

Comparative Analysis of Child Pornography Laws between China and the US: Suggestions for the Revision of Chinese Criminal Law Based on a Systematic Literature Review

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Abstract. Child pornography poses significant risks to children's well-being and safety, with the proliferation of digital platforms exacerbating its accessibility and prevalence. This paper conducts a comparative analysis of child pornography laws in the United States and China, highlighting key differences in definitions, enforcement measures, and protection of children's rights. While the US legal system has made strides in addressing child pornography through stringent penalties and protective measures, China's legal framework exhibits deficiencies, relying on outdated regulations and lacking specific provisions for combating this crime effectively. Recommendations for revising Chinese criminal law include clarifying the concept of child pornography, strengthening legal protections for children's rights, expanding regulations to cover possession and virtual child pornography, and enhancing victim protection measures in criminal proceedings. Aligning with international standards and enhancing enforcement mechanisms can improve China's ability to combat child pornography, safeguard children's rights, and create a safer online environment. Adapting legal frameworks to address evolving digital threats is crucial in ensuring the protection and well-being of vulnerable individuals, particularly children, in today's digital age.

Keywords: Child pornography; Criminal regulation; Legislative proposal.

1. Introduction

Providing special protection for children in the legal realm is vital. Due to their vulnerability and limited ability to comprehend the consequences of their actions, children are at higher risk of exploitation and harm, especially in cases of sexual abuse and exploitation [1]. Therefore, there need to be specific provisions to safeguard children from abuse, prevent crimes like child pornography, and promote a safe environment for their well-being, which also aim to prevent long-term negative effects on children's mental health and social development [1].

People have grown accustomed to utilizing the internet for everything from banking to shopping, making child pornography more accessible than ever [2]. Prior to the internet, child pornography was mostly distributed physically and could be limited to some extent by national regulatory measures. However, with the proliferation of information, popular media and online technologies have evolved significantly, allowing massive volumes of content to be stored with a single link [3]. Pornographic crime tendencies have altered as computers and the internet have been more widely used. The increased bandwidth and developments in file compression technology have made it easier to upload and download photographs and videos. The introduction of peer-to-peer (P2P) technology has sped up the distribution of pornography by allowing users to share resources stored on their hard drives and provide downloading services via protocols such as Gnutella. Palisade Systems conducted research in February 2003, collecting 22 million search requests on Gnutella over three weeks and analyzing a random sample of 40,000, and discovered that 42% of searches contained keywords related to adult or child pornography [4]. Furthermore, the unpredictable nature of click-to-share technology has required authorities to constantly improve their technical skills, greatly increasing the challenge of oversight. These products have created a low-cost underground commerce network motivated by profit, making child pornography a constant and unavoidable presence [3].

Child pornography is universally condemned, both socially and legally. Many nations across the world ban a variety of child pornography-related activities, “including production (actual abuse), manufacture or distribution, sale, purchase, receipt, and possession” [1]. In the last twenty years, the United States has notably heightened penalties associated with creating, disseminating, and possessing child pornography, leading to a marked escalation in the prosecution rates for such offenses. Additionally, prosecuting individuals involved in child pornography is increasingly seen as a means to safeguard children from sexual abuse [1]. However, in China, research findings in legal studies concerning pornography are scarce, primarily focusing on defining pornography and regulating obscenity. There is a notable lack of research on the criminal regulation of child pornography from the perspective of safeguarding children's rights [5]. Presently, the Chinese criminal law inadequately addresses crimes related to child pornography, as it continues to rely on outdated regulations for general obscenity offenses. The existing criminal law regulations are outdated and fail to recognize the unique nature of child pornography, thus ineffective in combating such crimes and protecting children's rights adequately in the face of the social harms posed by child pornography in the current online environment [6].

This article will utilize literature analysis and comparative research methods. Based on a detailed study of Chinese and American literature, it will analyze the challenges faced by Chinese and American laws in regulating child pornography. Furthermore, this article will refer to the legislative approach in the United States to improve China's criminal regulation of child pornography.

2. Legal Definition of Child Pornography

2.1. Child Pornography in US Law

In 1973, the landmark Miller case by the US Supreme Court introduced a significant ruling that remains pivotal in identifying obscene publications. This decision established a tripartite test for categorizing materials as obscene: evaluating whether the average person, applying community standards, would perceive the work as appealing to a "prurient interest" (known as the Roth test); assessing if the work presents sexual conduct in an offensive manner according to state law standards; and determining if the work lacks any literary, artistic, political, or scientific value. Following the Miller ruling, the legal standing on pornography emphasizes that, essentially, pornographic material is protected under the first Amendment unless it meets the criteria of being obscene [7]. Furthermore, federal criminal restrictions solely address the dissemination of obscene materials, while the possession of such materials for personal use is safeguarded under privacy rights and remains beyond legislative constraints. While American law acknowledges that freedom of speech applies to standard pornography, the treatment of child pornography is markedly distinct. In the 1982 case of *New York v. Ferber*, the Supreme Court determined that even if child pornography does not meet the criteria of obscenity under the Miller test, it is not entitled to the protection of freedom of speech [7]. In line with the court's stance, even if certain materials do not meet the definition of "obscenity" based on the Miller test, depicting children in pornographic content is considered harmful to their physical, emotional, and psychological well-being, thereby justifying prohibition [8].

In 2003, the United States Congress passed the "Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act," which imposed further restrictive provisions regarding virtual depictions in relation to child pornography [4]. According to 18 U.S. Code § 2256 (8) (A)-(C), "child pornography" refers to any visual depiction of child sexual conduct, including photographs, films, videos, pictures, computer-generated images, or graphics, regardless of the method of production, whether electronic, mechanical, or in any other form, and regardless of the manner of production, whether created, modified, or edited [9]. Therefore, if the court, through scientific and technological analysis, cannot ascertain that the images claimed by the defendant are computer-generated depictions of children engaging in explicit sexual conduct, these images will still be classified as child pornography.

The United States and the Convention on the Rights of the Child define a child as any person under the age of eighteen [2].

2.2. Child pornography in Chinese Criminal Law

Currently, Article 367, Paragraph 1 of the Chinese Criminal Law describes the scope of obscene materials, providing a unified standard for identifying obscene materials in China [6]. According to Article 367, Paragraph 1 of the Chinese Criminal Law: "The term 'obscene materials' as used in this Law refers to specific portrayals of sexual conduct or explicit promotion of pornography in obscene books, films, videotapes, audio recordings, images, and other obscene materials" [9]. However, this provision does not include specific regulations regarding the concept of child pornography, and in judicial practice, there is a lack of specific and operational provisions in this area [6].

In the "Interpretation on Several Issues Concerning the Specific Application of Law in Handling Criminal Cases Involving the Production, Duplication, Publication, Sale, and Dissemination of Obscene Electronic Information Utilizing the Internet, Mobile Communication Terminals, and Voice Messaging Services" issued by the Supreme People's Court and the Supreme People's Procuratorate in 2004, it is defined as "obscene electronic information depicting sexual conduct of individuals under the age of eighteen". In the 2010 "Interpretation II," it is defined as "content containing obscene electronic information involving individuals under the age of fourteen" [5].

2.3. Comparative Analysis

Child pornography legislation in the United States is covered by numerous bills, not only in criminal law. In China, the relevant legislation is mainly reflected in the Criminal Law of the People's Republic of China. After comparison, China's definition of child pornography presents several issues. Firstly, there is no specific definition, relying on the definition of obscene materials. This is unreasonable because pornography and obscenity are not the same concept. The regulation of child pornography in criminal law is based on the special nature of the subject matter. However, categorizing child pornography broadly under obscene materials increases the threshold for criminalization. Furthermore, child pornography and adult pornography have fundamental differences, with distinct legal interests to protect, thus requiring different regulatory methods and definitions. Child pornography violates the basic human rights of children, such as their physical and mental health rights and rights to development [9]. In contrast, adult pornography goes against the principle of the non-publicity of sexual conduct. Rooted in people's sense of shame regarding sexuality, this sense of shame forms a normal concept of sexual behavior internally, where sexual activity occurs discreetly under emotional drive. This concept of sexual behavior constrains individuals' sexual activities and sexual order [9].

The second issue is that the Chinese Criminal Law does not clearly define the age of "children," and there is inconsistency in the provisions of other relevant documents. Lastly, regarding the issues related to virtual child pornography in the digital age, the Chinese Criminal Law also does not address this aspect.

3. Legal Enforcement of Child Pornography

3.1. Legal Enforcement Measures in the US Legal System

In the practical application of law in the United States, there are some notable phenomena. Firstly, the definition of "child pornography" has been expanded far beyond its original meaning in practice, with legislative bodies and prosecutors pressing charges for possessing non-nude and non-sexual images of children, as well as for possessing a small amount of artistic and non-pornographic images. These instances indicate that child pornography laws are used to punish individuals not necessarily because of the nature of the images they possess, but because these individuals are deemed to have a sexual interest in children [10]. If law enforcement concludes that an individual finds certain images

of children sexually stimulating, these laws can be used to punish that individual, even if the same images might be completely harmless if possessed by others [10]. Even teenagers have been prosecuted for self-produced sexually suggestive images [11].

Secondly, there has been a significant increase in the imprisonment of individuals convicted of possessing child pornography. The criminal prohibitions against child pornography in the United States are outlined in Chapters 71 and 110 of Title 18 of the United States Code. Section 2252A specifically addresses non-production offenses [8]. According to subsection (a)(2), individuals who knowingly receive or distribute child pornography can face a prison sentence ranging from five to twenty years [8]. If the offender has a previous conviction related to sexual crimes against minors, the sentencing range can be elevated to fifteen to forty years. Moreover, individuals who knowingly possess or intend to view child pornography, as outlined in subsection (a)(5), can be imprisoned for up to ten years, with a maximum sentence of twenty years if the images involve children under twelve. Offenders with prior convictions related to sexual abuse may face imprisonment ranging from ten to twenty years [8].

Lastly, measures to protect children are incorporated into the criminal justice proceedings, primarily focused on preventing child victims from experiencing secondary harm and safeguarding their privacy [12]. According to the Adam Walsh Child Protection and Safety Act, any material constituting child pornography should be kept under government or court supervision, and courts should deny a defendant's request to duplicate such materials as long as the government provides the defendant with a "meaningful opportunity" to view them. This means that replication of child pornography materials is only allowed when it is not reasonably feasible to view the materials in any other way. Lawyers and judges are responsible for ensuring that the evidentiary procedures do not cause further harm to the victims and ensure that the defendant has access to crucial evidence for their defense [12].

3.2. Legal enforcement measures in the Chinese legal system

China's criminal law has not set up an independent crime on the crime of child pornography, but only the crime of producing, selling, and disseminating obscene materials, which can only be criminalized and punished in accordance with chapter 6, section 9, of the criminal law on the production, trafficking, and dissemination of obscene materials [3]. The way to regulate such crimes is to regulate child pornography-related crimes as a package with adult obscene material crimes without detailed differentiation, and the regulation of such crimes is mostly concentrated in the chapter of "Crimes Against the Social Management Order", which also reflects that the criminal law for the management of obscene pornography is more inclined to the social management and order maintenance tendency. This also reflects the tendency of the criminal law on the management of obscene pornography to be more in favor of social management and order maintenance [5].

Second, throughout China's legislative system, neither the Criminal Law nor the Law on Punishment for Public Security Administration contains clear legal provisions on the intentional possession and downloading of child pornography [6].

Finally, Judicial Interpretations 1 and 2 issued by China's Supreme Court and Supreme Prosecutor's Office have made up for the omission of criminal law on child pornography in the Internet environment, and have indeed imposed stricter regulations to protect the rights and interests of children, but, on the one hand, the Judicial Interpretations do not belong to the Basic Law, so they are not authoritative enough, and the judicial effect has been unsatisfactory; on the other hand, the Judicial Interpretations have failed to regulate the new issues of virtual child pornography that have arisen in the current Internet environment [6].

4. Current Legal Issues and Challenges

4.1. Challenges Faced by US laws

In the practical application of US child pornography laws, several challenges are encountered. Firstly, there is a disproportionate emphasis on the defendant's subjective intentions rather than the actual harm caused to children by the pornographic material itself. This focus on subjectivity risks turning child pornography laws into a form of thought crime. Enforcement efforts often seem to target individuals viewing child pornography more than those involved in producing such material or committing other forms of child sexual abuse [10]. Additionally, broadening the scope of child pornography laws may make prosecuting such cases more attractive than those involving actual child sexual abuse. By expanding the definition of child pornography, prosecutors may find it easier to secure convictions for possession of such material. Given the severity of child sexual abuse compared to possessing child pornography, there is a concern that law enforcement may prioritize cases of child pornography over cases of actual child sexual abuse [10]. Moreover, the practice of charging minors under child pornography laws should be discontinued [11]. Prevention through education, lighter offenses, and diversion programs should be prioritized as the preferred alternative to ensure the overall safety and well-being of minors [11].

Secondly, the punishment for possessing child pornography is deemed excessive. Given the challenges posed by the digital nature of data and the widespread access to the internet, the concept of electronic possession lacks a clear link to the actual abuse or production of child pornography [1]. The penalties for possessing child pornography should not be equated with those for severe crimes like child sexual abuse or statutory rape, as these offenses are judged on different moral scales. Instead, the penalties for possessing child pornography should be compared to penalties for other white-collar crimes such as tax evasion, insider trading, breach of trust, or embezzlement [8].

Lastly, in criminal proceedings, it is essential to ensure the protection of children, the victims, while also safeguarding the rights of the defendants. Therefore, the scope allowing for the replication of relevant evidence should be appropriately expanded [12].

4.2. Issues with Chinese Laws

First, there is a lack of independence in the criminalization of child pornography. This is reflected first of all in the lack of compatibility between the interests of the object of infringement and the chapter to which it belongs [5]. The current criminal law will be network child pornography crimes infringement of the object recognized as social management order, regulated in the crime of obstructing social management order, confuse such crimes should focus on the protection of the real object of criminal law children's personal rights and interests. Currently the current criminal law will network child pornography crime infringement object recognized as social management order, regulation in the crime of obstructing social management order, confuse such crimes should focus on the protection of the real object of criminal law children's personal rights [6]. This confuses the real object of such crimes, which should be the protection of children's rights and interests. But child pornography, the main infringement of children's personal rights, because no matter what form of child pornography exists on the network, represents the children have been or are suffering from sexual exploitation, for the dissemination of such products, copying, trafficking is also the same children's sexual rights and interests, privacy and other rights and interests of the person, and the influence of the network environment will be doubled to amplify the harm, making the crime Clarification of the object of the crime is even more important [6].

In addition, the crime of child pornography focuses on combating the production and dissemination of such acts for the purpose of profit, as well as the dissemination of such acts not for the purpose of profit [6]. The subjective element of "profit-making" is a high threshold for criminalization. For adult obscene material crime, it will be regulated as a result of adult freedom of speech and sexual freedom of consideration, but child pornography is more infringement of children's personal and sexual rights,

and ordinary obscene material in the harm there is a clear difference. Equal treatment of both as outcome crimes is bound to encourage the arrogance of criminals, and in the long run it is difficult to realize a long-term combat against child pornography crimes [6].

Secondly, the criminalization of child pornography offences is narrow and does not regulate possession offences. Although the act of illegal possession of child pornography does not directly contact the victimized child, nor does it cause any direct bodily harm to him or her, possession means that it is possible to browse and watch the private parts of the victimized child's private organs and other personal information at any time, which is an infringement of the victimized child's human dignity and privacy [13]. In addition to this, compared to ordinary cases of child sexual abuse that usually only occur in private spaces, people from any corner of the world can purchase and exchange the vast amount of child pornographic material owned by the possessor through the Internet. Since there is no way to know how many people have viewed and how many people have disseminated these pornographic materials, no matter when they are unsealed, it is undoubtedly a secondary harm to the child victims, which will cause them to be in deep pain and difficult to extricate themselves, and this harm is hidden and lasting, and may be accompanied by a lifetime [13].

Finally, there is a lack of regulation of Internet pornography crimes. Because the network virtual child pornography belongs to the Internet's new products, the law has not made a clear explanation, and child pornography penalties are heavier than ordinary obscene articles, therefore, when there are lawless elements dissemination and trafficking in child pornography, can be identified as the dissemination of its possession of virtual child pornography, requesting forensic examination to rule out reasonable doubt, which will undoubtedly be a huge increase in the workload of the judicial staff, resulting in a waste of judicial resources [6]. This will undoubtedly increase the workload of judicial officers and result in a waste of judicial resources. Therefore, while regulating child pornography on the Internet, it is necessary to have a certain degree of foresight and include virtual child pornography in the scope of regulation [6].

5. Recommendations for Revision of Chinese Criminal Law

5.1. Clarifying the Concept of Child Pornography

The first is the clarification of the age of the "child". In the judicial context of the parallel application of the term "child" and "minor" in the Criminal Law, the definition of "child" as a minor under the age of 18 is conducive to the comprehensive combating of child pornography crimes and to the implementation of the basic requirement of the principle of "maximizing the interests of the child", and at the same time is conducive to the convergence and transformation of China's criminal law with the relevant international treaties [5].

Secondly, the forms of content and penalization of child pornography should be clarified in legislation. The criminal law should further improve the definition of obscenity and pornography so as to facilitate better control of obscene and pornographic products by the State [5]. For the identification of obscene information, should focus on whether it is directly detailed, explicit portrayal and display of sex-related organs, behavior, and so on, and prohibited; for the identification of pornographic information, the key lies in the indirect way, the purpose is to sexual teasing, including those who are not explicit, but its indecent material; at the same time, should be graded pornography regulation, for adult pornography, with the strengthening of the concept of private autonomy of the right to sexual morality of adults, with the people for adult pornography, with the people for the right to sexual morality of the right to private autonomy, the state to better control. At the same time, pornography should be regulated on a graded basis; for adult pornography, as people's concept of adult sexual morality and the right to private autonomy strengthens, it would be counterproductive to regulate it across the board; for child pornography, it should be criminalized with lower standards of pornography under the concept of strict governance [5]. In addition, in determining whether pornography, should be more from the objective aspects, rather than focusing too much on the

subjective aspects of the perpetrator, in order to avoid the application of U.S. law to punish the object of the misplaced and the scope of the limitations of the situation is too broad.

5.2. Strengthening the Independence of the Criminal Law Protection of Children's Sexual Rights

First, it is necessary to reorganize the chapters under which child pornography offences fall. The social rights and interests that should be protected most by the criminal law on child pornography are the personal rights and interests of the individual child, so it should be regulated separately in the chapter on "Crimes against the Personal Rights of Citizens", with the establishment of child pornography-related crimes [6].

In addition, the premise of combating "for-profit purposes" should be removed. The criminalization of child pornography should remove the requirement of "profit-making purpose" and focus on the act itself. "Profit-making purpose" can only be used as an aggravating condition for online child pornography crimes, not as a precondition for punishment. Therefore, when the criminal law regulates child pornography crimes, the premise of "profit-making purpose" should be removed and covered by a specific law as an aggravating circumstance [6].

5.3. Inclusion of Illegal Possession of Child Pornography and Virtual Child Pornography on the Internet in the Scope of Regulation

Firstly, legislation should be used to counteract child pornography offences by bringing possession of child pornography within the scope of the criminal law. In terms of sentencing, since the act of possession is less injurious, it should be subject to a relatively lower sentence than the crime of production. At the same time, in order to make up for the gaps in legal regulation and to comply with the trend of the development of Internet science and technology, legislation should be enacted to make it clear that virtual child pornography also belongs to Internet child pornography, and that equal efforts will be made to curb the proliferation of such pornography and to protect children from its harm [6].

5.4. Addition of Criminal Proceedings for the Protection of Victims

Strict trial standards for the reproduction of evidence in child pornography offences can be adopted in the criminal procedure law, *mutatis mutandis*, in line with the relevant procedures in the United States law, in order to prevent the victim from being re-victimized in the course of the proceedings.

6. Conclusion

The protection of children from the detrimental effects of child pornography is a critical aspect of legal frameworks globally. The rise of the internet has facilitated the spread of child pornography, posing significant challenges for law enforcement and legal systems. While the United States has made strides in strengthening laws and enforcement mechanisms to combat child pornography and protect children's rights, China faces notable deficiencies in its legal framework regarding child pornography regulation.

The comparative analysis of child pornography laws in the United States and China reveals key disparities in definitions, enforcement measures, and protection of children's rights. The US legal system has evolved to address the complexities of child pornography, emphasizing stringent penalties and protective measures to safeguard children from exploitation. In contrast, China's legal framework lacks specific provisions for addressing child pornography, relying on outdated regulations, and failing to recognize the unique nature of this crime.

To address the current legal challenges and shortcomings in China's criminal law related to child pornography, several recommendations can be proposed. These include clarifying the concept of child pornography, strengthening the independence of laws protecting children's rights, including

illegal possession and virtual child pornography within regulatory scopes, and enhancing victim protection measures in criminal proceedings.

By aligning with international standards, enhancing legal definitions, and implementing robust enforcement mechanisms, China can better combat child pornography, protect children's rights, and promote a safer online environment for future generations. It is imperative for legal systems to adapt and evolve in response to the evolving landscape of digital crimes to ensure the well-being and protection of vulnerable individuals, especially children.

References

- [1] Asaf Harduf, *Criminalization Downloads Evil: Reexamining the Approach to Electronic Possession When Child Pornography Goes International*, 34 B.U. INT'L L.J. 279 (2016).
- [2] Jennifer P. Santos, *Who's Accountable: Should a Global Issue Change America's Internet Laws?*, 23 J. HIGH TECH. L. 226 (2022).
- [3] Liu Wenjie, *Research on the Legislative Problems and Perfection of Child Pornography Crime*, Qingdao University (2021).
- [4] Wu Chengxu and Cui Xiaoqian, *Criminal Law Regulation of Online Child Pornography Production*, Journal of Yunnan University (Law Edition) (2014).
- [5] Li Mengying, *A Study on the Criminal Law Regulation of Child Pornography Production*, Jiangsu University (2021).
- [6] Chu Wenjie, *A Study on the Criminal Law Regulation of Online Child Pornography Production*, Anhui University (2021).
- [7] Limor Ezioni, *Pornography as a Tool for Perpetuation of Gender Hierarchy: The United States as a Case Study*, 49 SW. L. REV. 215 (2020).
- [8] Anthony M. Dillof, *Possession, Child Pornography, and Proportionality: Criminal Liability for Aggregate Harm Offenses*, 44 FLA. ST. U. L. REV. 1331 (2017).
- [9] Liao Xingcun, *Identification and Governance of Online Child Pornography Production*, Journal of Vocational University, (2018).
- [10] Carissa Byrne Hessick, *The Expansion of Child Pornography Law*, 21 NEW CRIM. L. REV. 321 (2018).
- [11] Angela D. Minor, *Sexting Prosecutions: Teenagers and Child Pornography Laws*, 60 HOWARD L.J. 309 (2016).
- [12] Annie Zanobini, *Protecting Victims: Limiting Discovery of Child Pornography in California*, 29 GEO. J. LEGAL ETHICS 1461 (2016).
- [13] Li Zhenyu, *Establishment of the Crime of Possessing Child Pornography: Legal Basis and Article Design*, Youth Crime Issues, 04 (2023).