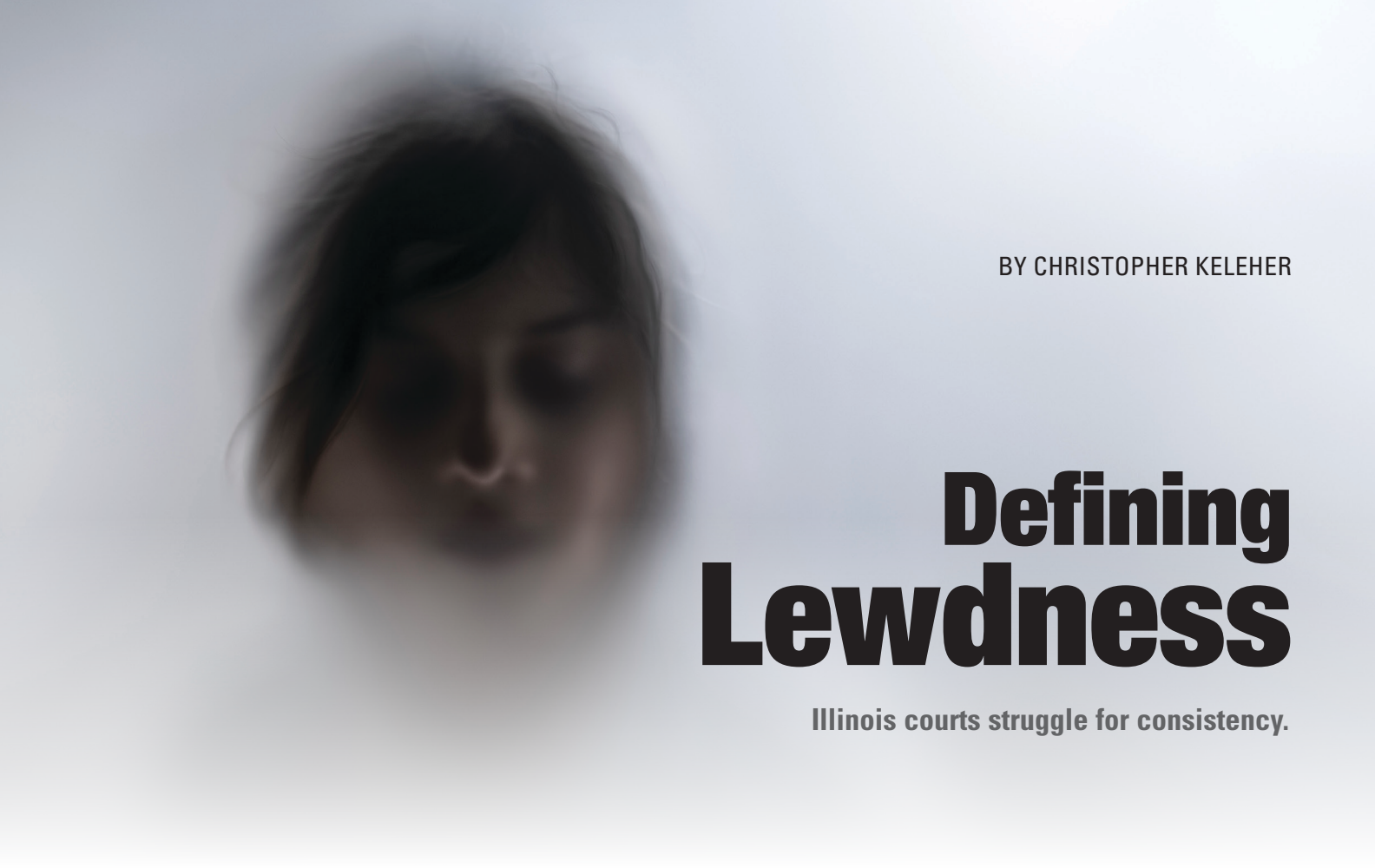

BY CHRISTOPHER KELEHER

Defining Lewdness

Illinois courts struggle for consistency.

CHILD PORNOGRAPHY SITS AT THE CROSSROADS OF CONSTITUTIONAL AND criminal law. Nudity is not the dividing line between free speech and prison, as the U.S. and Illinois Supreme courts hold that nudity—without more—is constitutionally permissible. Instead, there must be sexual conduct involving a minor to be pornographic. But the concept of child pornography is expanding beyond images of sexual conduct to include those that depict children in ways a viewer might perceive as sexual. One example is surreptitious recordings of minors. When a minor is secretly recorded changing clothes, or knowingly recorded and not depicted sexually, courts across the country are divided on whether it is child pornography or, in statutory parlance, "lewd" or "lascivious."

Illinois is no exception. The inability to agree on what constitutes "lewd" under the Illinois child pornography statute has left a patchwork of Illinois Appellate Court decisions. Illinois judges are essentially resorting to U.S. Supreme Court Justice Potter Stewart's infamous obscenity standard: "I know it when I see it."[1] But such subjectivity in the criminal law realm defies due process. So warned the Second District of the Illinois Appellate Court in 1999 when it asked the Illinois Supreme Court to ensure "the decision regarding whether a photo is lewd will not be left to the subjective moral standards of appellate court judges."[2] Shifting trends in technology and culture, including the ubiquity of smartphones and risqué selfies, have intensified that concern.

1. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
2. *People v. Lewis*, 305 Ill. App. 665, 688 (2d Dist. 1999).

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ISBA RESOURCES >>

- ISBA On-Demand CLE, *Current Issues in Criminal Appeals* (recorded May 2021), law.isba.org/3FuOAMR.
- Karilyn M. Orr, *Office of the Illinois Attorney General Addresses Internet Crimes Against Children Through Digital Safety Presentations to Schools*, Law Related Education (Apr. 2020), law.isba.org/3csFnrS.
- Joshua D. Herman, *Sexting: It's No Joke, It's a Crime*, 98 Ill. B.J. 192 (Apr. 2010), law.isba.org/3csFWlu.

Two decades later, guidance is still sought as the Second District acknowledged in 2020 that defining lewdness "has proven difficult … with some courts focusing on the content alone, other courts focusing on the intent of the photographer."[3] Based on the vagaries of geography, some defendants thus go free while others serve time and are branded sex offenders for life.

Given the First Amendment implications of pornography, Illinois relies heavily on federal courts for the parameters of lewdness. As such, this article begins with the federal framework, followed by the controlling Illinois Supreme Court decision on the issue, *People v. Lamborn*.[4] The multiple ways appellate courts have interpreted *Lamborn* and lewdness are then discussed.

While the facts of these cases can be vile, the dispositive question is whether an image is lewd. Separating moral and emotional qualms from the legal analysis is challenging when the issue is nude or partially nude children. Still, a clear, consistent, and constitutionally-sound approach to this difficult question is imperative as such images can now be created anywhere, anytime, and by anyone.

Federal law and child pornography

The First Amendment to the U.S. Constitution prohibits the infringement of free speech, which includes pictures and videos.[5] Criminalizing the depiction of nudity has constitutional consequences as the Supreme Court deems it "protected expression."[6] But free speech has its limits and in 1982 a unanimous Supreme Court removed child pornography from the First Amendment purview in *New York v. Ferber*.[7] The Court defined child pornography as "visual depictions … of sexual conduct involving a minor" and denied it constitutional protection because of the physical and emotional scars the children in the material suffered.[8] Thus, images "intrinsically related" to the sexual abuse required to produce them can be criminalized.[9]

The Supreme Court reaffirmed this reasoning in the 2002 decision of *Ashcroft v. Free Speech Coalition*.[10] *Ashcroft* involved the constitutionality of a federal law that treated computer-generated materials made without actual children as child pornography. But the virtual images lacked the defining trait of child pornography: the abuse of actual children. The law was thus unconstitutional as the images targeted did not involve children in the production process. The Court reiterated *Ferber*'s holding that child pornography was construed by "how it was made, not on what it communicated."[11]

Adhering to *Ferber* and *Ashcroft*, federal statutory law defines child pornography as "visual depictions" of "sexual conduct involving a minor."[12] A minor is anyone under 18. "Sexual conduct" includes sexual intercourse, bestiality, masturbation, sadistic abuse, and lascivious exhibition of the genitals.[13] The final category is most contested.

3. *People v. Zeas*, 2020 IL App (2d) 170437-U, ¶ 32.
4. *People v. Lamborn*, 185 Ill. 2d 585, 592 (1999).
5. U.S. Const. amend. I.
6. *Osborne v. Ohio*, 495 U.S. 103, 112 (1990).
7. *New York v. Ferber*, 458 U.S. 747 (1982).
8. *Id.* at 764-65.
9. *Id.* at 759.
10. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).
11. *Id.* at 251.
12. 18 U.S.C. § 2256(1).
13. *Id.*

TAKEAWAYS >>

- The Illinois child pornography statute resembles its federal counterpart but replaces "lascivious" with "lewd." However, "lewd" is not defined in the Illinois statute.
- A person commits a child pornography offense in Illinois by filming, photographing, or portraying anyone under 18 in a "pose, posture or setting involving a lewd exhibition of the unclothed or transparently clothed genitals, pubic area, buttocks, or … a fully or partially developed breast," or by possessing such images.
- Tension exists in caselaw when balancing a potentially child-pornographic image against the viewer's reaction, the objective content of the image, or whether it possesses voyeuristic characteristics.

AS THE SECOND CIRCUIT COURT OF APPEALS OBSERVED, FLAWS ASIDE, THE *DOST* TEST HAS "NOT BEEN MUCH IMPROVED UPON." *DOST* THUS REMAINS THE LAW OF THE LAND, INCLUDING ILLINOIS.

The leading decision on "lascivious" is a 1986 federal district court case from California, *United States v. Dost*.[14] Followed by most lower federal courts and states (although the Seventh Circuit Court of Appeals has neither adopted nor rejected it), *Dost* enumerates six factors to determine lasciviousness:

1) whether the focal point is on the child's genitalia;

2) whether the setting 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;

4) whether the child is fully or partially clothed, or nude;

5) whether the depiction suggests coyness or willingness to engage in sexual activity; and

6) whether the depiction is intended or designed to elicit a sexual response in the viewer.[15]

A depiction need not meet every factor to be lascivious and the factors are not exhaustive. The First Circuit Court of Appeals described the sixth *Dost* factor as the "most confusing and contentious."[16] Some courts apply it subjectively; that is, whether the material was intended to elicit a sexual response in the defendant or a like-minded pedophile. Other courts employ an objective approach, looking at whether the material was intended to elicit a sexual response in the average viewer.

Despite widespread acceptance, *Dost* has its critics. One federal district court derided the factors as so "malleable and subjective in their application" to be "not helpful."[17] A dissenting Massachusetts appellate judge likened a defendant's conviction under the *Dost* factors to a "trial by Rorschach test."[18] But as the Second Circuit Court of Appeals observed, flaws aside, the test has "not been much improved upon."[19] *Dost* thus remains the law of the land, including Illinois.

Illinois law and child pornography

The Illinois child pornography statute resembles its federal counterpart but replaces "lascivious" with "lewd." A person commits child pornography in Illinois by filming, photographing, or portraying anyone under 18 in a "pose, posture or setting involving a lewd exhibition of the unclothed or transparently clothed genitals, pubic area, buttocks, or … a fully or partially developed breast," or by possessing such images.[20] "Lewd" is not defined.

In 1999, the Illinois Supreme Court adopted the *Dost* test in *People v. Lamborn*.[21] *Lamborn* involved five pictures of nude minors, two of which the Court found lewd. In those two photos, a naked adult man draped his arm over a minor's shoulder. In the three nonlewd photos, two depict a minor's bikini bottom slightly pulled down revealing her buttocks, while the other is of two topless minors. The nudity in the nonlewd photos was not designed to elicit a sexual response in the viewer (the sixth *Dost* factor), as the minors engaged in "uninhibited moments of adolescent spontaneity."[22] How a particular viewer reacts to an image is irrelevant as the focus is on the image itself. "Private fantasies are not within the ambit of the child pornography statute," and so pictures of nude children do not necessarily become illegal when viewed by a pedophile.[23] The Court instead adopted an "objective standard," which focuses on whether material is designed to elicit a sexual response in an objective viewer.[24] Finally, nudity is insufficient: "Nudity without lewdness is not child pornography."[25]

Since *Lamborn*, Illinois Appellate Court justices have spent the last two decades elaborating on lewdness. The following summarizes those efforts.

In *People v. Lewis*, a naked 11-year-old was photographed standing in a bedroom with her arms at her side and looking straight ahead.[26] The Second District reversed the conviction because the photo was "nudity without lewdness."[27] Similarly, pictures of a 10-year-old's vaginal area and buttocks were not lewd in *People v. Wayman*, as the Fifth District considered them "simply nude photographs."[28] A conviction for the photo of a naked girl under 10 years old also fell in *People v. Freeburg*.[29] The Second District used an objective standard and found the photo did not invite the viewer to perceive the image sexually but rather captured "an inhibited moment of prepubescent spontaneity."[30] Finally, the Third District vacated a 10-year sentence and conviction in *People v. Barger*.[31] A nude 10-year-old girl was at a beach, seated on a tether ball with her legs straddling the ball. The majority held that the photo was not designed to elicit a sexual response from an objective viewer. The dissent countered that the sixth *Dost* factor was met because "the photographer set up [the image] for

14. *United States v. Dost*, 636 F.Supp 828 (S.D. Cal. 1986), *aff'd sub nom., United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987).
15. *Id.* at 832.
16. *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999).
17. *United States v. Hill*, 322 F.Supp. 2d 1081, 1085 (C.D. Cal. 2004).
18. *Commonwealth v. Sullivan*, 972 N.E. 2d 476 (Mass. App. Ct. 2012) (Milkey, J., dissenting).
19. *United States v. Rivera*, 546 F.3d 245, 253 (2d Cir. 2008).
20. 720 ILCS 5/11-20.1(a)(1)(vii); 720 ILCS 5/11-20.1(a)(6).
21. *People v. Lamborn*, 185 Ill. 2d 585 (1999).
22. *Id.* at 591-92.
23. *Id.*
24. *Id.* at 590.
25. *Id.* at 593.
26. *People v. Lewis*, 305 Ill. App. 3d 665, 678 (2d Dist. 1999).
27. *Id.*
28. *People v. Wayman*, 379 Ill. App. 3d 1043, 1056-58 (5th Dist. 2008).
29. *People v. Freeburg*, 2014 IL App (2d) 140079-U.
30. *Id.* at ¶¶ 12, 19.
31. *People v. Barger*, 2020 IL App (3d) 160316.

an audience of 'likeminded pedophiles.'"[32]

Not all cases are defense victories. The prosecution prevailed in *People v. Sven*, where the defendant secretly filmed the family babysitter undressing and bathing.[33] At times, seen on the video were the 14-year-old's vagina or buttocks. The Second District criticized the sixth *Dost* factor because it could not require "a finding that an image would elicit a sexual response in an ordinary person …. Ordinary people are not sexually stimulated by child pornography."[34] The *Sven* Court then revised the sixth *Dost* factor to "whether the image invites the viewer to perceive the image from some sexualized or deviant point of view."[35] Because the surreptitious recording placed the viewer in the role of a voyeur, the video was lewd.

The Second District followed *Sven* in the 2020 decision of *People v. Zeas*, where the defendant hid an iPhone to film a 15-year-old girl in a locker room.[36] The minor removed her bathing suit top and briefly revealed her breasts before dressing. The *Zeas* Court conceded the sixth factor was "difficult to apply, with some courts focusing on the content alone, other courts focusing on the intent of the photographer, and yet other courts virtually abandoning the factor."[37] Using the modified sixth factor of *Sven*, the video was determined to have invited the viewer to see the activity as deviant through a voyeuristic perspective.

The First District also relied on *Sven* in *People v. Van Syckle*.[38] The defendant, an employee at a high school, secretly recorded a 14-year-old student changing in the school locker room. Her buttocks were exposed. The court found the video's covert observation rendered the viewer a voyeur and the material was thus lewd.

Seismic shifts since *Lamborn*

Law often lags behind culture. It trails technology even farther. When *Lamborn* was decided in 1999, the technological tsunami of smartphones had not yet hit. But within a few years, discreet devices with camera and filming capabilities would be everywhere. An ascendant social media galvanized the demand for pictures and videos. Online platforms like TikTok and OnlyFans, along with countless adult-related websites, have eviscerated taboos about uploading nude images of oneself, especially for tech-savvy minors obsessed with social media.

But technology is both arsonist and fire department. In August 2021, Apple announced steps to combat the spread of explicit content involving children by matching images on users' devices to a database of child pornography from the National Center for Missing and Exploited Children. (Weeks later, Apple announced it would pause the rollout of this feature after backlash based on privacy concerns.[39]) Facebook also matches images against a child pornography database and has caught 4.5 million users posting known matches for child pornography.[40] As technology companies continue to work with authorities, an influx of child pornography cases could loom. These cultural and technological developments thus underscore the need for clarity on what constitutes child pornography and whether the current era of suggestive selfies has rendered *Lamborn* and *Dost* obsolete.

Viewer reaction vs. a material's production

There is a divergence between the decisions of the Illinois Appellate Court and U.S. Supreme Court. The presence of sexuality underlies *Ferber*, which sought "to prevent the abuse of children who are made to engage in sexual conduct."[41] Stated in the negative, the *Ashcroft* Court noted that where speech is not "the product of sexual abuse," it is protected.[42]

Departing from *Ferber* and *Ashcroft*, Illinois courts do not require material to have an explicitly sexual dynamic or involve sexual abuse to be pornographic. When a minor engages in mundane conduct such as showering, changing clothes, or weighing oneself on a scale, a provocative element is arguably lacking. While the privacy violations of video voyeurism are abhorrent and warrant punishment, is partaking in bathroom or locker-room rituals sexual conduct or sexual abuse? A strict reading of *Ferber* and *Ashcroft* suggests those questions would be answered in the negative and that child-pornography prosecutions for such incidental nudity may not be constitutionally viable. Instead, harsher voyeurism penalties may curtail such conduct while staying within constitutional bounds.

ILLINOIS COURTS DO NOT REQUIRE MATERIAL TO HAVE AN EXPLICITLY SEXUAL DYNAMIC OR INVOLVE SEXUAL ABUSE TO BE PORNOGRAPHIC.

Additionally, the lewdness debate cannot ignore the current zeitgeist. Online platforms and smartphones are havens for explicit content. Many images include minors in erotic displays. Such material that a minor authorizes—whether self-created or by friends or partners—is pornographic under *Dost*.[43] Yet absent evidence of compulsion, it would be difficult to establish sexual abuse, moving

32. *Id*. at ¶¶ 33, 37 (Lytton, J., dissenting).
33. *People v. Sven*, 365 Ill. App. 3d 226, 228 (2d Dist. 2006).
34. *Id*. at 235-36.
35. *Id*. at 239.
36. *People v. Zeas*, 2020 IL App (2d) 170437-U.
37. *Id*. ¶ 32 (citing *Sven*, 365 Ill. App. 3d at 234).
38. *People v. Van Syckle*, 2019 IL App (1st) 181410.
39. Coral Murphy Marcos & Kellen Browning, *Apple Delays the Rollout of Child-Safety Features Over Privacy Concerns*, The New York Times (Sept. 3, 2021; updated Oct. 14, 2021), law.isba.org/3nuM82X.
40. Bill Lovejoy, *Facebook's Former Security Chief Weighs in on Apple Child Protection Controversy*, 9TO5Mac (Aug. 10, 2021), law.isba.org/3oEiFCV.
41. *New York v. Ferber*, 458 U.S. 753 (1982).
42. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251 (2002).
43. Regarding the sharing or posting of self-created images by minors, see new Illinois Public Act 102-0412 implementing sex education curricula in Illinois schools addressing sexting and internet safety. Pub. Act 102-0412 (codified as amended at 105 ILCS 5/27-9.1).

it from the *Ferber-Ashcroft* framework to the First Amendment-protected realm.

As for the lewdness calculation, the sixth *Dost* factor is problematic as many courts and commentators note. Whether an image is designed to elicit a sexual response depends on the viewer. The average person would not deem any image of a child sexually appealing, while a pedophile might find even innocent images prurient. Indeed, the First Circuit Court of Appeals has cautioned that "a sexual deviant's quirks could turn a Sears catalog into pornography."[44] Another federal district court concluded that the subjective pedophile perspective will ensure convictions "in almost all cases."[45]

Sven, *Zeas*, and *Van Syckle* confirm this point as those convictions turned on the sixth factor. The First and Second districts analyzed the sixth factor as to whether the viewer could see the depiction from a deviant point of view. But this implies a subjective application, which clashes with *Lamborn*'s "objective approach" and its focus on the "photograph itself, not on the effect that the photograph has on an individual viewer."[46] Nor does the deviant point of view of *Sven*, *Zeas*, and *Van Syckle* align with *Ashcroft*'s instruction that child pornography is determined by "how it was made, not on what it communicated."[47] Moreover, exploring a pedophile's subjective desires has no statutory basis. Neither Illinois nor federal law suggests a child-pornography conviction rests on what may arouse a pedophile.

Another flaw of the sixth *Dost* factor, whether applied subjectively or objectively, is that it disregards the constitutional basis for banning child pornography. As *Ferber* and *Ashcroft* articulate, the visceral damage to a child during the making of explicit content is why it is unprotected speech. Yet this rationale does not implicate how pedophiles might react to an image. *Dost* cannot be reconciled with *Ferber* and *Ashcroft* because *Dost* removed the sexual-abuse component and replaced it with the viewer's reaction. Thus, when the inquiry hinges on a pedophile's imagined response to material rather than the toll on the child making the image, the moorings of *Ferber* and *Ashcroft* are cut completely. This disconnect is especially critical in the context of selfies and other images a minor agrees to because such material is child pornography under *Dost* but not *Ferber*.

Conclusion

Stopping the scourge of child pornography epitomizes a compelling government interest. But the *Dost* test raises First Amendment concerns. *Dost* is also being applied to images that are objectively asexual but that become sexual under the subjective pedophile gaze, straying from *Ferber*, *Ashcroft*, and *Lamborn*. If child pornography is to encompass content not overtly sexual, or not involving child sexual abuse in its production, it should have a Supreme Court's imprimatur. IBJ

44. *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999).
45. *United States v. McCarty*, 672 F.Supp. 2d 1085, 1101 n.11 (D. Haw. 2009).
46. *People v. Lamborn*, 185 Ill. 2d 585, 594-95 (1999).
47. *Ashcroft*, 535 U.S. at 251.