
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: SB 933 **Hearing Date:** March 19, 2024
Author: Wahab
Version: January 16, 2024
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Crimes: child pornography*

HISTORY

Source: Author

Prior Legislation: SB 145 (Pavley), Ch. 777, Stats. 2013
SB 203 (Harman), held Assem. Approps., 2010
AB 442 (Parra), held Sen. Public Safety, 2007
AB 235 (Tran), held Sen. Public Safety, 2007
SB 1238 (Battin), held Sen. Public Safety, 2006
SB 588 (Runner), failed Sen. Public Safety, 2005
SB 1499 (Liu) Ch. 751, Stats. 2004
AB 39 (Runner), failed Assem. Public Safety, 2003
AB 1012 (Corbett), Ch. 559, Stats. 2001
SB 927 (Honeycutt), Ch. 55, Stats. 1994
AB 2701 (Costa), Ch. 874, Stats. 1994
AB 2233 (Polanco), Ch. 1180, Stats. 1989

Support: Arcadia Police Officers' Association; Burbank Police Officers' Association; California Baptist for Biblical Values; California Coalition of School Safety Professionals; California District Attorneys Association; California Narcotic Officers' Association; California Reserve Peace Officers Association; California State Sheriffs' Association; Children's Advocacy Institute; Claremont Police Officers Association; Common Sense; Concerned Women for America; Corona Police Officers Association; Culver City Police Officers' Association; Deputy Sheriffs' Association of Monterey County; Fullerton Police Officers' Association; Los Angeles School Police Management Association; Los Angeles School Police Officers Association; Murrieta Police Officers' Association; Newport Beach Police Association; Novato Police Officers Association; Palos Verdes Police Officers Association; Placer County Deputy Sheriffs' Association; Pomona Police Officers' Association; Real Impact; Riverside Police Officers Association; Riverside Sheriffs' Association; Roblox Corporation; SAG-AFTRA, AFL-CIO; Santa Ana Police Officers Association; Upland Police Officers Association

Opposition: None known

PURPOSE

The purpose of this bill is to specify that computer-generated images, for purposes of statutes that criminalize child pornography, include images generated through the use of artificial intelligence (AI).

Existing law prohibits, except as provided, the act of knowingly sending or bringing into this state for sale or distribution, or possessing, preparing, publishing, producing, developing, duplicating, or printing in this state any representation of information, data, or image including among a non-exhaustive list of types of medium, computer-generated images, that contains or incorporates in any manner, any film or filmstrip, with the intent to distribute, exhibit or exchange with others any obscene matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct, as defined. (Pen. Code, § 311.1, subd. (a).)

Existing law prohibits, except as provided, the act of knowingly sending or bringing into this state for sale or distribution, or possessing, preparing, publishing, producing, developing, duplicating, or printing in this state any representation of information, data, or image, including among a non-exhaustive list of types of medium, computer-generated images, that contains or incorporates in any manner, any film or filmstrip, with intent to distribute, exhibit or exchange with others for commercial consideration, any obscene matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct. (Pen. Code, § 311.2, subd. (b).)

Existing law prohibits, except as provided, the act of knowingly sending or bringing into this state for sale or distribution, or possessing, preparing, publishing, producing, developing, duplicating, or printing in this state any representation of information, data, or image, including among a non-exhaustive list of types of medium, computer-generated images that contains or incorporates in any manner, any film or filmstrip, with intent to distribute, exhibit or exchange with a person 18 years of age or older, any matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct. (Pen. Code, § 311.2, subd. (c).)

Existing law prohibits, except as provided, the act of knowingly sending or bringing into this state for sale or distribution, or possessing, preparing, publishing, producing, developing, duplicating, or printing in this state any representation of information, data, or image, including among a non-exhaustive list of types of medium, computer-generated images, that contains or incorporates in any manner, any film or filmstrip, with intent to distribute or exhibit to, or to exchange with, a person under 18 years of age, any matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct. (Pen. Code, § 311.2, subd. (d).)

Existing law makes a person, except as provided, guilty of sexual exploitation of a child if the person knowingly develops, duplicates, prints, or exchanges any representation of information, data, or image, including among a non-exhaustive list of types of medium, computer-generated images, that contains or incorporates in any manner, any film or filmstrip that depicts a person under the age of 18 years engaged in an act of sexual conduct, as defined. (Pen. Code, § 311.3, subd. (a).)

Existing law prohibits, except as provided, a person who, with knowledge that a person is a minor, or who, while in possession of any facts on the basis of which they should reasonably know that the person is a minor, hires, employs, or uses the minor to participate in the production, distribution or exhibition of child pornography in violation of Penal Code section 311.2. (Pen. Code, § 311.4, subd. (a).)

Existing law prohibits, except as provided, a person who, knows that a person is a minor under the age of 18 years, or who should reasonably know that the person is a minor under the age of 18 years, knowingly promotes, employs, uses, persuades, induces, or coerces a minor under the age of 18 years to engage in or assist others to engage in either posing or modeling alone or with others for purposes of preparing any representation of information, data, or image, including among a non-exhaustive list of types of medium, computer-generated images, that contains or incorporates in any manner, any film, filmstrip, or a live performance involving sexual conduct by a minor for commercial purposes. (Pen. Code, § 311.4, subd. (b).)

Existing law prohibits, except as provided, a person who, with knowledge that a person is a minor under the age of 18 years, or who, while in possession of any facts on the basis of which he or she they should reasonably know that the person is a minor under the age of 18 years, knowingly promotes, employs, uses, persuades, induces, or coerces a minor under the age of 18 years to engage in either posing or modeling alone or with others for purposes of preparing any representation of information, data, or image, including among a non-exhaustive list of types of medium, computer-generated images, that contains or incorporates in any manner, any film, filmstrip, or a live performance involving, sexual conduct by a minor under the age of 18 years alone or with other persons or animals. (Pen. Code, § 311.4, subd. (c).)

Existing law prohibits, except as provided, a person from knowingly possessing or controlling any matter, representation of information, data, or image, including among a non-exhaustive list of types of medium, computer-generated images, that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under 18 years of age, knowing that the matter depicts a person under 18 years of age personally engaging in or simulating sexual conduct. (Pen. Code, § 311.11, subd. (a).)

Existing law states, except as provided, that any city, county, city and county, or state official or agency in possession of matter that depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct is subject to forfeiture. (Pen. Code, § 312.3, subd. (a).)

Existing law defines “sexual conduct” to mean “any of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina or rectum by any object in a lewd or lascivious manner, exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer, any lewd or lascivious sexual act as defined in Section 288, or excretory functions performed in a lewd or lascivious manner, whether or not any of the above conduct is performed alone or between members of the same or opposite sex or between humans and animals. An act is simulated when it gives the appearance of being sexual conduct.” (Pen. Code, § 311.4, subd. (d)(1).)

Existing law defines “matter” to mean “any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation, or any statue or other figure, or any recording, transcription or mechanical,

chemical or electrical reproduction, or any other articles, equipment, machines, or materials. “Matter” also means any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated-image that contains or incorporates in any manner any film or filmstrip. (Pen. Code, § 312.3, subd. (h).)

This bill includes an image generated through the use of AI as a computer-generated image in the above statutes.

COMMENTS

1. Need for This Bill

According to the author of this bill:

Our laws need to keep up with technology. New artificial intelligence (AI) tools allow anyone to create convincing images by typing a short description of what they want to see, and users have quickly found workarounds to previously established safeguards to protect children. The landscape of possibilities presented by artificial intelligence is changing rapidly. We must protect children from new forms of violations and ensure perpetrators are held responsible and accountable for their actions. As technology evolves, our laws must keep up to ensure children are safe

2. Background: Child Pornography

Existing law criminalizes any person who distributes, exhibits, possesses, prepares, publishes, produces, develops, duplicates, or prints any matter that depicts a person under 18 years of age personally engaging in or simulating sexual conduct. (Pen. Code, § 311.11.) Sexual conduct, for these purposes, is defined as “any of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina or rectum by any object in a lewd or lascivious manner, exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer, any lewd or lascivious sexual act as defined in Section 288, or excretory functions performed in a lewd or lascivious manner, whether or not any of the above conduct is performed alone or between members of the same or opposite sex or between humans and animals. An act is simulated when it gives the appearance of being sexual conduct.” (Pen. Code, § 311.4, subd. (d)(1).) Penalties for violating existing laws on child pornography range from one-year county jail misdemeanors to state-prison felonies.

Until 1994, child pornography was defined to mean depictions of children under the age of 14 engaged in a sexual conduct. In 1994, child pornography was defined as depicting any person under the age of 18 years. (AB 927 (Honeycutt), Ch. 55, Stats. 1994.)

However, when the age standard for child pornography was set to include images of any minor, the definition of “sexual conduct” did not change. That definition is broad enough to include not only graphic depictions of sexual intercourse, oral copulation and sodomy, but also what could be characterized sexually oriented posing. Thus, the range of prohibited depictions makes it difficult to assess exactly what a “child pornography” conviction means in any particular

instance since child pornography can range from the most graphic depiction of the rape of a prepubescent child possessed by an adult to a nude image of a 17-year old possessed by another minor.

3. First Amendment Considerations

The First Amendment to the United States Constitution states: “Congress shall make no law . . . abridging the freedom of speech” This fundamental right is applicable to the states through the due process clause of the Fourteenth Amendment. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal. 4th 121, 133-134, citing *Gitlow v. People of New York* (1925) 268 U.S. 652, 666.) Article I, section 2, subdivision (a) of the California Constitution provides that: “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.” It is a fundamental tenant of First Amendment law that speech cannot be prohibited merely because someone justifiably finds it offensive and objectionable. (See e.g. *Cohen v. California*, (1971) 403 U.S. 15, 22; *Virginia v Black* (2003) 538 U.S. 343, 358.)

Speech can come in all forms of expression, including but not limited to, words both written and spoken, actions, symbols, clothing, art, donations, images, movies, videos, and online posts.

While these guarantees are stated in broad terms, “the right to free speech is not absolute.” (*Aguilar v. Avis Rent A Car System, Inc.*, supra, 21 Cal. 4th at p. 134, citing *Near v. Minnesota* (1931) 283 U.S. 697, 708; and *Stromberg v. California* (1931) 283 U.S. 359.) Courts have recognized that there are categories of speech that are not protected under the First Amendment, such as soliciting a bribe (Pen. Code, § 653f), perjury (Pen. Code, § 118), or making a terrorist threat (Pen. Code, § 422). As discussed further below, obscenity and child pornography have also been held to fall outside the protections of the First Amendment. (*Roth v. United States* (1957) 354 U.S. 476 and *New York v. Ferber* (1982) 458 U.S. 747.)

a. Indecent Materials, Obscenity, and Child Pornography

Indecent speech, which can include pornography and other sexually explicit speech, is not inherently obscene and thus is generally protected speech under the First Amendment. (*Sable Communications of Cal. v. FCC* (1989) 492 U.S. 115, 126.) The U.S. Supreme Court has laid out the following test to determine whether speech is obscene requires “(a) whether the average person, applying contemporary community standards, not national standards, would find that the work appealed to the prurient interest, (b) whether the work depicted sexual conduct defined by state law, and (3) whether the work lacked serious literary, artistic, or scientific value.” (*Miller v. California* (1973) 413 U.S. 15, 24.)

While pornography that is not obscene is protected speech under the First Amendment, child pornography is a different matter. The Supreme Court has recognized that a state may legitimately sanction activities which amount to harmful conduct rather than “pure speech,” particularly when the conduct in question involves the use of children to make sexual material. (*Ferber, supra*, 458 U.S. at pp. 770-771.) The “prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” (*Id.* at p. 757.) The use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. (*Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, 757; *Osborne v. Ohio* (1990) 495 U.S. 103, 109.) Thus, “pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller v.*

California.” (*Free Speech Coalition, supra*, 535 U.S. at p. 240, *citing Ferber, supra*, 458 U.S. at p. 764.)

Due to the differences of how these categories of speech are treated under the First Amendment, obscene speech and child pornography may be banned based on its content, whereas indecent speech cannot be outright banned but may be regulated by the government which has a substantial interest in protecting morals and public order in society. (*Barnes v. Glen Theater, Inc.* (1991) 501 U.S. 560, 569.) Generally, laws that are content neutral face intermediate scrutiny, while laws that are content based are presumptively invalid and face strict scrutiny, a higher standard. (*Turner Broadcasting System v. Federal Communication Commission* (1994) 512 U.S. 622.) A content-based restriction means that the regulation restricts a specific subject matter, in this case sexually explicit speech. Thus, the standard by which the court would allow such a regulation to be upheld is strict scrutiny which requires a showing that the restriction is necessary to serve a compelling state interest. (*Sable Communications of California, supra*, at p. 126.) Thus, regardless of how important the state interest, the regulation of indecent speech must still be precise enough to achieve the purpose the regulation is intended to serve. (*Reno v. ACLU* (1977) 521 U.S. 844, 874.)

b. Relevant Court Cases

This bill adds images generated by AI to the existing statutes that criminalize child pornography and obscene matter. Specifically, these statutes criminalize the possession, distribution, exchange or production of any matter, representation of information, data, or image, including but not limited to a list of medium, such as computer-generated images, that may be used to distribute or exhibit matter that contains or incorporates materials involving the use of a person under the age of 18 years old personally engaging in or simulating sexual conduct. This bill specifies that computer-generated images include images generated by AI.

While AI encompasses a broad range of images which may be real or fabricated, when applied in the context of existing child pornography statutes, the image must be of a real minor in order to pass constitutional scrutiny. In *Free Speech Coalition, supra*, the U.S. Supreme Court declared unconstitutional a federal law that defined child pornography to include visual depictions that appear to be of a minor, even if no minor was actually used. (535 U.S. 234.) The government argued that while real children were not harmed in the production of the materials, the materials could still lead to abuse of real children by pedophiles who “whet their own sexual appetites” with such materials. (*Id.* at p. 241.) Additionally, the government argued that as imaging technology improves, it becomes more difficult to prove that a particular picture was produced using actual children. (*Id.* at 242.) The Court found these arguments were insufficient reasons to treat virtual child pornography the same as child pornography made with a real minor. In *Ferber, supra*, the Court found that the production and distribution of child pornography are “intrinsicly related” to the sexual abuse of the child because the material acts as a permanent record of the child’s abuse and the circulation of the material would harm the child’s reputation and emotional well-being. (*Id.* at p. 249.) The Court distinguished the harm in virtual child pornography created without using a real minor because it is not a recording of a criminal act nor is there continuing harm on a child victim by the distribution of the materials. (*Id.* at p. 250.)

The *Free Speech Coalition* ruling, albeit in dicta, did comment on the difference between pure virtual images versus morphing images where innocent pictures of real children are altered so that the children appear to be engaged in sexual activity. “Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children

and are in that sense closer to the images in *Ferber*. Respondents do not challenge this provision, and we do not consider it.” (*Id.* at p. 242.)

In *U.S. v. Hotaling* (2002), 599 F.Supp.2d 306, the Northern District Court of New York, relying on dicta from the *Free Speech Coalition* case, as well as other district court and U.S. appellate court cases, held that criminalizing morphed images of child pornography created without the filming or photography of actual sexual conduct on the part of the identifiable minor does not violate the First Amendment. (*Id.* at p. 321.) “An image of an identifiable, real child involving sadistic conduct -- even if manipulated to portray conduct that was not actually inflicted on that child -- is still harmful, and the amount of emotional harm inflicted will likely correspond to the severity of the conduct depicted.” (*Id.* at p. 320, citing *U.S. v. Hoey* (1st Cir. 2007) 508 F.3d 687, 693.) *Hotaling* also cited similar reasoning which was used by another appellate court in holding that an image in which the face of a known child was transposed onto the naked body of an unidentified child in a lascivious pose constituted child pornography outside the scope of the First Amendment protections. (*Id.* at p. 319, citing *U.S. v. Bach* (8th Cir. 2005) 400 F.3d 622.)

In contrast, a California appellate court held that the possession of morphed images, while morally repugnant, does not fall outside the protection of the First Amendment. (*People v. Gerber* (2011) 196 Cal.App.4th 368, 386.) The court looked at Legislative history of previously enacted statutes that contain the same language -- “personally engaging in or personally simulating sexual conduct” -- and found that it is “clear that the purpose of that legislation was to prevent exploitation of children used to make child pornography.” (*Id.* at p. 380, citing Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1580 (1977-1978 Reg. Sess.) as amended Aug. 18, 1977, p. 1.) The court also noted that at the time that the Legislature enacted the crime of possession of child pornography, the term “child pornography” had a particular meaning under *Ferber, supra*. Specifically, not only must the offender have known that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct, production of the matter must have “involve[d] the use of a person under the age of 18 years...” (*Id.* at p. 382, citing *Ferber, supra*, 458 U.S. 747, and Cal. Pen. Code, § 311.11.)

Thus, *Gerber* held that “it would appear that a real child must have been used in the production and actually engaged in or simulated the sexual conduct depicted.” (*Id.* at p. 382.) The court acknowledged the dicta in *Free Speech Coalition* on morphed images, however, held that such altered materials are closer to virtual child pornography than to real child pornography because the act does not necessarily involve sexual exploitation of an actual child. (*Id.* at p. 386.) Relying on the rationales laid out in both *Ferber, supra* and *Free Speech Coalition*, the court emphasized that “*Ferber’s* judgment about child pornography was based upon how it was made, not on what it communicated and *Ferber* reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.” (*Id.* at p. 385, citing *Free Speech Coalition, supra*, 535 U.S. at pp. 250-251.)

As stated above, this bill includes images generated by the use of AI to computer-generated images in existing statutes that prohibit obscene matter and child pornography. In a literal sense, an AI image is a type of computer-generated image so this bill could be interpreted to merely clarify existing law. To the extent that this bill may be interpreted to expand existing law to images not explicitly covered, such as applying to morphed images of child pornography, case law is not clear on where the constitutional line should be drawn. Whether such expanded application of this bill passes First Amendment scrutiny is ultimately up to the courts.

4. Argument in Support

According to Concerned Women for America:

Child pornography is a root cause of sexual child abuse and child sex trafficking. With AI technology, pornography filmmakers can create new and ever-increasing pictures, images, and videos of children engaging in or simulating sexual acts. Such images dehumanize children and transforms them into objects for abuse. (Fn. omitted.)

It is well documented that viewing pornography, of any type, eventually ceases to satisfy the viewer and increases the likelihood of engaging in the fantasized behavior. Child pornography normalizes and legitimizes the sexual interest in minors. SB 933 takes a bold step in protecting children from artificial intelligent software or computer-generated depictions of children being sexually exploited.

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