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Prosecuting the Simulacrum: Amendments to Sexual Exploitation Laws Address AI Images

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Child pornography (also known as child sexual abuse material, “CSAM”) is a category of speech that is not protected by the First Amendment to the United States Constitution, so long as the images depict actual minors engaged in sexual activity. State laws criminalizing the creation, distribution, and possession of child pornography have been upheld in North Carolina on this basis. Responding to a growing concern over generative AI, however, the legislature recently amended these laws to cover material created, adapted, or modified by technological means, including artificial intelligence. **S.L. 2024-37**. This post examines the scope of these amendments.

The First Amendment Context

The First Amendment to the U.S. Constitution guarantees, among other things, freedom of speech. **U.S. Const. Amend. 1**. The First Amendment has been applied to the states through the due process clause of the Fourteenth Amendment. In general, obscenity is not a constitutionally protected form of expression. See **Roth v. United States**, 354 U.S. 476 (1957). Likewise, child pornography is not entitled to protection under the First Amendment. **New York v. Ferber**, 458 U.S. 747, 764 (1982).

These categories – obscenity and child pornography – are separate and distinct. The three-part test for *obscenity* is whether (1) the average person would find the work appeals to the prurient interest, (2) the work depicts or describes sexual conduct in a patently offensive way, and (3) the work lacks serious literary, artistic, political, or scientific value. **Miller v. California**, 413 U.S. 15, 24 (1973). For *child pornography*, the State need not prove the material appeals to the prurient interest or that the sexual conduct is portrayed in a patently offensive manner.

Ferber, 458 U.S. at 764. Rather, the State must establish only that the material depicts actual minors engaged in sexual activity. **Ashcroft v. Free Speech Coalition**, 535 U.S. 234, 251 (2002).

Though neither obscenity nor child pornography are protected forms of speech, nor are they entirely subject to regulation. While it is permissible to prohibit the dissemination or exhibition of obscenity, the private *possession* of obscene material may not be criminalized. **Stanley v. Georgia**, 394 U.S. 557, 568 (1969). It is permissible to criminalize the possession or solicitation of child pornography. **United States v. Williams**, 553 U.S. 285, 299 (2008) (solicitation); **Osborne v. Ohio**, 495 U.S. 103, 111 (1990) (possession). But a statute that proscribes the possession or distribution of *virtual* child pornography, including computer-generated images of children who do not exist, sweeps too broadly. **Ashcroft**, 535 U.S. at 251; cf. **State v. Howell**, 169 N.C. App. 58, 66 (2005).

Sexual Exploitation Laws Before 2024

In North Carolina, the creation and distribution of child pornography has been a crime since 1985. See **State v. Fletcher**, 370 N.C. 313, 320 (2017). In general, a person commits first degree sexual exploitation of a minor by facilitating a minor (defined as a person under 18 years old) to engage in sexual activity, either for live performance or for the purpose of producing material that contains a visual representation depicting this activity. G.S. **14-190.16**. Duplication or distribution of such material is second degree sexual exploitation of a minor. G.S. **14-190.17**. As of 1989, the knowing possession of such material is third degree sexual exploitation of a minor. G.S. **14-190.17A**. For purposes of these statutes, the term “material” was defined – until 2024 – as pictures, drawings, video recordings, films or other visual depictions or representations. G.S. **14-190.13**(2) (2023).

For purposes of these statutes, the term “sexual activity” is defined to include not only intercourse and masturbation but also “the lascivious exhibition of the genitals or pubic area.” G.S. **14-190.13**(5)g. The term “lascivious” means “tending to arouse sexual desire.” **State v. Corbett**, 264 N.C. App. 93, 100 (2019). Whether a minor’s display of the pubic area constitutes sexual activity depends on the circumstances. Compare **State v. Shelton**, 293 N.C. App. 154, 159 (2024) (material depicted sexual activity that showed minor sitting fully nude with her legs apart displaying pubic area); with **State v. Ligon**, 206 N.C. App. 458, 469 (2010) (material did not depict sexual activity that showed minor pulling up the leg of her shorts with her hand in proximity to crotch area).

These statutes have been upheld against constitutional challenges. Their references to a visual representation of a minor, the Court of Appeals said, pertain to “a representation of a live person under 18 years of age.” **Cinema I Video, Inc. v. Thornburg**, 83 N.C. App. 544, 566 (1986), *aff’d*, 320 N.C. 485 (1987). Indeed, to criminalize the constitutionally unprotected category of child pornography, the State is required to show the involvement of an actual minor in sexual activity. Under the statutes as they existed before the 2024 amendments (discussed more fully below), “when the minor depicted in an image appears to have been shown as engaged in sexual activity as the result of digital manipulation, the defendant has not committed the offense of first-degree sexual exploitation of a minor.” **State v. Fletcher**, 370 N.C. 313, 322 (2017).

2024 Amendments to Sexual Exploitation Laws

The legislature amended the pertinent statutes in 2024. See **S.L. 2024-37**. First, the term “material” was redefined to include not only pictures, drawings, and videos, but also other depictions or representations, “including digital or computer-generated visual depictions or representations created, adapted, or modified by technological means, such as algorithms or artificial intelligence.” G.S. **14-190.13**(2). This new definition of “material” modifies the preexisting offenses.

Second, the legislature expanded first, second, and third degree sexual exploitation to include additional acts with material “created, adapted, or modified to appear that an identifiable minor is engaging in sexual activity.” G.S. **14-190.16**(a)(5); **14-190.17**(a)(2); **14-190.17A**(a). The term “identifiable minor” is defined as an individual who (1) was a minor when the material was created or when the source image was taken, and (2) is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic. G.S. **14-190.13**(1e). The term “identifiable minor” does not, however, require proof of the actual identity of the minor. **Id.** Material “created, adapted, or modified to appear that an identifiable minor is engaging in sexual activity” could include images of an actual minor downloaded from social media and altered by AI to produce a visual depiction of the child engaging in sexual activity, such as reported in this article from **NBC**.

Third, the legislature created a new offense, “obscene visual representation of sexual exploitation of a minor,” under G.S. 14-190.17C. That statute makes it a Class E felony for a person knowingly to produce, distribute, receive, or possess with intent to distribute material that (1) depicts a minor engaged in sexual activity, and (2) is obscene. G.S. **14-190.17C**(a). The same statute makes it a Class H felony for a person knowingly to possess such material. **Id.** at (b). The term “obscene” is

defined consistently with *Miller*. G.S. **14-190.13**(3a). And “[i]t is not a required element of any offense under this section that the minor depicted actually exist.” G.S. **14-190.17C**(c). This statute apparently represents North Carolina’s first attempt to regulate entirely virtual child pornography (though North Carolina is part of a national trend among states in doing so, as documented [here](#)).

Prosecuting Sexual Exploitation After the 2024 Amendments

As noted above, North Carolina’s sexual exploitation laws have been upheld against constitutional challenges, at least insofar as the material that forms the basis of the prosecution depicts actual minors. The 2024 amendments to these statutes that account for representations created, adapted, or modified by technological means, including AI, could give rise to new challenges under the First Amendment. Prosecutors seeking to prove sexual exploitation under the new definition of “material” should ensure they are familiar with the categories of unprotected speech under *Miller* and *Ashcroft* (noted above) and be prepared to defend the statutes as amended.

Since child pornography involving actual minors is unprotected by the constitution, the additions pertaining to identifiable minors should survive First Amendment scrutiny. Defining “identifiable minor” as one “recognizable as an actual person,” the legislature seems to have brought such material within the ambit of what may constitutionally be criminalized under *Ferber* and *Ashcroft*. Still, even if the offenses involving identifiable minors do not require proof of the minor’s actual identity, it may be difficult in some cases to prove that the material depicts an actual person less than 18 years old without some evidence of who that person is and when the image was taken.

The new offense regarding obscene visual representation raises a number of difficult questions. Again, the possession of child pornography involving actual minors is not protected by the First Amendment, but the mere possession of obscenity that does not constitute child pornography is. Section 14-190.17C criminalizes the production, distribution, and possession of obscene material depicting a minor engaging in sexual activity, with no requirement to prove the minor depicted actually exists. If the State can establish the material depicts an actual minor, prosecutors would be advised to consider charging sexual exploitation in lieu of a violation of G.S. 14-190.17C.