CH. 35
OBSCENITY

§35-1
Generally

United States Supreme Court

U.S. v. Williams, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) The "Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today" Act, which prohibits advertising, promoting, presenting, distributing or soliciting "any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe" that it depicts children engaged in sexual activity, does not violate the First Amendment. Furthermore, the Act is not unconstitutionally vague.

Ashcroft v. Free Speech Coalition *et al.*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) 1. **New York v. Ferber**, 458 U.S. 747 (1982), which held that Congress may criminalize non-obscene child pornography as part of its compelling interest in protecting children, does not authorize the banning of "virtual child pornography," which portrays sexually explicit images appearing to depict minors but which were in fact produced without using real children. Congress has no authority to prohibit "virtual pornography" that is not "obscene" under **Miller v. California**.

2. The court rejected the argument that virtual child pornography must be outlawed because it is indistinguishable from pornography produced by using real children, making it more difficult to prosecute actual child pornographers. "Protected speech should not become unprotected merely because it resembles the latter."

3. A provision banning sexually explicit depictions that are advertised, promoted, presented, described, or distributed in such a matter as to convey an impression that the material involves minors is unconstitutionally overbroad, because it prohibits a substantial amount of protected speech and applies to persons who have no responsibility for the manner in which a particular item is marketed, sold or described. See also, **People v. Alexander**, 204 Ill.2d 472, 791 N.E.2d 506 (2003) (Illinois Child Pornography Statute (720 ILCS 5/11-20.1), which defines "child" as including a computer depiction of "what appears to be" a child under the age of 18, "regardless of the method by which the film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer is created, adopted, or modified to appear as such," suffers from the same constitutional infirmity as the federal statute involved in **Ashcroft**; however, §11-20.1(f)(7) is severable from the remainder of the child pornography statute, which remains in effect).

Alexander v. U.S., 509 U.S. 544, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) After being convicted of 17 counts of obscenity and three RICO violations based on the obscenity convictions, defendant was ordered to forfeit his wholesale and retail adult entertainment businesses and almost $9 million obtained through racketeering activities. He was also sentenced to six years imprisonment and ordered to pay a $100,000 fine. The verdicts rested on jury findings that defendant had distributed and stocked copies of four obscene magazines and three obscene videotapes.

1. The Supreme Court rejected defendant's argument that forfeiture of the businesses, which essentially closed them, was an impermissible prior restraint of activities protected by the First Amendment. The "prior restraint" doctrine applies only to orders forbidding future communications. Because the forfeiture order seized assets related to crimes of which the

defendant had already been convicted, and did not forbid him from engaging in future communication, it was punishment for prior offenses rather than a future restraint.

Furthermore, the forfeited assets had already been adjudicated obscene (in contrast to most "prior restraints"), and defendant was afforded full procedural safeguards.

2. The forfeiture did not have an impermissible "chilling effect" on First Amendment rights by deterring bookstore owners from stocking "marginally protected materials." The threat of forfeiture creates no greater "chilling effect" than that posed by obscenity laws, which involve substantial prison sentences and fines.

(Dissent by Kennedy, Blackmun & Stevens: forfeiting an entire business because a small portion of the inventory is obscene has a "chilling effect" on First Amendment rights; a store owner is likely to censor constitutionally-protected materials to avoid even a slight possibility that any of his stock will be judged obscene.)

Pope v. Illinois, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987) In obscenity cases, the jury must first determine whether a "reasonable person" would find serious literary, artistic, political or scientific value in the material. It is improper to consider whether an "ordinary person in any given community" would find such value.

Renton v. Playtime Theatres, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) City zoning ordinance prohibiting adult movie theaters within 1000 feet of residential property, church, park, or school did not violate the First Amendment. The ordinance served a substantial governmental interest and allowed reasonable alternative avenues of communication.

New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) The Court upheld a state statute which prohibited the distribution of material depicting certain sexual conduct of children. Although such material may not be legally obscene, the State's legitimate interest in protecting minors justifies reasonable restrictions.

Cooper v. Mitchell Brothers, 454 U.S. 90, 102 S.Ct. 172, 70 L.Ed.2d 262 (1981) The burden of proof for a city in an action to abate a nuisance (displaying an allegedly obscene film) need not be "beyond a reasonable doubt." Because such an action is civil in nature, the highest standard of proof need not be utilized.

Vance v. Universal, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980) An improper "prior restraint" was created by a State nuisance statute which authorized an injunction against the manufacture, commercial distribution or commercial exhibition of obscene material, but did not require a final judicial determination of obscenity and or a prompt review of the preliminary finding of probable obscenity. See also, **People v. Eagle Books, Inc.,** 151 Ill.2d 235, 602 N.E.2d 798 (1992) (police engaged in improper "prior restraint" where they seized over 700 copies of allegedly obscene material, thereby emptying an adult bookstore of its stock, and impounded that material for two years without a hearing; the Court refused to extend the "good-faith" exception to the exclusionary rule to permit seizure of materials potentially protected by the First Amendment.)

Pinkus v. U.S., 436 U.S. 293, 98 S.Ct. 1808, 56 L.Ed.2d 293 (1978) When determining "community standards" in an obscenity prosecution, it is error to instruct the jury that children are part of the relevant community. However, it is proper to include "sensitive persons."

Here, the trial court did not err when it instructed the jury that in determining whether a picture is obscene, it should consider whether the picture as whole "is an appeal to the prurient interest of the average person of the community as a whole or the prurient interest of members of a deviant sexual group." Where the evidence supports such a charge, it is proper to instruct the jury on "prurient appeal to deviate sexual groups" as part of an instruction pertaining to appeal to the average person.

Marks v. U.S., 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) Due process prevents the obscenity standards announced in **Miller v. California** from being applied to pre-**Miller** conduct that was not punishable under the law in effect at the time of the offense. However, constitutional principles announced in **Miller** must be applied if the defendant would benefit.

Young v. American Mini Theatres, 427 U.S. 50, 96 S.Ct. 2440, 49 N.E.2d 310 (1976) City zoning ordinances prohibiting theaters presenting matter depicting "specified sexual activities" or "specified anatomical areas" from being located within 1,000 feet of any two other "regulated uses," or within 500 feet of a residential area, were not vague under the Fourteenth Amendment. Furthermore, such ordinances did not violate the First Amendment or the equal protection clause.

Hamling v. U.S., 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) 1. Jury could constitutionally find that a brochure advertising an illustrated version of the presidential commission's report on obscenity and pornography was obscene.

2. **Miller** rejected the view that a finding of obscenity may be based on uniform nationwide standards. Instead, **Miller** defines obscenity in terms of "the average person, applying contemporary community standards." In making this determination, a juror is entitled to draw on his own knowledge of the community from which he comes. Furthermore, although **Miller** held that a State may use a statewide standard in proscribing obscenity, use of a precise geographic area is not constitutionally required.

Finally, a court may admit evidence of standards existing in some place outside the particular district, if it feels such evidence would assist the jury in resolving the issues before it. The principal concern is that the judgment be based on "contemporary community standards," and not on each juror's personal opinion or the effect of the material on persons of particular sensitivity or insensitivity.

Roaden v. Kentucky, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973) Improper "prior restraint" occurred where police made a warrantless seizure of a film that was being shown at a public theater on a regular schedule.

Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) The Court rejected the test of "utterly without redeeming social value" and set out a new standard for judging obscenity: whether the average person applying contemporary community standards would find that the work, as a whole, appeals to prurient interests; whether the work depicts sexual conduct in a patently offensive way, as defined by state law; and whether the work, as a whole, lacks serious literary, artistic, political or scientific value.

U.S. v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973) The right of possession created by **Stanley v. Georgia** covers only possession in a private home, and not the right to transport obscene materials. The First Amendment was not violated by a federal statute prohibiting the interstate transport of obscene material via common carrier.

Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973) The State is not required to provide an adversarial hearing before seizing a film pursuant to a warrant, provided that a prompt judicial determination of obscenity is available at the request of any interested party.

U.S. v. Reidel, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971) First Amendment right to possess obscene material in one's home does not create a right on the part of others to sell such material; Congress could properly prohibit mailing obscene material even to consenting adults.

Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) The First Amendment protects the right to possess obscene films in one's home.

Roth v. U.S., 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) Obscene materials are not protected under the First Amendment.

Illinois Supreme Court

People v. Normand, 215 Ill.2d 539, 831 N.E.2d 587 (2005) Under **Ashcroft v. Free Speech Coalition**, 535 U.S. 234 (2002) and **People v. Alexander**, 204 Ill.2d 472, 791 N.E.2d 506 (2003), to obtain a conviction for child pornography the State must prove beyond a reasonable doubt that the sexually explicit images in question depicted actual rather than "virtual" children. While technology can render depictions of "virtual" children indistinguishable from images of actual children, such technology is not in common use, and therefore the State does not have to produce evidence beyond the images themselves to carry its burden of proof. The trier of fact may determine, by viewing the images, whether real children are depicted. The State is not required to present any evidence in addition to the allegedly pornographic photographs.

Here, "any trier of fact could conclude beyond a reasonable doubt that the photographs depicted actual children, and that defendant knowingly possessed the images." Therefore, the evidence was sufficient to prove beyond a reasonable doubt that defendant was guilty of possession of child pornography.

People v. Phillips, 215 Ill.2d 554, 831 N.E.2d 574 (2005) A defendant is prejudiced by a charging instrument that alleges disparate acts in a single count, because the use of the disjunctive creates uncertainty concerning which of the alternative acts the accused is charged with committing. However, the same rule does not apply where an indictment for possession of child pornography charged defendant with possessing "a photograph or other similar visual reproduction or depiction by computer." The disjunctive language "simply gave the State flexibility as to the physical form of the pictures," and did not "leave defendant uncertain about which of several disparate acts he stood accused of committing."

Here, the indictment was not impermissibly vague just because it failed to specify which of the numerous pictures seized by the police would be offered into evidence. The indictment is not required to preview the State's evidence, and the defendant was told exactly why all the pictures he possessed were alleged to be obscene.

The evidence was sufficient to establish guilt beyond a reasonable doubt of possession of child pornography. Although **Ashcroft v. Free Speech Coalition**, 535 U.S. 234 (2000) and **People v. Alexander**, 204 Ill.2d 472, 791 N.E.2d 506 (2003) held that the legislature cannot criminalize the possession of "virtual child pornography," by viewing the photographs

in question the trier of fact was able to determine that real children had been photographed. "[W]e find little or no reason to fear that realistic virtual child pornography exists and was so readily available as to create an unacceptable risk that the trial judge, unaided by expert testimony, mistook legal computer-generated images for illegal child pornography."

The evidence was also sufficient to show beyond a reasonable doubt that defendant intended to disseminate the pictures he possessed. Although a confession, standing alone, cannot establish the *corpus delicti* of a crime, defendant's confession was corroborated by the presence of internet access software on his computer, a statement by a friend of defendant that defendant had used the friend's Internet account, and the large number of digital pictures discovered in defendant's home.

Illinois Appellate Court

People v. Van Syckle, 2019 IL App (1st) 181410 The trial court granted defendant's motion to dismiss various child pornography charges, finding the photograph of a 14-year-old girl changing in a locker room did not meet the definition of "lewd."

The Appellate Court first held that the trial court had the power to entertain the motion to dismiss on these grounds. Where child pornography charges have been filed against a defendant, the trial court does have the authority to consider whether a reasonable trier of fact could find that the material charged in the indictment constituted a "lewd exhibition." **People v. Lamborn**, 185 Ill. 2d 585 (1999).

Nevertheless, the trial court erred in dismissing the charges. The trial court offered no reasoned analysis as to why it found the image could not be deemed "lewd" by a reasonable trier of fact. The court made no reference to the factors articulated in **Lamborn** and cited no analogous caselaw, instead offering its own unsupported opinion. The Appellate Court, noting in particular the voyeuristic and therefore sexualized nature of the photograph, found it could reasonably be considered lewd. The court remanded for trial before a different trial judge to "remove any suggestion of unfairness."

People v. Murphy, 2013 IL App (2d) 120068 In **People v. Carter**, 213 Ill. 2d 295, 821 N.E.2d 233 (2004), the Illinois Supreme Court held that the unlawful possession of a weapon statute was ambiguous concerning whether the simultaneous possession of multiple firearms and ammunition could support multiple convictions. Applying the rule of lenity, which provides that ambiguities in a criminal statute must be resolved in the defendant's favor, the court concluded that the "allowable unit of prosecution" in such a case consists of the entire transaction. Thus, the simultaneous possession of weapons and/or ammunition constitutes only a single offense and will support only one conviction.

In **People** People v. McSwain, 2012 IL App (4th) 100619, the Fourth District applied the same rationale to the simultaneous possession of multiple pornographic images of a single child, and held that such possession will support only one conviction for child pornography.

Here, the court distinguished **McSwain** where the defendant possessed a thumb drive which contained 15 pornographic images of several different children. The court concluded that the rule of lenity does not require courts to construe statutes so rigidly as to defeat legislative intent. The court concluded that by enacting the aggravated child pornography statute, the legislature intended to protect children from exploitation by eliminating the market for such materials. Because that legislative intent would be undermined if the possession of multiple images of child pornography constitutes only a single offense no matter how many children are portrayed, the court concluded that possession of pornographic images of multiple children support multiple convictions.

The court added that it questioned the validity of **McSwain** even for possession of multiple images of a single child, because having what is in effect a "volume discount" for images of a single child might increase the demand for such images and result in continued exploitation of that child. The court declined to consider whether **McSwain** was properly decided, however, finding that defendant's simultaneous possession of images of multiple children supports convictions for 15 counts of aggravated child pornography.

People v. Family Video Movie Club, Inc., 318 Ill.App.3d 991, 744 N.E.2d 322 (5th Dist. 2001) Although in an obscenity prosecution the State need not introduce evidence concerning contemporary community standards, the defense is entitled to introduce the best evidence it can on this issue. Where a video rental store was alleged to have violated an obscenity ordinance by renting particular tapes, the trial court erred by refusing to admit: (a) a survey conducted by a law clerk to determine whether similar videos were available at other stores in the region, and (2) a survey conducted by store personnel in which patrons indicated their support of or opposition to the store's rental of adult videos. Although mere availability of similar materials in a particular area does not necessarily demonstrate that such materials are acceptable to average members of the community, "the availability of the same or comparable materials . . . may indicate that the challenged materials enjoy a 'reasonable degree of community acceptance.'" By refusing to allow such evidence, the trial court denied defendant the right to present the best available evidence on the issue of community standards, and left the jury to apply personal rather than community standards.

However, exclusion of the survey conducted by the store was harmless error in view of obvious "flaws in the methodology." Because only persons who voluntarily commented on the pending obscenity prosecution were asked whether they wanted to sign a petition, it was doubtful that a majority of the signers had actually viewed the films in question. Thus, the surveys "were virtually worthless as an indicator of a community standard."

The court noted, however, that it might have been better for the trial court to admit the surveys and allow the prosecution to point out the flaws in their methodology.

§35-2
Illinois Statutes

United States Supreme Court
Ward v. Illinois, 431 U.S. 767, 97 S.Ct. 2085, 52 L.Ed.2d 738 (1977) The Illinois obscenity statute is not unconstitutionally vague or overbroad.

Illinois Supreme Court
People v. Hollins, 2012 IL 112754 The Illinois Supreme Court upheld the conviction of defendant for child pornography against due process and equal protection challenges.

The 32-year-old defendant and his 17-year-old girlfriend were college students who engaged in legal consensual sex. Defendant used his cell phone to take extreme closeup photographs of the couple's genitals. At her request, defendant emailed the photos to his girlfriend. They were discovered when her mother accessed her account. While defendant did not violate any law when he had sexual intercourse with his girlfriend, his recording of that act violated the child pornography statute, which sets 18 as the age at which a person may be legally photographed engaging in sexually explicit conduct. 720 ILCS 5/11-20.1(a)(1).

Defendant conceded that his case did not implicate a fundamental right, and therefore the test for determining whether the statute complies with substantive due

process is the rational-basis test. A statute will be upheld under this test so long as it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable.

The court rejected defendant's argument that the application of the child pornography statute to persons old enough to consent to the private sexual activity they have chosen to photograph does not serve the statute's purpose, which is to prevent the sexual abuse and exploitation of children. The State's legitimate interest in protecting the psychological welfare of children is served by having a higher age threshold for appearance in pornography than to consent to sexual activity. The dangers of appearing in pornography are not as readily apparent as the concrete dangers of sexual activity and can be more subtle. Regardless of the intentions of the parties, there is no guarantee that private photographic images will always remain private.

The statute does not criminalize wholly innocent conduct. The conduct underlying the recording was legal but the recording was not.

Even though the Illinois Constitution provides greater privacy protections than the federal constitution, defendant's claim is not cognizable under the privacy clause of the Illinois Constitution. Ill. Const. 1970, Art. I, §6. Privacy claims in the context of criminal prosecutions have only been recognized where the government or its agents intrude on the privacy of the defendant. The mere fact that the recording of the sex act took place in private, rather than in public, does not implicate the privacy clause.

Because the pornography statute is clear and definite, and defendant's ignorance of the statute is no defense, the court rejected defendant's argument that the anomaly between the pornography statute and the sexual assault statute prevented him from having fair notice that his conduct in photographing the legal sex act was criminal.

When the legislature raised the age limit of the pornography statute to 18, it did not express any concerns about 17-year-olds not being able to appreciate the subtle dangers of memorializing sexual activity. Its motivation was to aid law enforcement in the prosecution of child pornography. A law will be upheld if there is any conceivable basis for finding a rational relationship to a legitimate legislative purpose, even if that purpose did not in fact motivate the legislative action. Moreover, the desire to aid law enforcement is also rationally related to a legitimate legislative purpose.

Defendant's equal protections challenges are rejected for the same reasons as his due process challenges, as those claims are also subject to a rational-basis analysis.

Burke, J., joined by Freeman, J., dissented. The case should be rebriefed to address the effect of the "holding" of **United States v. Stevens**, 559 U.S. ___, 130 S. Ct. 1577 (2010), that "child pornography, for purposes of the first amendment, exists only if it is 'an integral part of conduct in violation of a valid criminal statute.'"

People v. Normand, 215 Ill.2d 539, 831 N.E.2d 587 (2005) Although technology is available to produce depictions of "virtual" children that are indistinguishable from unretouched photographic images of actual children, such technology is not in common use. "[W]e are not convinced that this technology is so widely available that the State must be required as a matter of law to produce evidence in addition to the images themselves to carry its burden of proof."

Thus, by viewing the images which defendant was alleged to have possessed, the trier of fact may determine whether real children are depicted. The State is not required to present any evidence in addition to the allegedly pornographic photographs.

Here, "any trier of fact could conclude beyond a reasonable doubt that the photographs depicted actual children, and that defendant knowingly possessed the images." Therefore,

the evidence was sufficient to prove beyond a reasonable doubt that defendant was guilty of possession of child pornography.

People v. Ward, 215 Ill.2d 317, 830 N.E.2d 556 (2005) Under 720 ILCS 5/11-21(a), the offense of distribution of harmful material to a minor, requires the State to prove that defendant knowingly distributed harmful material to a person known to be under the age of 18. "Distribute" is defined as transferring possession of material, with or without consideration. (720 ILCS 5/11-21(b)(3)). Although the term "possession" is not defined by the statute, the court held that under the ordinary and popular meaning of the term, harmful material is "distributed" when it is transferred to a minor's control or dominion.

Here, defendant committed the offense of distribution of harmful material when she gave a 13-year-old girl an envelope containing sexually explicit photographs of the defendant and the child's father, with instructions to give the envelope to the father. Although the envelope was sealed, taped and addressed to the father, the court found that defendant "distributed" the photographs by allowing the child to have "power and dominion" over the envelope, without regard to any intent or expectation that the child would open the envelope.

The court rejected the argument that the conviction was improper because the statute was intended to punish persons who sell or give pornography to minors or act with the purpose of sexually exploiting a minor. Even if the legislature was primarily concerned with such problems, "common sense does not dictate that this is the *only* scenario the legislature envisioned when it adopted the harmful material statute." In view of the governmental interest in protecting children, the court found that the legislature intended to punish any person who gives harmful material to minors, without regard to their intent.

Two dissenters would have read the statute as preventing the intentional or foreseeable exposure of children to pornography or other harmful material, and would have held that the transfer of a sealed envelope to a minor, with instructions to give the envelope to the minor's father, did not constitute "distribution."

People v. Phillips, 215 Ill.2d 554, 831 N.E.2d 574 (2005) A defendant is prejudiced by a charging instrument that alleges disparate acts in a single count, because the use of the disjunctive creates uncertainty concerning which of the alternative acts the accused is charged with committing. However, the same rule does not apply where an indictment for possession of child pornography charges defendant with possessing "a photograph or other similar visual reproduction or depiction by computer," because the disjunctive language "simply gave the State flexibility as to the physical form of the pictures" and did not "leave defendant uncertain about which of several disparate acts he stood accused of committing."

The court also rejected the argument that the indictment was impermissibly vague because it failed to specify which of the numerous pictures seized by the police would be offered into evidence. The indictment is not required to preview the State's evidence, and the defendant was told exactly why all the pictures he possessed were alleged to be obscene.

The evidence was sufficient to establish guilt beyond a reasonable doubt of possession of child pornography. Although **Ashcroft v. Free Speech Coalition**, 535 U.S. 234 (2000) and **People v. Alexander**, 204 Ill.2d 472, 791 N.E.2d 506 (2003) held that the legislature cannot criminalize the possession of "virtual child pornography," which consists of realistic-appearing photographs generated entirely by computer without the use of real children, by viewing the photographs in question the trier of fact was able to determine whether real children had been photographed. "[W]e find little or no reason to fear that realistic virtual child pornography exists and was so readily available as to create an unacceptable risk that

the trial judge, unaided by expert testimony, mistook legal computer-generated images for illegal child pornography."

The court also concluded that the evidence was sufficient to show beyond a reasonable doubt that defendant intended to disseminate the pictures he possessed. Although a confession, standing alone, cannot establish the *corpus delicti* of a crime, defendant's confession was corroborated by the presence of internet access software on his computer, a statement by a friend of defendant that defendant had used the friend's Internet account, and the large number of digital pictures discovered in defendant's home.

People v. Alexander, 204 Ill.2d 472, 791 N.E.2d 506 (2003) In **Ashcroft v. Free Speech Coalition**, 535 U.S. 234 (2002), the United States Supreme Court held that although Congress may criminalize non-obscene child pornography, it has no authority to ban "virtual child pornography," which portrays sexually explicit images appearing to depict minors but which were in fact produced without using real children. The court concluded that the Illinois Child Pornography Statute (720 ILCS 5/11-20.1) suffers from the same constitutional infirmity as the federal statute involved in **Ashcroft**, and that §11-20.1(f)(7) is therefore unconstitutional. However, §11-20.1(f)(7) is severable from the remainder of the child pornography statute, which remains in effect.

People v. Lamborn, 185 Ill.2d 585, 708 N.E.2d 350 (1999) Under Illinois obscenity law, "child pornography" includes a photograph depicting a person under the age of 18 "in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks, or, if such a person is female, a fully or partially developed breast of the child or other person." As a matter of first impression, the Supreme Court held that several factors are to be considered in determining whether a photograph constitutes a "lewd exhibition," including: (1) whether the child's genitals are the focal point of the visual depiction; (2) whether the photograph involves a sexually suggestive setting; (3) whether the child is depicted in an unnatural pose or in inappropriate attire in light of his or her age; (4) whether the child is fully or partially clothed or nude; (5) whether the depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the depiction is intended or designed to elicit a sexual response in the viewer.

A photograph need not involve all these factors to be considered lewd; whether a visual depiction is lewd involves "an analysis of the overall content of the depiction, taking into account the age of the minor." The court cited with approval Appellate Court cases that have defined "lewd" as "obscene, lustful, indecent, lascivious [or] lecherous." Under such cases, photographs of children are "lewd" if they are "obviously intended to excite sexual desire," and are not "simply incidental pictures of partial nudity" or portrayals of "uninhibited moment[s] of adolescent spontaneity."

When determining whether a photograph is sexually suggestive, the court must gauge the effect of the photograph on a reasonable viewer. The fact that a particular defendant was aroused by a photograph is irrelevant to whether that photograph is "lewd."

Here, photographs of teenage girls were not "lewd" where they did not depict "sexually suggestive poses" or inappropriate attire. The court described the photos as "capturing an uninhibited moment of adolescent spontaneity" revealing "incidental pictures of partial nudity."

However, photographs which depicted the defendant standing naked next to partially nude teenage girls were "lewd." The court concluded that the photographs did not merely "capture uninhibited adolescent spontaneity."

People v. Eagle Books, Inc., 151 Ill.2d 235, 602 N.E.2d 798 (1992) Defendant was convicted of 144 counts of obscenity under a complaint alleging that it "provided, offered for sale or otherwise made available" obscene magazines. The Supreme Court found that because the complaint charged defendant in the disjunctive, it did not set forth the nature and elements of the crime. The Court rejected the State's argument that the three alternative ways to commit the offense were so intimately related that defendant had sufficient notice of the charge; the Court noted that one can "provide" or "make available" an obscene magazine without offering it for sale.

In addition, the Appellate Court erred by remanding the cause for further proceedings after it found that the complaints were void. A complaint that contains a fundamental defect is void and cannot be amended, although the State is not precluded from filing a new charge.

Police conducted an improper "prior restraint" of materials arguably within First Amendment protection where they seized 700 copies of allegedly obscene materials and essentially depleted the stock of an adult bookstore. Although one copy of an allegedly obscene document may be seized for evidentiary purposes where there is probable cause to believe that obscenity laws are being violated, police may not completely remove a publication from circulation until there is an actual finding of obscenity after an adversarial hearing.

People v. Capital News, 137 Ill.2d 162, 560 N.E.2d 303 (1990) The Supreme Court upheld a statutory affirmative defense for dissemination of materials "to institutions or individuals having scientific or other special justification for possession of such materials." The Court rejected the contention that the statutory language was unconstitutionally vague.

People v. Sequoia Books, 127 Ill.2d 271, 537 N.E.2d 302 (1989) Following several convictions of Sequoia and/or its employees for the sale of obscene materials, the State's Attorney filed a complaint under Ch. 38, ¶37-1 (maintaining a public nuisance)and ¶37-4 (abatement of nuisance). The Complaint requested that the bookstore be declared a public nuisance and that an injunction be granted. The trial court enjoined Sequoia from maintaining a public nuisance, expressly enjoined the sale of obscene materials, and enjoined Sequoia from using the business premises for one year unless it posted a $5,000 bond and committed no further obscenity offenses.

The Supreme Court held that the one-year closure and bond provision were "unconstitutional as applied to properties which have been adjudicated to be nuisances solely on account of their use in the commission of the offense of obscenity."

Cook County v. Renaissance, 122 Ill.2d 123, 522 N.E.2d 73 (1988) The Supreme Court upheld a county zoning ordinance which allows adult uses (such as adult bookstores and theaters) to operate only in industrially zoned and commercially zoned areas, and not within 100 feet of each other in a commercial zone.

Chicago v. Festival Theatre, 91 Ill.2d 295, 438 N.E.2d 159 (1982) Obscene stage shows may be enjoined as common law public nuisances. Although the concept of public nuisance under common law may be too vague to satisfy First Amendment requirements, this "vagueness difficulty may be corrected by restricting the reach of the common law nuisance action to the definition of obscenity in our criminal obscenity statute."

An injunction against a live stage show was not an impermissible "prior restraint" on expression. Because the injunction required only that defendants not violate criminal laws against obscenity, it "did not touch protected expression."

Although the injunction was not constitutionally defective, it was improvidently

granted. It is a principle of equity that an injunction will not issue except where there is no adequate remedy at law. Here, the city failed to adequately show "that criminal prosecution would not lend a remedy as clear, complete, practical and effective as the equitable remedy." Injunction vacated.

People v. Stromblad, 74 Ill.2d 35, 383 N.E.2d 969 (1978) Where a jury instruction defining obscenity was erroneous, the defendant was entitled to a new trial. Because the "error was so fundamental," the Court declined to consider the harmless error doctrine.

People v. Steskal, 55 Ill.2d 157, 302 N.E.2d 321 (1973) Defendant was charged with possession of obscene materials, and filed a motion to suppress that was granted. The State then filed a complaint for declaratory judgment, seeking to have the items declared obscene and destroyed. The circuit court found some of the items to be obscene and ordered them destroyed.

The Supreme Court ordered the items returned to defendant. Police may not conduct an unlawful search with knowledge that even if a criminal prosecution will be futile, forfeiture proceedings will partially accomplish the same result.

People v. Butler, 49 Ill.2d 435, 275 N.E.2d 400 (1971) The obscenity statute contemplates a statewide standard of public acceptance, not a standard that varies from county to county. See also, **People v. Watson**, 26 Ill.App.3d 1081, 325 N.E.2d 629 (1975) (obscenity conviction reversed because jury was not instructed to apply a statewide standard).

People v. Romaine, 38 Ill.2d 325, 231 N.E.2d 413 (1967) Selling the book "Fannie Hill" was not obscenity; testimony of English professors and literary critics showed that the book had literary and historical importance.

People v. Kimmel, 35 Ill.2d 244, 220 N.E.2d 203 (1966) Sex is not synonymous with obscenity.

Illinois Appellate Court

People v. Covalt, 2025 IL App (5th) 220346 The appellate court rejected defendant's request to reverse some of his convictions for child pornography. Defendant first argued that certain photos cited in the indictment did not meet the statutory requirement that they "depicted or portrayed in any pose, posture or setting involving *a lewd exhibition* of the unclothed or transparently clothed genitals, pubic area, buttocks, or, if such person is female, a fully or partially developed breast." 720 ILCS 5/11-20.1(a)(1)(vii) (emphasis added). Specifically, defendant argued that some of the photographs showed incidental nudity, as in a photo where his young stepdaughter was standing on a bed with a shirt on and her buttocks exposed.

The appellate court disagreed. When challenged on appeal, a photograph's lewdness is reviewed *de novo*, using an objective standard based on several factors: "(1) whether the focal point of the visual depiction is on the child's genitals; (2) whether the setting of the visual depiction is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer."

The appellate court dismissed the notion that a photograph's lewdness depends on a precise number of these factors. Rather, the focus is on the overall content of the photo, taking into account the age of the minor. Analyzing the first photo, the appellate court found it to be lewd: the buttocks were in the center of the photograph, it was taken in a bedroom, and the attire was inappropriate for her age. This was not natural or incidental nudity. As to the second and third challenged photos, although the buttocks were not centered, the pose – standing on a bed with a friend without pants on – is unnatural and not incidental. Similarly, in photos where the girls faced the camera and the stepdaughter's pubic area was exposed, the nudity was lewd, not incidental, given the girl's age, the setting, and the inappropriateness of the attire. Accordingly, the appellate court affirmed.

Defendant next argued that the State failed to prove him guilty because it alleged he took photographs or filmed various images in certain counts of the indictment, whereas the images cited in the indictment were reproductions. The appellate court determined that because one may violate the child pornography statute by reproducing lewd images, defendant's argument amounted to a "variance" claim. To obtain reversal on a variance claim, defendant must establish the variance is fatal, in that it prejudiced him in presenting a defense. Defendant could not do so here. The only defense offered at trial was the fact that the images were not lewd; there was no claim that defendant did not possess the images. Thus, it did not matter whether they were taken by him or merely reproduced.

People v. Rollins, 2023 IL App (2d) 200744 The appellate court upheld the summary dismissal of defendant's post-conviction petition, which alleged that subsection (b)(5) of the child pornography statute is unconstitutionally vague. 720 ILCS 5/11-20.1(a)(6)/(b)(5).

The facts showed that defendant pled guilty after a forensic search of his laptop revealed a deleted video depicting child pornography. Defendant pointed out that the statute at issue requires the possession of child pornography to be "voluntary," meaning, in part, that it was possessed for a sufficient time to be able to terminate the possession. Defendant alleged that this implies that the termination of the file may be a defense, but that the statute's failure to explain or define "termination" renders it vague.

The appellate court found the claim lacked merit. To withstand a vagueness challenge, the statute's prohibitions must be sufficiently definite, when measured by common understanding and practices, to give a person of ordinary intelligence fair warning as to what conduct is prohibited, and provide sufficiently definite standards for law enforcement officers and triers of fact that its application does not depend merely on their private conceptions. Here, the definition of voluntariness within the child pornography statute is nearly identical to the general statutory definition of voluntary possession (720 ILCS 5/4-2) as well as the jury instruction on voluntary possession (IPI Criminal No. 4.15). The definition of voluntary possession and "terminate" are commonly understood terms. Nor is there a constitutional requirement that a criminal law's exceptions, such as the termination provision here, as opposed to its prohibitions, be clearly defined.

People v. Baker, 2021 IL App (3d) 190618 Defendant's conviction for possession of child pornography was affirmed despite the absence of direct proof of the age of the girl in the photograph, and over defendant's argument that the photograph was not "lewd."

To convict a person of a Class 2 felony of possession of child pornography, the State must prove beyond a reasonable doubt that: (1) the defendant possessed a photograph of a child who he knew or reasonably should have known was under the age of 13; and (2) the child was depicted or portrayed in a pose, posture or setting involving a lewd exhibition of

her unclothed genitals, pubic area, buttocks or breasts. See 720 ILCS 5/11-20.1(a)(1)(vii), (a)(6), (c-5).

Here, the trial court viewed the photograph, which depicted a naked girl sitting on the floor, observed that she appeared "prepubescent," and found defendant guilty. The Appellate Court reviewed this determination *de novo*. First, using the six factors outlined in **People v. Lamborn**, 185 Ill. 2d 585 (1999), the court agreed that the photo was lewd. It noted that the girl's legs were bent in such a way as to expose her genitals, making them the focal point of the image, that her pose was unnatural, she was completely nude, and her gaze at the camera, along with the word "naughty" printed on the photo, suggest sexualization.

Second, the Appellate Court affirmed the finding that the girl was under 13. The child pornography statute states that "[t]he issue of whether the child depicted is under the age of 13 is an element of the offense to be resolved by the trier of fact." The trial court's determination that the girl was prepubescent, and thus under the age of 13, was supported by the her physical characteristics, such as undeveloped breasts, no body hair and a lack of muscular development.

People v. Murphy, 2013 IL App (2d) 120068 In **People v. Carter**, 213 Ill. 2d 295, 821 N.E.2d 233 (2004), the Illinois Supreme Court held that the unlawful possession of a weapon statute was ambiguous concerning whether the simultaneous possession of multiple firearms and ammunition could support multiple convictions. Applying the rule of lenity, which provides that ambiguities in a criminal statute must be resolved in the defendant's favor, the court concluded that the "allowable unit of prosecution" in such a case consists of the entire transaction. Thus, the simultaneous possession of weapons and/or ammunition constitutes only a single offense and will support only one conviction.

In People v. McSwain, 2012 IL App (4th) 100619, the Fourth District applied the same rationale to the simultaneous possession of multiple pornographic images of a single child, and held that such possession will support only one conviction for child pornography.

Here, the court distinguished **McSwain** where the defendant possessed a thumb drive which contained 15 pornographic images of several different children. The court concluded that the rule of lenity does not require courts to construe statutes so rigidly as to defeat legislative intent. The court concluded that by enacting the aggravated child pornography statute, the legislature intended to protect children from exploitation by eliminating the market for such materials. Because that legislative intent would be undermined if the possession of multiple images of child pornography constitutes only a single offense no matter how many children are portrayed, the court concluded that possession of pornographic images of multiple children support multiple convictions.

The court questioned the validity of **McSwain** even for possession of multiple images of a single child, because having what is in effect a "volume discount" for images of a single child might increase the demand for such images and result in continued exploitation of that child. The court declined to consider whether **McSwain** was properly decided, however, finding that defendant's simultaneous possession of images of multiple children supports convictions for 15 counts of aggravated child pornography.

People v. Rivera, 409 Ill.App.3d 122, 947 N.E.2d 819 (1st Dist. 2011) Defendant was convicted of child pornography based on his possession of a compact disc labeled "Jose's stuff" containing a video clip depicting a female performing oral sex on a male. A State's Attorney investigator, who the parties stipulated was an expert in the area of computer forensic analysis, testified that the video was labeled "13-year-old give head" and depicted "a young adolescent," "small in stature," with "underdeveloped breasts" performing fellatio.

The Appellate Court noted that the State's witness was not an expert in any field that would allow him to determine the age of an individual in the video clip. Contrary to his testimony, the female in the video was not obviously adolescent or juvenile in appearance. She was depicted in the video fully clothed wearing a sweater and bra, and only her shoulders, face and right hand were visible during the act of fellatio, so nothing indicated that her breasts were underdeveloped. Also contrary to the investigator's testimony, nothing in the file name of the disc referred the age of the female. The disc was numbered 13 in a group of consecutively-numbered videos and photographs, and thus that number was not an apparent reference to the age of the person depicted therein. The literal file name was "13givehead" rather than "13-year-old gives head."

The court acknowledged the great deference ordinarily accorded to jury determinations. Where the evidence at issue does not involve credibility determinations or observations of demeanor, the deference afforded is logically less. Because a simple viewing of the video clip itself created a reasonable doubt of defendant's guilt, the court reversed the conviction..

People v. Knebel, 407 Ill.App.3d 1058, 946 N.E.2d 920 (2d Dist. 2011) Defendant was charged with possession of child pornography under 720 ILCS 5/11-20.1(a)(1)(vii) for possessing a photograph "involving a lewd exhibition of the . . . genitals, pubic area [or] buttocks" of a child under the age of 18. In determining whether a photograph is "lewd," courts consider several factors, including: (1) whether the focal point of the visual depiction is on the child's genitals; (2) whether the setting of the visual depiction is sexually suggestive; (3) whether the child is depicted in an unnatural pose or in inappropriate attire considering his or her age; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended to elicit a sexual response in the viewer.

A finding that a photograph is lewd does not require that each factor be present; the photograph is to be judged in light of its overall content, taking into consideration the age of the child. Whether a photograph is "lewd" is determined *de novo*.

The court concluded that all six factors supported a finding that the photograph at issue, which portrayed a young girl lying naked on a bed, was "lewd." Defendant's conviction was affirmed.

People v. Wayman, 379 Ill.App.3d 1043, 885 N.E.2d 416 (5th Dist. 2008) A conviction of child pornography may be entered even if the photographs in question are not admitted to evidence. Thus, defendant could be prosecuted for child pornography although the only evidence consisted of his ex-wife's description of photographs which she saw on defendant's computer and which she immediately deleted.

When the photographs in question are available, a *de novo* standard of review applies because the reviewing court is able to examine the visual depiction itself. However, where no photographs are available and the court is reviewing the trial judge's finding based upon testimonial descriptions, the standard of review should be that of any case challenging the sufficiency of the evidence - whether the evidence viewed most favorably to the State would justify a rational trier of fact in finding that the evidence sufficient to convict.

The Appellate Court found that the conviction could not be based on testimony about two nude photographs of the defendant's 10-year-old daughter. The testimony showed that only one of the six relevant factors - that the daughter was nude - was present. Mere nudity does not constitute child pornography.

Nor could the conviction be based on the ex-wife's testimony that she saw two

additional photographs which appeared to be cropped and enlarged photographs of the stepdaughter's vagina and buttocks. Defendant was charged only with photographing his stepdaughter, not with "some uncharged violation" of the child pornography statute. Because there was no testimony that defendant took the pictures in question or cropped and enlarged them, or that the photos even depicted the stepdaughter or any other child, there was no basis on which to sustain the conviction. "[W]e cannot ignore the fact that the only witness who described these photographs is . . . the defendant's ex-wife who admitted that she had deleted the photographs from the computer" and whose "antagonism toward the defendant is evident from the record."

The court rejected the argument that any photograph which portrays only the vagina of a child is "lewd." Because the child pornography statute prohibits the "lewd exhibition" of a child's unclothed genitals, the statute creates a distinction between "lewd" and non-lewd depictions. "Criminal statutes must be interpreted so that they clearly separate criminal conduct from noncriminal conduct."

People v. Jackson, 358 Ill.App.3d 927, 832 N.E.2d 418 (1st Dist. 2005) 720 ILCS 5/11-21, which creates the offense of distributing harmful material to a minor, is constitutional even if the definition of "harmful" does not conform to the federal definition of "obscene." Because the State has authority to regulate the distribution of materials that are "harmful" to children even if the distribution of such material to adults would be constitutionally protected, the statute was not intended to regulate only the distribution of "obscene" materials.

A restriction on the distribution of "harmful" materials must be justified by a governmental interest pertaining to minors, and a statute intended to keep non-obscene but "harmful" material from minors could be overbroad in scope. However, because the defendant had not challenged §11-21 on that basis, "[w]e express no opinion . . . as to whether the Harmful Material statute is overbroad or in conformance with the principle announced in [**Ginsberg v. New York**, 390 U.S. 629 (1968)] and its progeny."

Finally, §11-21 is not unconstitutionally vague.

People v. Lewis, 305 Ill.App.3d 665, 712 N.E.2d 401 (2d Dist. 1999) Under **People v. Lamborn**, 185 Ill.2d 585 (1999), whether a photograph is "lewd" is reviewed *de novo*. The Appellate Court stated its belief that the supreme court will "revisit this issue and apply the traditional standard of review." Otherwise, the supreme court's approach "will logically lead to *de novo* review of every criminal case which includes the interpretation of statutory language and every case where the evidentiary facts are uncontroverted."

People v. Crowell, 145 Ill.App.3d 341, 495 N.E.2d 1223 (1st Dist. 1986) The evidence was sufficient to prove defendant guilty of child pornography; trial judge properly found that defendant did not reasonably believe the children (age 13) were 16 years of age.

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