



## 96TH GENERAL ASSEMBLY

### State of Illinois

2009 and 2010

HB1316

Introduced 2/18/2009, by Rep. Bob Biggins

#### SYNOPSIS AS INTRODUCED:

720 ILCS 5/11-20.1

from Ch. 38, par. 11-20.1

Amends the Criminal Code of 1961 in relation to child pornography. Provides that the commission of the offense by filming or videotaping or creating a moving image or possession of such films, videotapes, or moving images is a felony one class higher than photographing or possessing photographs of child pornography. Provides that telecommunications carriers, commercial mobile service providers, and providers of information services, including, but not limited to, Internet service providers and hosting service providers, are not liable under the child pornography statute, except for willful and wanton misconduct, by virtue of the transmission, storage, or caching of electronic communications or messages of others or by virtue of the provision of other related telecommunications, commercial mobile services, or information services used by others in violation of the child pornography statute.

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CORRECTIONAL  
BUDGET AND  
IMPACT NOTE ACT  
MAY APPLY

A BILL FOR

1 AN ACT concerning criminal law.

2 **Be it enacted by the People of the State of Illinois,**  
3 **represented in the General Assembly:**

4 Section 5. The Criminal Code of 1961 is amended by changing  
5 Section 11-20.1 as follows:

6 (720 ILCS 5/11-20.1) (from Ch. 38, par. 11-20.1)

7 Sec. 11-20.1. Child pornography.

8 (a) A person commits the offense of child pornography who:

9 (1) films, videotapes, photographs, or otherwise  
10 depicts or portrays by means of any similar visual medium  
11 or reproduction or depicts by computer any child whom he  
12 knows or reasonably should know to be under the age of 18  
13 or any severely or profoundly mentally retarded person  
14 where such child or severely or profoundly mentally  
15 retarded person is:

16 (i) actually or by simulation engaged in any act of  
17 sexual penetration or sexual conduct with any person or  
18 animal; or

19 (ii) actually or by simulation engaged in any act  
20 of sexual penetration or sexual conduct involving the  
21 sex organs of the child or severely or profoundly  
22 mentally retarded person and the mouth, anus, or sex  
23 organs of another person or animal; or which involves

1 the mouth, anus or sex organs of the child or severely  
2 or profoundly mentally retarded person and the sex  
3 organs of another person or animal; or

4 (iii) actually or by simulation engaged in any act  
5 of masturbation; or

6 (iv) actually or by simulation portrayed as being  
7 the object of, or otherwise engaged in, any act of lewd  
8 fondling, touching, or caressing involving another  
9 person or animal; or

10 (v) actually or by simulation engaged in any act of  
11 excretion or urination within a sexual context; or

12 (vi) actually or by simulation portrayed or  
13 depicted as bound, fettered, or subject to sadistic,  
14 masochistic, or sadomasochistic abuse in any sexual  
15 context; or

16 (vii) depicted or portrayed in any pose, posture or  
17 setting involving a lewd exhibition of the unclothed or  
18 transparently clothed genitals, pubic area, buttocks,  
19 or, if such person is female, a fully or partially  
20 developed breast of the child or other person; or

21 (2) with the knowledge of the nature or content  
22 thereof, reproduces, disseminates, offers to disseminate,  
23 exhibits or possesses with intent to disseminate any film,  
24 videotape, photograph or other similar visual reproduction  
25 or depiction by computer of any child or severely or  
26 profoundly mentally retarded person whom the person knows

1 or reasonably should know to be under the age of 18 or to  
2 be a severely or profoundly mentally retarded person,  
3 engaged in any activity described in subparagraphs (i)  
4 through (vii) of paragraph (1) of this subsection; or

5 (3) with knowledge of the subject matter or theme  
6 thereof, produces any stage play, live performance, film,  
7 videotape or other similar visual portrayal or depiction by  
8 computer which includes a child whom the person knows or  
9 reasonably should know to be under the age of 18 or a  
10 severely or profoundly mentally retarded person engaged in  
11 any activity described in subparagraphs (i) through (vii)  
12 of paragraph (1) of this subsection; or

13 (4) solicits, uses, persuades, induces, entices, or  
14 coerces any child whom he knows or reasonably should know  
15 to be under the age of 18 or a severely or profoundly  
16 mentally retarded person to appear in any stage play, live  
17 presentation, film, videotape, photograph or other similar  
18 visual reproduction or depiction by computer in which the  
19 child or severely or profoundly mentally retarded person is  
20 or will be depicted, actually or by simulation, in any act,  
21 pose or setting described in subparagraphs (i) through  
22 (vii) of paragraph (1) of this subsection; or

23 (5) is a parent, step-parent, legal guardian or other  
24 person having care or custody of a child whom the person  
25 knows or reasonably should know to be under the age of 18  
26 or a severely or profoundly mentally retarded person and

1 who knowingly permits, induces, promotes, or arranges for  
2 such child or severely or profoundly mentally retarded  
3 person to appear in any stage play, live performance, film,  
4 videotape, photograph or other similar visual  
5 presentation, portrayal or simulation or depiction by  
6 computer of any act or activity described in subparagraphs  
7 (i) through (vii) of paragraph (1) of this subsection; or

8 (6) with knowledge of the nature or content thereof,  
9 possesses any film, videotape, photograph or other similar  
10 visual reproduction or depiction by computer of any child  
11 or severely or profoundly mentally retarded person whom the  
12 person knows or reasonably should know to be under the age  
13 of 18 or to be a severely or profoundly mentally retarded  
14 person, engaged in any activity described in subparagraphs  
15 (i) through (vii) of paragraph (1) of this subsection; or

16 (7) solicits, uses, persuades, induces, entices, or  
17 coerces a person to provide a child under the age of 18 or  
18 a severely or profoundly mentally retarded person to appear  
19 in any videotape, photograph, film, stage play, live  
20 presentation, or other similar visual reproduction or  
21 depiction by computer in which the child or severely or  
22 profoundly mentally retarded person will be depicted,  
23 actually or by simulation, in any act, pose, or setting  
24 described in subparagraphs (i) through (vii) of paragraph  
25 (1) of this subsection.

26 (b) (1) It shall be an affirmative defense to a charge of

1 child pornography that the defendant reasonably believed,  
2 under all of the circumstances, that the child was 18 years  
3 of age or older or that the person was not a severely or  
4 profoundly mentally retarded person but only where, prior  
5 to the act or acts giving rise to a prosecution under this  
6 Section, he took some affirmative action or made a bonafide  
7 inquiry designed to ascertain whether the child was 18  
8 years of age or older or that the person was not a severely  
9 or profoundly mentally retarded person and his reliance  
10 upon the information so obtained was clearly reasonable.

11 (1.5) Telecommunications carriers, commercial mobile  
12 service providers, and providers of information services,  
13 including, but not limited to, Internet service providers  
14 and hosting service providers, are not liable under this  
15 Section, except for willful and wanton misconduct, by  
16 virtue of the transmission, storage, or caching of  
17 electronic communications or messages of others or by  
18 virtue of the provision of other related  
19 telecommunications, commercial mobile services, or  
20 information services used by others in violation of this  
21 Section.

22 (2) (Blank).

23 (3) The charge of child pornography shall not apply to  
24 the performance of official duties by law enforcement or  
25 prosecuting officers or persons employed by law  
26 enforcement or prosecuting agencies, court personnel or

1 attorneys, nor to bonafide treatment or professional  
2 education programs conducted by licensed physicians,  
3 psychologists or social workers.

4 (4) Possession by the defendant of more than one of the  
5 same film, videotape or visual reproduction or depiction by  
6 computer in which child pornography is depicted shall raise  
7 a rebuttable presumption that the defendant possessed such  
8 materials with the intent to disseminate them.

9 (5) The charge of child pornography does not apply to a  
10 person who does not voluntarily possess a film, videotape,  
11 or visual reproduction or depiction by computer in which  
12 child pornography is depicted. Possession is voluntary if  
13 the defendant knowingly procures or receives a film,  
14 videotape, or visual reproduction or depiction for a  
15 sufficient time to be able to terminate his or her  
16 possession.

17 (c) If the violation does not involve a film, videotape, or  
18 other moving depiction, a violation ~~Violation~~ of paragraph (1),  
19 (4), (5), or (7) of subsection (a) is a Class 1 felony with a  
20 mandatory minimum fine of \$2,000 and a maximum fine of  
21 \$100,000. If the violation involves a film, videotape, or other  
22 moving depiction, a violation of paragraph (1), (4), (5), or  
23 (7) of subsection (a) is a Class X felony with a mandatory  
24 minimum fine of \$2,000 and a maximum fine of \$100,000. If the  
25 violation does not involve a film, videotape, or other moving  
26 depiction, a violation ~~Violation~~ of paragraph (3) of subsection

1 (a) is a Class 1 felony with a mandatory minimum fine of \$1500  
2 and a maximum fine of \$100,000. If the violation involves a  
3 film, videotape, or other moving depiction, a violation of  
4 paragraph (3) of subsection (a) is a Class X felony with a  
5 mandatory minimum fine of \$1500 and a maximum fine of \$100,000.  
6 If the violation does not involve a film, videotape, or other  
7 moving depiction, a violation ~~Violation~~ of paragraph (2) of  
8 subsection (a) is a Class 1 felony with a mandatory minimum  
9 fine of \$1000 and a maximum fine of \$100,000. If the violation  
10 involves a film, videotape, or other moving depiction, a  
11 violation of paragraph (2) of subsection (a) is a Class X  
12 felony with a mandatory minimum fine of \$1000 and a maximum  
13 fine of \$100,000. If the violation does not involve a film,  
14 videotape, or other moving depiction, a violation ~~Violation~~ of  
15 paragraph (6) of subsection (a) is a Class 3 felony with a  
16 mandatory minimum fine of \$1000 and a maximum fine of \$100,000.  
17 If the violation involves a film, videotape, or other moving  
18 depiction, a violation of paragraph (6) of subsection (a) is a  
19 Class 2 felony with a mandatory minimum fine of \$1000 and a  
20 maximum fine of \$100,000.

21 (d) If a person is convicted of a second or subsequent  
22 violation of this Section within 10 years of a prior  
23 conviction, the court shall order a presentence psychiatric  
24 examination of the person. The examiner shall report to the  
25 court whether treatment of the person is necessary.

26 (e) Any film, videotape, photograph or other similar visual



1 reproduction or depiction by computer which includes a child  
2 under the age of 18 or a severely or profoundly mentally  
3 retarded person engaged in any activity described in  
4 subparagraphs (i) through (vii) or paragraph 1 of subsection  
5 (a), and any material or equipment used or intended for use in  
6 photographing, filming, printing, producing, reproducing,  
7 manufacturing, projecting, exhibiting, depiction by computer,  
8 or disseminating such material shall be seized and forfeited in  
9 the manner, method and procedure provided by Section 36-1 of  
10 this Code for the seizure and forfeiture of vessels, vehicles  
11 and aircraft.

12 (e-5) Upon the conclusion of a case brought under this  
13 Section, the court shall seal all evidence depicting a victim  
14 or witness that is sexually explicit. The evidence may be  
15 unsealed and viewed, on a motion of the party seeking to unseal  
16 and view the evidence, only for good cause shown and in the  
17 discretion of the court. The motion must expressly set forth  
18 the purpose for viewing the material. The State's attorney and  
19 the victim, if possible, shall be provided reasonable notice of  
20 the hearing on the motion to unseal the evidence. Any person  
21 entitled to notice of a hearing under this subsection (e-5) may  
22 object to the motion.

23 (f) Definitions. For the purposes of this Section:

24 (1) "Disseminate" means (i) to sell, distribute,  
25 exchange or transfer possession, whether with or without  
26 consideration or (ii) to make a depiction by computer

1 available for distribution or downloading through the  
2 facilities of any telecommunications network or through  
3 any other means of transferring computer programs or data  
4 to a computer.

5 (2) "Produce" means to direct, promote, advertise,  
6 publish, manufacture, issue, present or show.

7 (3) "Reproduce" means to make a duplication or copy.

8 (4) "Depict by computer" means to generate or create,  
9 or cause to be created or generated, a computer program or  
10 data that, after being processed by a computer either alone  
11 or in conjunction with one or more computer programs,  
12 results in a visual depiction on a computer monitor,  
13 screen, or display.

14 (5) "Depiction by computer" means a computer program or  
15 data that, after being processed by a computer either alone  
16 or in conjunction with one or more computer programs,  
17 results in a visual depiction on a computer monitor,  
18 screen, or display.

19 (6) "Computer", "computer program", and "data" have  
20 the meanings ascribed to them in Section 16D-2 of this  
21 Code.

22 (7) "Child" includes a film, videotape, photograph, or  
23 other similar visual medium or reproduction or depiction by  
24 computer that is, or appears to be, that of a person,  
25 either in part, or in total, under the age of 18,  
26 regardless of the method by which the film, videotape,

1 photograph, or other similar visual medium or reproduction  
2 or depiction by computer is created, adopted, or modified  
3 to appear as such. "Child" also includes a film, videotape,  
4 photograph, or other similar visual medium or reproduction  
5 or depiction by computer that is advertised, promoted,  
6 presented, described, or distributed in such a manner that  
7 conveys the impression that the film, videotape,  
8 photograph, or other similar visual medium or reproduction  
9 or depiction by computer is of a person under the age of  
10 18.

11 (8) "Sexual penetration" and "sexual conduct" have the  
12 meanings ascribed to them in Section 12-12 of this Code.

13 (g) Re-enactment; findings; purposes.

14 (1) The General Assembly finds and declares that:

15 (i) Section 50-5 of Public Act 88-680, effective  
16 January 1, 1995, contained provisions amending the  
17 child pornography statute, Section 11-20.1 of the  
18 Criminal Code of 1961. Section 50-5 also contained  
19 other provisions.

20 (ii) In addition, Public Act 88-680 was entitled  
21 "AN ACT to create a Safe Neighborhoods Law". (A)  
22 Article 5 was entitled JUVENILE JUSTICE and amended the  
23 Juvenile Court Act of 1987. (B) Article 15 was entitled  
24 GANGS and amended various provisions of the Criminal  
25 Code of 1961 and the Unified Code of Corrections. (C)  
26 Article 20 was entitled ALCOHOL ABUSE and amended

1 various provisions of the Illinois Vehicle Code. (D)  
2 Article 25 was entitled DRUG ABUSE and amended the  
3 Cannabis Control Act and the Illinois Controlled  
4 Substances Act. (E) Article 30 was entitled FIREARMS  
5 and amended the Criminal Code of 1961 and the Code of  
6 Criminal Procedure of 1963. (F) Article 35 amended the  
7 Criminal Code of 1961, the Rights of Crime Victims and  
8 Witnesses Act, and the Unified Code of Corrections. (G)  
9 Article 40 amended the Criminal Code of 1961 to  
10 increase the penalty for compelling organization  
11 membership of persons. (H) Article 45 created the  
12 Secure Residential Youth Care Facility Licensing Act  
13 and amended the State Finance Act, the Juvenile Court  
14 Act of 1987, the Unified Code of Corrections, and the  
15 Private Correctional Facility Moratorium Act. (I)  
16 Article 50 amended the WIC Vendor Management Act, the  
17 Firearm Owners Identification Card Act, the Juvenile  
18 Court Act of 1987, the Criminal Code of 1961, the  
19 Wrongs to Children Act, and the Unified Code of  
20 Corrections.

21 (iii) On September 22, 1998, the Third District  
22 Appellate Court in *People v. Dainty*, 701 N.E. 2d 118,  
23 ruled that Public Act 88-680 violates the single  
24 subject clause of the Illinois Constitution (Article  
25 IV, Section 8 (d)) and was unconstitutional in its  
26 entirety. As of the time this amendatory Act of 1999

1 was prepared, People v. Dainty was still subject to  
2 appeal.

3 (iv) Child pornography is a vital concern to the  
4 people of this State and the validity of future  
5 prosecutions under the child pornography statute of  
6 the Criminal Code of 1961 is in grave doubt.

7 (2) It is the purpose of this amendatory Act of 1999 to  
8 prevent or minimize any problems relating to prosecutions  
9 for child pornography that may result from challenges to  
10 the constitutional validity of Public Act 88-680 by  
11 re-enacting the Section relating to child pornography that  
12 was included in Public Act 88-680.

13 (3) This amendatory Act of 1999 re-enacts Section  
14 11-20.1 of the Criminal Code of 1961, as it has been  
15 amended. This re-enactment is intended to remove any  
16 question as to the validity or content of that Section; it  
17 is not intended to supersede any other Public Act that  
18 amends the text of the Section as set forth in this  
19 amendatory Act of 1999. The material is shown as existing  
20 text (i.e., without underscoring) because, as of the time  
21 this amendatory Act of 1999 was prepared, People v. Dainty  
22 was subject to appeal to the Illinois Supreme Court.

23 (4) The re-enactment by this amendatory Act of 1999 of  
24 Section 11-20.1 of the Criminal Code of 1961 relating to  
25 child pornography that was amended by Public Act 88-680 is  
26 not intended, and shall not be construed, to imply that

1           Public Act 88-680 is invalid or to limit or impair any  
2           legal argument concerning whether those provisions were  
3           substantially re-enacted by other Public Acts.

4           (Source: P.A. 94-366, eff. 7-29-05.)