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Maryland's Unjust Court Decision on Sexting

A Maryland teen shared a video of her own sex act. She was punished as a child pornographer.

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On Wednesday, the Maryland Court of Appeals—the state’s highest court—upheld the punishment of a minor who was prosecuted for child pornography after she distributed a video of herself performing a sex act. The [ruling](#) is dangerous on several levels: It mangles a law designed to *protect* minors by putting them in greater risk of legal jeopardy than adults. It clashes with fundamental principles of due process, punishing the ostensible victim of a crime as a perpetrator as well. And it essentially encourages revenge porn against minors, who cannot attempt to halt the distribution of their own intimate images without risking prosecution. Wednesday’s decision is a disastrous blow to the rights and safety of minors in Maryland.

The facts of the case, *In re: S.K.*, are appalling. In 2016, a 16-year-old Maryland student known as S.K. in court documents sent a brief cellphone video to two friends. The clip depicted S.K. performing oral sex on an unknown man—a legal activity in Maryland, where the age of consent is 16. She sent the video as part of a game in which the friends attempted to “one-up” each other with “silly photos and videos.” A few months later, S.K. had a falling-out with one recipient of the video, a 17-year-old boy known as K.S. He began to mock S.K., allegedly writing that she was a “slut” on classroom blackboards. He then reported the video to the school resource officer, Eugene Caballero.

After Caballero saw the minutelong video, he met with S.K. By that point, the clip had been passed around school; a mutual friend alleged that K.S. shared it with the broader student body. At the meeting, S.K. cried, expressing her distress that the video had been shared widely. She believed Caballero was meeting with her to help stop the clip’s distribution. Caballero encouraged S.K. to provide a written statement admitting that she was in the video and had sent it to two friends.

If there is any victim here, it is S.K.

What Caballero did not tell S.K. was that she was considered not a victim but a criminal suspect. Instead of trying to halt the video's dissemination, the officer passed along S.K.'s statement to the state prosecutor. Maryland then charged S.K. with illegally distributing child pornography and displaying an obscene item to a minor. She was found guilty by a juvenile court, which found her delinquent as a distributor of child pornography. The court sentenced S.K. to supervised probation and placed her on electronic monitoring. Her punishment required her to report to a probation officer periodically, allow him to visit her home, obtain permission before leaving the state, submit to weekly drug urinalysis, and complete an anger management course. (Because she was a minor, she did not have to register as a sex offender.)

S.K. completed these requirements but appealed her delinquency finding, arguing that Maryland law does not allow the *subject* of child pornography to be the perpetrator as well. The Court of Appeals rejected that argument by a 6–1 vote. Writing for the majority, Judge Joseph M. Getty expressed some discomfort with the outcome but declined to “read into the statute an exemption for minors.” The law, he wrote, punishes all individuals who distribute pornographic images of children, including children who share images of themselves. Legislation to change that, Getty wrote, “ought to be considered by the General Assembly in the future.”

In the lone dissent, Judge Michele D. Hotten—who is emerging as [the court's great defender of justice](#)—accused the majority of reaching an absurd result by misreading the [statute](#). The law at issue, Hotten wrote, is genuinely ambiguous: It states that a “person may not” distribute material that “depicts a minor engaged as a subject in ... sexual conduct.” Can the “person” who distributes this criminal material also be the “minor” who is “engaged as a subject” in it? In other words, does the law's text allow the criminal and the victim to be the same individual?

Hotten found the text to be unclear. And under the court's own [precedent](#), “[w]hen a statute can be interpreted in more than one way, the job of this Court is to resolve that ambiguity in light of the legislative intent.” Here, Hotten found ample evidence that Maryland “sought to protect children from *exploitation and abuse* as opposed to enacting laws that criminalized consensual sexual activity among minors.” (Italics in the original.) The General Assembly has repeatedly indicated that its legal regime is designed to aid victims of child pornography, not to penalize minors who film lawful, consensual sex acts. “Reading the statute in a contrary fashion,” Hotten wrote, “subverts legislative intent.”

There are two other reasons why Hotten's reading of the statute should've carried the day. First, a canon of statutory construction known as [the rule of lenity](#) should apply here. Under this rule, ambiguous criminal statutes must be interpreted in the defendant's favor. And in many ways, the law here is the essence of ambiguity. True, the statute's broad language conceivably sweeps in minors who distributed images of their own sex acts. But it seems likely that its drafters did not intend to penalize these minors given the legislative record explaining the purpose of the law. Moreover, the text hints that the “person” who distributes child pornography is different from the “minor” depicted in it. In light of this uncertainty, the rule of lenity requires an interpretation that lets S.K. off the hook.

Similarly, the majority's interpretation of the law raises due process concerns. According to the majority, an individual's status as a victim makes her a criminal too. The General Assembly's

efforts to shield minors from abuse perversely put these same minors [at higher risk of criminal liability](#). Due process [requires](#) criminal laws to give an ordinary person fair notice of the conduct they prohibit. But who, upon reading the Maryland statute, could discern that the law might punish the same individuals it is meant to safeguard? That's an outrageous, arguably unforeseeable result. And under the doctrine of [constitutional avoidance](#), a court must adopt the interpretation of a law that does not clash with the Constitution. The majority should have deployed this doctrine to read the Maryland statute in a manner that did not clash with due process principles.

In the end, all these flaws in the court's reasoning point toward its core flaw: The ruling simply makes no sense. If there is any victim here, it is S.K., who was allegedly the target of revenge porn by her erstwhile friend K.S. Yet K.S. was never charged with distributing the video, nor were any of the students who passed it around. Only S.K., humiliated and horrified, found herself charged as a child pornographer. The system failed her at every step, from the school resource officer who treated her like a criminal, to the prosecutor who inexplicably brought a criminal case against her, to the courts that affirmed the prosecutors' ridiculous reading of the law.

Until the General Assembly fixes the problem, *In re: S.K.* will make it more difficult for minors to shield themselves against exploitation. Underage individuals who film and share consensual sex acts with partners or friends will have little recourse if those images are shared more widely to embarrass them. Maryland has a revenge porn ban, but the Court of Appeals just created a loophole, opening up teenage victims of revenge porn to child pornography charges. Like North Carolina, Minnesota, and other states, Maryland has turned teenage sexters into sex offenders. A handful of states, such as Washington, New Mexico and Colorado, have reformed their laws to repeal penalties for teen sexters. Maryland lawmakers must follow suit and amend their statute to ensure that more minors like S.K. aren't victimized by a law ostensibly designed to protect them.

This post has been updated to clarify that while Washington state is under the effect of a punitive state Supreme Court ruling regarding teen sexting and child pornography, the state is taking steps to reform its measures.

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