AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era—Democratic Rights/Free Speech/Obscenity

**In re S.K., 466 Md. 31** (MD 2019)

*During the 2016-17 school year, two sixteen-year-old females and a seventeen-year-old male maintained a group chat in which they would post photos, videos, and texts. S.K. sent to the group chat a one-minute video of herself performing fellatio on a male (who was not a member of the group chat). The three friends later had a falling out, and the fellatio video was distributed to other students at their shared high school in suburban Maryland. One of the former friends from the group chat gave the video to the school resource officer (a law enforcement officer assigned to the school), while bragging that he would get S.K. sent to jail. The school resource officer referred the case to the country prosecutor.*

*The county prosecutor brought charges against S.K. in juvenile court. The juvenile court found S.K. guilty of distributing child pornography and displaying an obscene item to a minor, but not guilty of filming a minor engaging in sexual conduct (it was argued that the male in the video had held the camera). She was put on probation, but was not put on the sex offender registry. After she successfully completed her probation, her case records were sealed. S.K. appealed, and a state court of special appeals partly upheld her conviction. She appealed to the state supreme court. In a 6-1 decision, the state supreme court held that self-produced images of sexual activity by minors fell within the confines of the state’s child pornography statute and that videos of sexual imagery of a minor fell within the statute criminalizing the display of obscene materials to minors, and thus upheld the conviction of S.K. One point of disagreement between the majority and the dissent involved the extent to which the Maryland statute and the U.S. Supreme Court in characterizing all forms of child pornography as outside the scope of the First Amendment depended on such imagery involving the exploitation of children by adults.*

JUDGE GETTY.

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As a matter of first impression, the main issue before this Court is whether a minor may be adjudicated delinquent under the current statutory scheme as the “person” who is a distributor of child pornography and a displayer of obscene matter when she is also the minor participant in the sex act. Put more dramatically, can a minor legally engaged in consensual sexual activity be his or her own pornographer through the act of sexting? [T]he language of [the state child pornography statute] in its plain meaning is all-encompassing. The General Assembly has not updated the statute's language since the advent of sexting and thus we may not read into the statute an exception for minors. As to a second issue, a cellphone video is a digital file that is broadly captured under the term “film” in the enumerated “items” set forth in [in the state statute]. Therefore, S.K.'s conduct is covered by the language of the obscenity statute.

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Sexting is a sociocultural phenomenon that has evolved from the use of smartphones. *Black's Law Dictionary* identifies the origin of the word “sexting” in the year 2005 and defines it as “the sending of sexually explicit messages or images by cellphone.” Consistent with the rise in smartphone usage, at least 18.5% of middle and high schoolers report having received sexually explicit images or videos on their phones or computers. There is no indication this trend will decrease as the pervasiveness of technology in our lives continues.

As sexting has grown in popularity, so has the attention given to the issue. As early as 2007, the legal community began to debate what was coined “self-produced child pornography.” . . . In 2009, in response to the national attention focused on teenage sexting, additional legal scholars began to address the issue by distinguishing this activity from child pornography and discussing appropriate sanctions. . . .

In addition to the attention many legal scholars gave the issue, other states responded with specific legislation addressing teenage sexting. . . . Maryland is one of twenty-one states that have not passed any such legislation and thus permit teenagers to be charged under the child pornography statute.

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. . . . The General Assembly enacted Maryland's first child pornography statute in 1978.

Also guiding our interpretation is the constitutional case of *New York v. Ferber* (1982). The Court in Ferber held “that the First Amendment permits a state to proscribe the distribution of sexual materials involving minors without regard to an obscenity standard.” The Supreme Court has recognized that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” . . .

With this historical backdrop, we now turn to an analysis of the statute. This Court provides judicial deference to the policy decisions that the General Assembly enacts into law. . . .

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The 1978 child pornography statute as amended prohibits a “person” from knowingly distributing “any matter, visual representation, or performance ... that depicts a minor engaged as a subject in ... sexual conduct.” Sexual conduct is defined in CR § 11-101(d) as (1) human masturbation; (2) sexual intercourse; or (3) whether alone or with another individual or animal, any touching of or contact with: (i) the genitals, buttocks, or pubic areas of any individual; or (ii) breasts of a female individual.” . . .

S.K. contends this case is about whether CR § 11-207(a)(4) permits the prosecution of a minor for transmitting a visual representation of herself engaged in consensual, legal sexual conduct. S.K. argues the answer is no, stating the statute was intended to protect, not prosecute, minors victimized and exploited in the production of sexually explicit videos. . . .

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We do not find any ambiguity in this text and, therefore it is our duty to interpret the law as written and apply its plain meaning to the facts before us. . . .

As to the first potential area of ambiguity S.K. raises, we agree with the Court of Special Appeals and the State that a minor is “engaged as a subject” under the statute “if she or he is a participant in, or the object of, such conduct.” . . .

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This case presents a unique challenge. On the one hand, there is no question that the State has an overwhelming interest in preventing the spread of child pornography and has been given broad authority to eradicate the production and distribution of child pornography. On the other hand, S.K., albeit unwisely, engaged in the same behavior as many of her peers. Here, S.K is prosecuted as a “child pornographer” for sexting and, because she is a minor, her actions fell directly within the scope of the statute. The General Assembly has consistently expanded the scope of the statute to assist in the eradication of any form of child pornography. As written, the statute in its plain meaning is all encompassing, making no distinction whether a minor or an adult is distributing the matter.

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Maryland's statutory definition of obscenity is primarily based on the test for obscenity provided by the Supreme Court in *Miller v. California* (1973). Within our analysis, we first must determine whether the materials S.K. disseminated to her two minor friends constitute obscene material. After, we must determine whether a digital file falls within the list of “items” enumerated by CR § 11-203(a)(4).

Although the Maryland statutory definition of obscenity within this context contours closely to the definition set forth in Miller, the Supreme Court has recognized that states possess a compelling interest in “safeguarding the physical and psychological well-being of a minor” and has expanded the definition of obscenity in situations involving child pornography. *New York v Ferber* (1982). . . . Moreover, obscene material involving adults is entitled to a substantially greater level of First Amendment protection, as compared to obscene material involving minors. *United States v. Williams* (2008).

S.K. transmitted to her friends, A.T. and K.S., also minors, the digital file that contained depictions of: (1) her nude torso and exposed breast; (2) the male's erect penis; (3) and S.K. performing fellatio on a nude male. This material falls squarely within the definition of “illicit sex” as enacted by the General Assembly in CR § 11-203(a)(3). In fact, the video S.K. distributed depicted all forms of “illicit sex” contemplated by the statute. . . . Based on these statutory definitions and the Supreme Court's guidance upon obscenity within the context of displaying such materials to a minor, the video file that S.K. transmitted constitutes obscene material.

We agree with the juvenile court's finding and conclude that the video file S.K. transmitted to her friends contained obscene material based on the video's depiction of sexualized content of a nude minor engaging in the act of fellatio. Although the sexual act in this case was consensual, it also falls directly within the definition of Maryland's obscenity statute of “display[ing] or exhibit[ing] to a minor an [obscene] item” which contains “illicit sex” and a “partially nude figure.” *Moore v. Maryland* (MD 2005). . .

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We agree with the Court of Special Appeals that the statute technically “has not kept pace with the ways in which obscene images may be displayed to minors.” . . . n our plain language approach, we recognize the problematic aspects of applying statutory language emerging from the 1970s and 1990s to modern technologies. In short, the provision has failed to keep pace with technology and, in some instances, may be ill-suited in application to some technological advancement occurring subsequent to enactment and later amendment.

. . . . [A]lthough the list of technologies enumerated under CR § 11-203(a)(4) can be viewed as somewhat antiquated when compared to post-enactment advancements in technology, the intent of the General Assembly remains clear: to avoid loopholes that may arise under the statute based on rapid technological advancement and the emergence of new forms of media.

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*Reversed*.

JUDGE HOTTEN, dissenting.

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. . . . As provided by S.K., the statute creates a dichotomy “between the pornographer, or “person,” and victim, or “minor” so that these two actors are different individuals[.]” Therefore, I conclude that the plain language of Crim. Law § 11-207(a)(4)(i) does not permit S.K. to be delinquent for transmitting a visual representation of herself. There is ambiguity in Crim. Law § 11-207(a). When such ambiguity exists, “the job of this Court is to resolve the ambiguity in light of the legislative intent[.]”

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In the case at bar, S.K. was not being exploited by someone else. She made a video depicting consensual sexual conduct. The General Assembly did not seek to subject minors who recorded themselves in non-exploitative sexual encounters to prosecution. . . . Rather, the statute contemplates protecting children from the actions of others that bear negatively upon them.

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. . . . [T]he Ferber Court qualified its broader and generalized assertion regarding its concern for children in pornographic content. The qualification in footnote nine specified the Court's particular concern regarding the **exploitative** nature that arises when children are used in pornographic content. The Court expressed concern for the welfare of exploited children, rather than the general use of children as subjects. The Ferber Court's specific concern for exploited and abused children is further evidenced by the very quote that the Majority cites: “The distribution of photographs and films depicting sexual activity by juveniles is intrinsically **related to the sexual abuse of children** in at least two ways.” . . .

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I respectfully dissent and conclude that the term “film,” as used in the statute, does not refer to “a motion picture or movie” but rather, to a kind of medium. Because S.K.'s digital file is not within the medium of film, she is not subject to adjudication under the statute.

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