedingly modest, if not *de minimis*."<sup>27</sup> Finally, the Court pointed to existing First Amendment exceptions including libel and "fighting comment[s]" to suggest that such an exception is in keeping with existing precedent.<sup>28</sup> However, the Court noted that the child pornography exception does not apply to materials that are not otherwise obscene and do not involve live performance or visual representation of live performances.<sup>29</sup> Under *Ferber*, the nature of the harm the state seeks to prevent does not justify the proscription of materials outside these boundaries.<sup>30</sup>

In *Ashcroft v. Free Speech Coalition*, the Court again gave central importance to the nature of the harm asserted.<sup>31</sup> In 1996, Congress passed the Child Pornography Prevention Act (CPPA), which proscribed sexually explicit images that appeared to portray minors but did not include any real children.<sup>32</sup> Section 8(B) prohibited "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."<sup>33</sup> Section 8(D) prohibited materials that "convey[] the impression that the material . . . contains a visual depiction of a minor engaging in sexually explicit conduct."<sup>34</sup> In response, the Free Speech Coalition, a trade association for the adult-entertainment industry, brought suit.<sup>35</sup>

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22. *Id.* at 757.

23. *Id.*

24. *Id.*

25. *Id.* at 759.

26. *Id.* at 761.

27. *Id.* at 762.

28. *Id.* at 763 (first citing *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976); then *FCC v. Pacifica Found.*, 438 U.S. 726, 742–48 (1978); then *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942); and then *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952)).

29. *Id.* at 764–65.

30. *Id.*

31. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 241–42 (2002).

32. See 18 U.S.C. § 2256(8) (1996) (current version at 18 U.S.C. § 2256(8)).

33. *Id.* § 2256(8)(B).

34. *Id.* § 2256(8)(D).

35. *Free Speech Coal.*, 535 U.S. at 243. The CPPA also prohibits visual depictions that are modified to appear as though an identifiable minor is engaging in sexually explicit conduct, prohibiting much of the "deepfake" pornography discussed in this Note. Because these images implicate the interests of real minors,

As the Court pointed out, Sections 8(B) and 8(D) of the CPPA could prohibit a broad range of expression, including Renaissance Era art depicting sexually explicit mythological scenes and adaptations of *Romeo and Juliet*.<sup>36</sup> Such a prohibition goes beyond the obscene materials defined in *Miller* and child pornography defined in *Ferber*, requiring the Court to analyze the harm posed by these materials to determine whether the state can proscribe them.<sup>37</sup> According to the Court, the reasoning of *Ferber* does not apply to these materials: the use of adult actors to portray children and the use of technology to create virtual child pornography are not “intrinsically related” to child sexual exploitation in the same way as materials produced using real minors.<sup>38</sup> Importantly, the harm of child pornography involving actual minors is “based upon how it [is] made, not what it communicate[s].”<sup>39</sup> The government’s assertion that the proscribed images could lead to actual child abuse was inadequate because it failed to prove more than a speculative relationship between the materials and actual harm to children.<sup>40</sup> Because the harm of virtual child pornography is inherently different from the distribution of materials involving actual sexual abuse, the Court held that virtual child pornography cannot fit into *Ferber*’s child pornography exception.<sup>41</sup>

In her concurrence, Justice O’Connor suggested that virtual child pornography could cause a separate form of harm sufficient to justify its prohibition.<sup>42</sup> If computer-generated materials are truly indistinguishable from materials involving actual child exploitation, allowing virtual materials could hinder efforts at prosecuting the distribution and possession of “real” child pornography.<sup>43</sup> The concurrence further argued that the Court ought to defer to Congress’s findings that virtual child pornography may be used to seduce young children or whet the appetites of child molesters.<sup>44</sup> In order to evade any ambiguity posed by the “appears to be” language and address this harm, the concurrence indicated that the majority ought to read the phrase “appears to be” to proscribe only materials “virtually indistinguishable from” traditional child pornography.<sup>45</sup> As discussed below, Congress adopted Justice O’Connor’s

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the respondent did not challenge this provision, and the Court declined to issue a ruling on its constitutionality. *Id.* at 242.

36. *Id.* at 241–43.

37. *Id.* at 240.

38. *Id.* at 250 (quoting *New York v. Ferber*, 458 U.S. 747, 759 (1982)).

39. *Id.* at 250–51.

40. *Id.*

41. Daisy Gray, *Do You Know It When You See It? Using Alaska’s Child Pornography Statute as a Nationwide Model for Proscribing Morphed Images*, 38 ALASKA L. REV. 231, 240 (2021).

42. See *Free Speech Coal.*, 533 U.S. at 263–65 (O’Connor, J., concurring).

43. See *id.* at 263 (noting that the prospect that defendants indicted for producing, distributing, or possessing actual child pornography may evade liability by claiming that the images attributed to them are in fact computer-generated is a serious concern).

44. See *id.*

45. See *id.* at 264.

suggested language in the PROTECT Act to prohibit virtual child pornography indistinguishable from pornography involving actual sexual exploitation of minors, largely based on the same reasoning as Justice O'Connor's concurrence.<sup>46</sup>

The Court's avoidance of the morphed pornography provision of the CPPA leaves its legal status unclear. However, the analyses undertaken in *Ferber* and *Free Speech Coalition* suggest that in order to proscribe morphed CSAM, the state must be specific and persuasive in describing the harm imposed by any form of child pornography and its interest in prohibiting the practice. Unlike the materials in *Ferber*, morphed CSAM does not serve as a permanent record of actual sexual abuse, and no physical harm occurs in its production.<sup>47</sup> However, morphed CSAM still imposes harm on actual children.<sup>48</sup> Thus, it seems that morphed CSAM exists somewhere between *Ferber*, where real sexual abuse justifies state action, and *Free Speech Coalition*, where the absence of tangible harm to an actual child renders state action unconstitutional. In Parts II and III, I discuss the measures taken and harms contemplated by Congress, state governments, and the courts and argue for a theory of harm based on the loss of fundamental human dignity rather than the risk of misinformation or prosecutorial inconvenience.

## II. VARYING APPROACHES TO MORPHED CSAM IN STATE AND FEDERAL LAW

The federal government's ban on morphed CSAM, enacted in the PROTECT Act of 2003, uses the broadest language available.<sup>49</sup> It defines child pornography as any visual depiction that involves (a) the actual engagement of a minor in sexual conduct,<sup>50</sup> (b) any computer-generated or digital image that is indistinguishable from depictions involving the actual engagement of a minor,<sup>51</sup> or (c) any visual depiction in which it "appear[s]" that an identifiable minor is engaging in sexually explicit conduct.<sup>52</sup> The combination of (b) and (c) implicate a broad range of virtual and morphed CSAM. Under this language, materials created without the physical exploitation of minors must either involve identifiable minors or be realistic enough that a reasonable person cannot determine whether the image is real or virtual.

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46. PROTECT Act, Pub. L. No. 108-21, § 502, 117 Stat. 678, 678 (2003).

47. Gray, *supra* note 41.

48. *Id.*

49. *See generally* PROTECT Act.

50. 18 U.S.C. § 2256(8)(A).

51. *Id.* § 2256(8)(B).

52. *Id.* § 2256(8)(C).

The majority of states do not criminalize the creation or distribution of morphed CSAM.<sup>53</sup> Explicit statutory language and court interpretations of state statutes vary significantly from state to state, and there is no uniform approach to protecting children from these materials.<sup>54</sup> In Alabama, the Court of Criminal Appeals found that possessing morphed CSAM constituted “a visual reproduction of a person under the age of 17 years” engaged in sexual acts and therefore constituted a Class B felony despite the statute’s lack of explicit language criminalizing depictions where a child’s image is combined with that of an adult.<sup>55</sup>

However, other states have interpreted similar and even broader language to exclude morphed materials. A Florida court of appeals, for instance, found that possession of a “photograph . . . representation, or other presentation”<sup>56</sup> of “actual or simulated sexual intercourse”<sup>57</sup> by a child did not include possession of morphed CSAM because the child *herself* did not simulate sexual intercourse.<sup>58</sup> Cases where children’s images are superimposed on the bodies of adults engaged in sexual conduct to simulate the *appearance* of a child engaged in conduct, the Florida court found, are different from a child’s actual participation in “simulated sexual conduct.”<sup>59</sup> Because “no child engaged in simulated conduct and no reasonable viewer could believe so,” the court found that the material was permitted under Florida law.<sup>60</sup> The Florida legislature abrogated the decision in part by criminalizing portrayals of identifiable minors engaged in sexual conduct;<sup>61</sup> however, the court’s decision defines the term “engaged in simulated conduct” so narrowly that morphed pornography may not be included.<sup>62</sup> The New Hampshire Supreme Court has gone even further than Florida, finding that it would be unconstitutional for the government to proscribe mere possession of morphed CSAM because “no demonstrable harm” results to the child depicted as long as the photos are retained solely for personal use.<sup>63</sup>

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53. Gray, *supra* note 41, at 251–52.

54. See e.g., MD. CODE ANN., CRIM. LAW § 11-207 (West, Westlaw through all legislation from the 2024 Regular Session of the General Assembly) (prohibiting morphed CSAM only when created by a computer); COLO. REV. STAT. § 18-6-403(2)(j) (2013) (prohibiting all materials depicting children as participating in, observing, or being used for explicit sexual conduct); *People v. Gerber*, 126 Cal. Rptr. 3d 688, 690 (Cal. Ct. App. 2011) (holding that California law prohibits only materials where a child engaged in actual sexual conduct). For a helpful overview of state laws, see Gray, *supra* note 41, at 251–52.

55. *McFadden v. State*, 67 So. 3d 169, 179 (Ala. Crim. App. 2010) (applying ALA. CODE § 13A-12-192 (2024)).

56. *Parker v. State*, 81 So. 3d 451, 453 (Fla. Dist. Ct. App. 2011) (interpreting FLA. STAT. ANN. § 827.071(5)(a) (2024)), *superseded in part by statute*, FLA. STAT. ANN. § 827.071(b)(2) (2024).

57. *Parker*, 81 So. 3d at 453 (citing FLA. STAT. ANN. § 827.071(1)(g) (2024)).

58. *Id.* at 454 (citing *Stelmack v. State*, 58 So. 3d 874 (Fla. Dist. Ct. App. 2010)).

59. *Id.*

60. *Id.*

61. FLA. STAT. ANN. § 827.071(b)(2) (2024).

62. *Parker*, 81 So. 3d at 453–54.

63. *State v. Zidel*, 940 A.2d 255, 263 (N.H. 2008).



Explicit statutory bans on morphed CSAM also vary. Several statutes prohibit depictions where a child *appears to be* engaged in sexual conduct,<sup>64</sup> while others prohibit any portrayal where the child is *depicted as* engaged in such conduct.<sup>65</sup> While both versions address some images that are created without the physical abuse of a minor, it is unclear whether a minor “appears to be” engaged in sexual conduct when the content does not give the impression of actual engagement. In other words, is it a defense that morphed materials were not made skillfully? There is little or no case law suggesting that “appears to be” requires a viewer to have a reasonable impression that the child actually engaged in such conduct.<sup>66</sup> In Part III of this Note, I argue that whether this “appears to be” language includes unrealistic depictions hinges on how a court conceptualizes the harm of child pornography.<sup>67</sup>

### III. LEGISLATIVE APPROACHES AND UNDERSTANDING OF HARM

I argue that each of these approaches reflects a different understanding of the actual harm of child pornography. States that do not criminalize morphed CSAM limit the harm to that accompanying *physical* child exploitation as described in *Ferber*.<sup>68</sup> In doing so, these states ignore the manner in which CSAM harms subjects who were never physically involved in the abuse. States that criminalize only very realistic morphed CSAM recognize some nonphysical harm but define that harm primarily as reputational damage and potential difficulties in prosecuting “real” child pornography. Section 8(B) of the PROTECT Act, which criminalizes depictions “indistinguishable from” traditional child pornography,<sup>69</sup> also seems to adopt this view. The broadest approaches, which criminalize depictions of children engaged in sexual activity regardless of realism, define the harm of child pornography as the violation of

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64. See, e.g., HAW. REV. STAT. ANN. § 707-752 (2024); DEL. CODE ANN. tit. 11, § 1111(2) (West, Westlaw through ch. 3 of the 153rd General Assembly (2025-2026)); ALASKA STAT. § 11.61.127 (2020).

65. See, e.g., ARK. CODE ANN. § 5-27-602 (LEXIS through all legislation of the 2024 Fiscal Session and the Second Extraordinary Session (2024)); COLO. REV. STAT. § 18-6-403 (2)(j) (LEXIS through all 2024 legislation); CONN. GEN. STAT. § 53a-193(13) (2012); GA. CODE ANN. § 16-12-100.2 (LEXIS through 2024 Regular and Extraordinary Session of the General Assembly).

66. See, e.g., absence of cases interpreting HAW. REV. STAT. ANN. § 707-752 (2024), DEL. CODE ANN. tit. 11, § 1111(2) (West, Westlaw through ch. 3 of the 153rd General Assembly (2025-2026)), ALASKA STAT. § 11.61.127 (2020), and 18 U.S.C. § 2256(8)(C).

67. Other states have banned depictions only in highly specific contexts that seem to have no coherent approach regarding what harm is being prevented. Maryland, for example, criminalizes unrealistic depictions, but only if they are created by a computer, while the state of Arizona prohibits the use of a child’s likeness only if superimposed onto a sex doll. MD. CODE ANN., CRIM. LAW § 11-207 (West, Westlaw through all legislation from the 2024 Regular Session of the General Assembly); ARIZ. REV. STAT. ANN. § 13-3553 (West, Westlaw through legislation of the Second Regular Session of the Fifty-Sixth Legislature (2024), and includes Election Results from the November 5, 2024 General Election).

68. See *New York v. Ferber*, 458 U.S. 747, 757–58 (1982).

69. 18 U.S.C. § 2256(8)(B).

dignity inherent in the creation of these materials.<sup>70</sup> While each approach has strengths and weaknesses, the third approach best addresses the reality of CSAM and its impact on the subjects. As a result, states should work towards adding provisions to criminalize the depiction of an identifiable minor in pornographic materials.

*A. Approach #1: Harm Contemplated Under Ferber Framework*

All fifty states criminalize pornography created by the sexual exploitation of actual children.<sup>71</sup> The Supreme Court upheld this kind of depiction as entirely outside the protections of the First Amendment in *New York v. Ferber*.<sup>72</sup> The reasoning in *Ferber* applies to these materials more strongly than it applies to virtual or morphed CSAM or pornography made using younger-looking adults.<sup>73</sup> While some of the reasoning in *Ferber* could be extended to morphed CSAM, the opinion does not provide a framework for articulating the harm of these materials. As a result, states like Florida and New Hampshire continue to reject the idea that the state has an interest in proscribing these materials.<sup>74</sup>

The Court's first point, that the state has a compelling interest in protecting the physical and psychological wellbeing of children,<sup>75</sup> remains relevant to discussions of morphed CSAM because depiction in these materials can cause children significant psychological harm.<sup>76</sup> The harm contemplated in *Ferber*, however, rests largely on the Court's second point: that child pornography is intrinsically related to the actual sexual exploitation of children.<sup>77</sup> The production of these materials, rather than their viewing and distribution, is the harmful factor.<sup>78</sup> Digitally altered images can still serve as a "permanent record" of an individual's fantasies about a child, but they do not permanently record physical sexual abuse of the child. Here, the harm contemplated by the Court is unclear: is the child harmed by the ongoing reminder of a trauma that actually happened or by the very use of her image in an explicit manner? Standing alone, *Ferber* provides few answers. Similarly, the state's interest in prosecuting possession and distribution hinges on the harm associated with production.<sup>79</sup> If

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70. See Caleb Beacham, *Metamorphosis: Changing Oklahoma Law to Protect Children from Morphed Child Pornography*, 55 TULSA L. REV. 311, 332 (2020).

71. See NAT'L DIST. ATT'YS ASS'N, CHILD PORNOGRAPHY STATUTES (June 2010), <https://ndaa.org/wp-content/uploads/Child-Pornography-Statutory-Compilation-6-2010.pdf> [<https://perma.cc/KFM7-CBPN>].

72. *Ferber*, 458 U.S. at 757–58.

73. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250–51 (2002).

74. *Parker v. State*, 81 So. 3d 451, 453–54 (Fla. Dist. Ct. App. 2011); *State v. Zidel*, 940 A.2d 255, 263–65 (N.H. 2008).

75. *Ferber*, 458 U.S. at 756–57.

76. See Beacham, *supra* note 70, at 324.

77. *Ferber*, 458 U.S. at 759.

78. See Beacham, *supra* note 70, at 320–21.

79. *Ferber*, 458 U.S. at 761.

the harm associated with production is *only* the physical exploitation of a child, this reasoning is insufficient to prohibit morphed CSAM.

*Ferber's* fourth and fifth points, that child pornography has *de minimis* social value<sup>80</sup> and that its proscription is consistent with past jurisprudence,<sup>81</sup> remains true of morphed CSAM. Unlike the Shakespeare reenactments discussed in *Free Speech Coalition*,<sup>82</sup> the use of an actual minor's image to create sexually explicit materials has little artistic, literary, or scientific value. As in *Ferber*, "[t]he First Amendment interest is limited to that of rendering the portrayal somewhat more 'realistic' by utilizing . . . children."<sup>83</sup> Given the alternatives of virtual renderings and using youthful-looking adults, both explicitly granted constitutional protection in *Free Speech Coalition*,<sup>84</sup> it is likely that the Court's reasoning here extends just as readily to morphed images.

All of *Ferber's* points continue to provide a compelling reason to proscribe pornography made by means of physical sexual exploitation. The harm of physical sexual exploitation is well-recognized.<sup>85</sup> However, state approaches that only criminalize these materials ignore the psychological and reputational harm that accompanies the use of a minor's image in pornographic materials. While *Ferber's* reasoning does not foreclose a state's ability to prohibit morphed CSAM, it fails to articulate the specific harm that exempts these materials from First Amendment protection. Therefore, in order to protect children from morphed CSAM and its effects, states must base regulation on a more specific framework of harm.

#### B. *Approach #2: Morphed and Virtual CSAM as Harmful When Indistinguishable from Actual Child Pornography*

A second approach to morphed CSAM proscribes all materials that are virtually indistinguishable from depictions of real child sexual abuse. This includes virtual child pornography, which is made without the use of any minor's image,<sup>86</sup> and morphed CSAM, which is indistinguishable from real CSAM. Proponents of the indistinguishability standard cite two advantages. First, the standard aids in the prosecution of actual child sexual abuse by eliminating the defense that there is "reasonable doubt" as to whether the material depicts actual child abuse.<sup>87</sup> Thus, the standard helps prevent the same

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80. *Id.* at 762.

81. *Id.* at 763.

82. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 247 (2002).

83. *Ferber*, 458 U.S. at 763.

84. *Free Speech Coal.*, 535 U.S. at 257.

85. See, e.g., Joseph H. Beitchman et al., *A Review of the Long-Term Effects of Child Sexual Abuse*, 16 CHILD ABUSE & NEGLECT 101 (1992).

86. See *Free Speech Coal.*, 535 U.S. at 241.

87. Brian G. Slocum, *Virtual Child Pornography: Does It Mean the End of the Child Pornography Exception to the First Amendment?*, 14 ALB. L.J. SCI. & TECH. 637, 658–59 (2004).

harm that *Ferber* authorizes states to proscribe.<sup>88</sup> Second, the standard criminalizes materials that cause the most severe reputational harm to children by creating the impression that the child actually engaged in sexual conduct.<sup>89</sup> Because both of these justifications hinge on a strong resemblance to actual sexual activity, this framing of the harm would likely interpret “appears-to-be” statutes as criminalizing only materials that are indistinguishable from actual sexual abuse.

### 1. Prosecutorial Expediency

The prosecutorial-expediency argument closely mirrors Justices O'Connor's and Thomas's concurrences in *Free Speech Coalition*, which focus on the importance of enforcing prohibitions on actual child pornography and concede that it is up to the legislature to determine whether “indistinguishable” materials should be criminalized in order to reach that goal.<sup>90</sup> The congressional record suggests that this concern was front of mind when Congress enacted Section 8(C) of the PROTECT Act.<sup>91</sup> Under *Free Speech Coalition*, proponents of Section 8(C) worried, defendants could evade prosecution for offenses involving child pornography by arguing that some doubt exists as to whether the materials were created with or without the use of an actual minor.<sup>92</sup> As a result, the PROTECT Act broadened criminalization to include materials “indistinguishable” from depictions involving physical sexual abuse of a child,<sup>93</sup> unless defendants affirmatively prove that the depiction did not involve the use of any actual minor.<sup>94</sup> In creating the affirmative defense, Congress shifted the burden from the prosecution, who otherwise would be required to prove that the materials “involve[] the use of a minor engaging in sexually explicit conduct,”<sup>95</sup> to the defendant, who must now prove that the materials do *not* include an actual minor.<sup>96</sup>

88. *See id.*

89. *See, e.g.,* Stacey Steinberg, *Changing Faces: Morphed Child Pornography Images and the First Amendment*, 68 EMORY L.J. 909, 933 (2019) (“If a child is depicted as a victim of child pornography or a willing participant in a sexual encounter, she might face reputational . . . harm, including stigmatization and shame for years into the future.”).

90. *Free Speech Coal.*, 535 U.S. at 259 (Thomas, J., concurring); *id.* at 263–64 (O'Connor, J., concurring in part).

91. *The Child Abduction Prevention Act and The Child Obscenity and Pornography Prevention Act of 2003: Hearing on H.R. 1104 and H.R. 1161 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 108th Cong. 6 (2003) [hereinafter *Hearing on H.R. 1104 & H.R. 1161*] (statement of Daniel P. Collins, Associate Deputy Att'y Gen.) (“In the absence of . . . legislation . . . the Government cannot present cases where it cannot meet its affirmative burden of proving that the child depicted in a given image is real.”); *see also* Slocum, *supra* note 87, at 658.

92. *See* *Hearing on H.R. 1104 & H.R. 1161*, *supra* note 91.

93. 18 U.S.C. § 2256(8)(B).

94. *Id.* § 2252A(c).

95. *Id.* § 2256(8)(A).

96. *Id.* § 2252A(c).

The burden shift has been largely successful in allowing convictions for child pornography of which the government cannot prove how the materials were created or whether the defendant was aware of their nature.<sup>97</sup> Although defendants raise the affirmative defense, “few cases . . . suggest that the availability of this defense is anything more than a creative trial strategy.”<sup>98</sup> Around the time of the PROTECT Act’s passage, a flurry of scholarship criticized the First Amendment implications of the indistinguishability standard and the burden shift imposed by the affirmative defense.<sup>99</sup> As technology develops and virtual images improve, the presence of a realistic image becomes less and less convincing evidence that material constitutes actual child pornography.<sup>100</sup> As a result, the indistinguishability standard has the potential to sweep in virtual child pornography, which the Court held to be protected expression in *Free Speech Coalition*.<sup>101</sup> While the state has a compelling interest in prosecuting real child pornography, the presence of more narrowly tailored alternatives led some scholars to speculate that the PROTECT Act would be struck down on the same constitutional grounds as the CPPA.<sup>102</sup> As a result, criminalizing morphed and virtual child pornography as a method of preventing the harm of real child pornography (and addressing *only* the harm of real child pornography) yields serious constitutional questions.

## 2. Combating the Impression of Actual Engagement

While the PROTECT Act proscribes both indistinguishable virtual CSAM and morphed CSAM, other state law and proposed legislation attacks only the harm associated with realistic depictions of actual children engaged in sexual activity. Congressman Kean’s bill, H.R. 6466, responded to the incident at Westfield High by proposing that depictions created using AI be clearly labeled as such.<sup>103</sup> The proposal would not criminalize AI pornography involving identifiable minors (perhaps because, at least in some cases, such activity is already covered by the PROTECT Act)<sup>104</sup> but would instead address the harm

97. Gray, *supra* note 41, at 271.

98. *Id.*

99. See, e.g., Slocum, *supra* note 87; Timothy J. Perla, Note, *Attempting to End the Cycle of Virtual Pornography Prohibitions*, 83 B.U. L. REV. 1209 (2003). For a general critique of child pornography laws, see Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 210 (2001).

100. Perla, *supra* note 99, at 1224–25.

101. *Id.* at 1230 (citing *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 247 (2002)).

102. See Slocum, *supra* note 87, at 661–67 (predicting that the PROTECT Act will be struck down as unconstitutional); Perla, *supra* note 99, at 1231–35 (outlining a framework for prosecution of “attempted possession of child pornography” and describing how such a standard could accomplish prosecutorial goals without infringing on protected activity).

103. Press Release, Office of Congressman Tom Kean, Jr., Kean Takes Action to End AI Generated Deepfake Pornography (Jan. 16, 2024), <https://kean.house.gov/media/press-releases/kean-takes-action-end-ai-generated-deepfake-pornography> [https://perma.cc/J36J-8RD8].

104. See *supra* Part II (discussing possible ambiguity of “appears to be” language).

associated with viewers becoming persuaded that a depiction of a victim involves their actual engagement in sexual activity.<sup>105</sup> Another bill, part of a group of attempted reforms coming through Congress,<sup>106</sup> seeks to prohibit using deepfake technology to create intimate digital depictions of an individual without their consent.<sup>107</sup> However, the scope of the bill is limited to “realistic” depictions.<sup>108</sup> In a press conference on the importance of addressing AI pornography, bill supporters were clear that the current legislation was designed to prevent the reputational harm that comes with viewers believing that the subject was actually involved in the acts depicted.<sup>109</sup> At the state level, prohibitions on children engaging in “simulated” sexual conduct reflect the same logic: if a reasonable individual believes that a child engaged in sexual conduct, the simulation is harmful despite the absence of actual engagement.<sup>110</sup>

Proscribing indistinguishable materials certainly helps minors avoid the harm that comes with the convincing but false use of their image. However, the damage posed by morphed CSAM is not limited to the fact that viewers may believe the child actually engaged in the behavior. When the creator does not distribute the materials to others who may reach the impression of the child’s participation, or even explicitly disclaims the possibility of the child’s actual involvement, multiple United States circuit courts have held that the interests of an actual minor are still implicated.<sup>111</sup> Thus, the damage of morphed CSAM must go beyond the possibility of reputational harm. In Section III.C, I argue that the harm associated with morphed CSAM is rarely articulated in full by the courts. Scholars, judges, and legislators must view the harm of morphed CSAM as the inherent violation of human dignity that occurs when a child is depicted in a sexually explicit manner.

### *C. Approach #3: Morphed CSAM as a Violation of Human Dignity*

In states that proscribe even unrealistic depictions privately held by an individual who does not distribute them, none of the above frameworks justify proscription. No actual child sexual abuse occurs, no real child pornography

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105. See *supra* Part II (discussing possible ambiguity of “appears to be” language).

106. Solcyré Burga, *How a New Bill Could Protect Against Deepfakes*, TIME (Jan. 31, 2024, 4:34 PM), <https://time.com/6590711/deepfake-protection-federal-bill/> [https://perma.cc/3GA6-XWZR].

107. Preventing Deepfakes of Intimate Images Act, H.R. 3106, 118th Congress (2023).

108. *Id.*

109. Office of Congressman Tom Kean, Jr., *supra* note 103 (“Try to imagine the horror of receiving intimate images looking exactly like you—or your daughter, or your wife, or your sister—and you can’t prove it’s not.” (quoting Congressman Joe Morelle)).

110. *Parker v. State*, 81 So. 3d 451, 454 (Fla. Dist. Ct. App. 2011) (interpreting “simulated sexual intercourse” to mean materials that “cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera” (citing *United States v. Williams*, 553 U.S. 285, 297 (2008))).

111. See, e.g., *United States v. Hotaling*, 634 F.3d 725, 729 (2d Cir. 2011); *Doe v. Boland*, 698 F.3d 877, 883 (6th Cir. 2012) (upholding conviction where attorney created morphed images to show a jury how easily images can be morphed, clearly stating that the images were taken from innocent photographs).

could evade prosecution, no individual could become convinced that a child actually engaged in sexual activity, and no psychological damage will occur to a child who never learns of the image's existence. In fact, prosecution for possession of morphed CSAM could create psychological and reputational harm to the minor: in trial, a minor's image would be publicized to the jury rather than remaining with a single person, and the minor would become aware of the use of their own image for sexual gratification.<sup>112</sup>

What, then, justifies the risk of harming the subject to prosecute materials that otherwise would not directly impact them? In decisions upholding morphed pornography prohibitions, courts tend to gesture to the possibility of reputational harm and the fact that the materials "implicate the interests of real children" as mentioned by the Court in *Free Speech Coalition*.<sup>113</sup> However, few decisions elaborate on *what* interests the law seeks to protect given the absence of the harms listed above. While legal scholarship has taken steps to define and explain these interests, "no singular theory of the harm caused by morphed CSAM has been established" in court.<sup>114</sup> To address this, one thread of scholarship argues that when morphed CSAM exploits the image of a child, that child is made an object of sexual gratification in a manner that deprives them of basic human dignity.<sup>115</sup> Neither the exploitation nor the objectification of the child are contingent upon whether the subject actually experiences psychological or reputational damage. Because objectification is inherently harmful as a violation of human dignity, courts should adopt this approach to prohibit all pornographic materials that use the image of a real minor.<sup>116</sup>

Unlike most justifications for banning child pornography, the human-dignity approach is based on deontological reasoning: the morality of an action depends not on its consequences but on objective moral rules—among them the requirement not to use an individual solely as a means to an end.<sup>117</sup> Morphed CSAM violates "the child's inherent right of human dignity not to be viewed in

112. Perla, *supra* note 99, at 1225.

113. See, e.g., *United States v. Hotaling*, 634 F.3d 725, 729 (2d Cir. 2011); *United States v. Mecham*, 950 F.3d 257, 267 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020); *Doe v. Boland*, 698 F.3d 877, 883 (6th Cir. 2012); *United States v. Bach*, 400 F.3d 622, 630 (8th Cir. 2005); *United States v. Anderson*, 759 F.3d 891, 895 (8th Cir. 2014).

114. Beacham, *supra* note 70, at 334.

115. See, e.g., Audrey Rogers, *The Dignitary Harm of Child Pornography—From Producers to Possessors*, in *REFINING CHILD PORNOGRAPHY LAW: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCES* 165, 166 (Carissa Byrne Hessick ed., 2016); Suzanne Ost, *Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?*, 30 *LEGAL STUD.* 230, 241 (2010); ALISDAIR A. GILLESPIE, *CHILD PORNOGRAPHY: LAW AND POLICY* 2, 100 (2011) (all cited in Beacham, *supra* note 70, at 335).

116. When the victim experiences physical sexual exploitation, psychological harm, or reputational harm, these harms compound the violation of human dignity that occurs. I do not argue that the damage caused by materials created without the subject's knowledge is equivalent to the damages of other kinds of pornography—merely that the harm of these materials, even without the other forms of damage, is sufficient for the state to have a compelling interest in the proscription of the materials.

117. Jennifer M. Barrow & Paras B. Khandhar, *Deontology*, *STATPEARLS* (Aug. 8, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK459296> [https://perma.cc/9N8H-CZRJ].

this fashion,” treating them not as individuals but as objects to be deployed to a particular end.<sup>118</sup> In *Ferber*, the Court touched on this topic by describing “the individual interest in avoiding disclosure of personal matters.”<sup>119</sup> In cases of morphed CSAM, however, the interest is in the *use* of personal matters or images rather than their disclosure. This use violates the dignity of the child in the same way as disclosure, regardless of the absence of direct consequences—much like molestation of individuals who are unconscious.<sup>120</sup> Regardless of the harm inherent in the producer’s method of creating the material, the child has been exploited in a manner that the government has a compelling interest in preventing.<sup>121</sup>

The deontological idea that activities can be proscribed even without tangible negative consequences is already widespread in other areas of American law. Tort doctrine, for instance, does not require a victim to be injured or even conscious for a battery to occur.<sup>122</sup> In the United States, an individual’s body cannot be used for organ donation without that individual’s consent, even in the absence of family members who would be offended by such a violation.<sup>123</sup> Courts and legislatures have applied this logic even when First Amendment interests are implicated.<sup>124</sup> Death-scene and autopsy photographs, for instance, are typically protected from public distribution—despite the lack of direct harm to the deceased, the interest of the subject and his family in dignity and privacy tends to foreclose the public release of these images.<sup>125</sup> While the psychological damage imposed by the child’s eventual awareness is significant and well documented,<sup>126</sup> our society proscribes such activity even when the chances of a child learning of such treatment are nonexistent.<sup>127</sup> The idea of proscribing morphed CSAM based on human dignity alone, therefore, would not be inconsistent with existing First Amendment or criminal law doctrine.

## CONCLUSION

Because of the inherent violation of human dignity that occurs when any minor is used in CSAM, states ought to adopt an approach focused on preventing this violation in addition to the physical harm of actual child

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118. Rogers, *supra* note 115, at 177; *see also* Beacham, *supra* note 70.

119. *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982) (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

120. Rogers, *supra* note 115, at 177.

121. *Id.*

122. RESTATEMENT (SECOND) OF TORTS § 18 cmt. D (AM. L. INST. 1965).

123. UNIF. ANATOMICAL GIFT ACT (UNIF. L. COMM’N 2006).

124. Rogers, *supra* note 115, at 178.

125. *Id.*

126. *Id.* at 170–71.

127. *Id.*



pornography and the psychological damage accompanying distribution. Rather than focusing on the possibility of a child suffering direct harm, courts upholding statutes on morphed CSAM should draw from existing scholarship on human dignity to more clearly articulate why these images are harmful under all circumstances. Courts adopting this approach can consistently resolve the question of whether “appears to be” statutory language requires a realistic depiction because the realism of the image is not the sole source of its harm.

By understanding harm in this way and proscribing materials involving identifiable minors, legislatures can avoid the constitutional pitfalls that may come with adopting an indistinguishability standard and the harm that comes with proscribing only actual child pornography. In adopting this approach, we can protect both the First Amendment and the dignity of our children.

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