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## PUNISHING VICTIM AS PERPETRATOR: *IN RE: S.K.* AND THE CHILLING EFFECT OF LABELING TEEN SEXTING AS CHILD PORNOGRAPHY

BY EMMA KAUFMAN\*

In their 2019 decision, *In re S.K.*<sup>1</sup>, the Maryland Court of Appeals addressed two issues: whether it is possible to convict a minor for the distribution of child pornography, and whether it is possible to convict a minor for the display of obscene material when the minor is a consensual party participating in the documented sexual activity.<sup>2</sup> On the distribution issue, the Court held that there was no exception for minors within the Maryland child pornography criminal statute, and therefore, minors can be adjudicated as delinquent as distributors of child pornography.<sup>3</sup> As for the obscene materials issue, the Court held that cellphone videos qualified as one of the “items” enumerated by the Maryland child pornography statute and S.K.’s conduct fell within the purview of the statute, thus violating its provisions.<sup>4</sup>

However, the Court’s decision was incorrect in three major capacities: the holding failed to advance the legislative intent underlying the child pornography statute<sup>5</sup> the decision takes too broad a view in characterizing a text message video as one of the “items” enumerated by the applicable statute<sup>6</sup>, and the decision neglected to use a constitutional analysis to reconcile the technological realities of voluntary sexting<sup>7</sup> with the antiquated child pornography statute.<sup>8</sup>

Part I of this article will outline the circumstances that resulted in criminal charges being filed against S.K., and the decisions of the trial and appellate courts thereafter.<sup>9</sup> Part II will discuss the case’s legal his-

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<sup>1</sup> 461 Md. 31 (2019).

<sup>2</sup> *Id.* at 36.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *See infra* Part IV-A.

<sup>6</sup> *See infra* Part IV-B.

<sup>7</sup> *See infra* Part IV-C; *see also* *Sexting*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The creation, possession, or distribution of sexually explicit images via cellphones”).

<sup>8</sup> *See infra* Part IV-C.

<sup>9</sup> *See infra* Part I.

tory, including foundational Supreme Court cases addressing child pornography, the legislative effort to combat child pornography at the national and state level, research on sexting among minors, and the attempts of various states to reconcile consensual sexting among minors with child pornography legislation.<sup>10</sup> Part III will explore the Court of Appeals' reasoning in deciding S.K.'s case, ultimately leading the Court to adjudicate S.K. as delinquent for her involvement in the distribution of child pornography, as well as in the display of an obscene item to a minor.<sup>11</sup> Part IV analyzes the Court's decision in *In re S.K.*, examining the Court's adherence to the legislative intent behind the child pornography statute, as well as the Court's characterization of a texted video as a "film", concluding with a discussion of the implications of categorizing consensual sexting among minors as child pornography.<sup>12</sup>

## I. THE CASE

From 2016 to 2017, a trio of friends attending Maurice J. McDonough High School in Charles County, Maryland, used their cell-phones to send each other photos and videos in a group chat.<sup>13</sup> The friend group was comprised of A.T., a sixteen-year-old female, K.S., a seventeen-year-old male, and S.K., a sixteen-year-old female.<sup>14</sup> The group chat communications were occasionally used as a sort of "one-up" competition, where the videos and photos sent by one friend were intended to impress or shock the other friends in some way.<sup>15</sup> In accordance with the group chat dynamic, S.K. sent K.S. and A.T. a one-minute video in which S.K. performed fellatio on an unidentified male.<sup>16</sup> The male appeared to be filming the video with his arm extended, during which the male's upper torso and erect penis were visible, and S.K.'s nude upper body and breast were exposed.<sup>17</sup> Unfortunately, there was a conflict between S.K. and K.S. in December of 2016, after which K.S. persuaded A.T. to accompany him in reporting S.K.'s video to the school resources officer, a uniformed police officer assigned to the school.<sup>18</sup> A.T. later testified that during this time period, K.S. bragged

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<sup>10</sup> See *infra* Part II.

<sup>11</sup> See *infra* Part III.

<sup>12</sup> See *infra* Part IV.

<sup>13</sup> *In re S.K.*, 466 Md. 31, 36 (2019).

<sup>14</sup> *Id.*

<sup>15</sup> See *id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 37.

<sup>18</sup> *In re S.K.*, 466 Md. at 37.

to his peers that he would be able to send S.K. to jail if he showed the texted video to the school administration.<sup>19</sup>

A.T. and K.S. brought the video to the attention of the school resource officer, Mr. Eugene Caballero, an of the Charles County Sheriff's Office.<sup>20</sup> Following the meeting, Officer Caballero met with S.K., who provided the officer with a written statement declaring that she was in the video and she had only sent it to K.S. and A.T.<sup>21</sup> According to the officer's police report, S.K. agreed to speak with Officer Caballero after she was read her Miranda rights.<sup>22</sup> Additionally, S.K. believed that the purpose of the meeting was to stop the video being from being distributed further at the school and was not informed that she was suspected of criminal activity.<sup>23</sup> Officer Caballero submitted his report to the State's Attorney for Charles County, which used its discretion to file criminal charges against S.K. on three counts.<sup>24</sup> Count 1 charged S.K. with violating CR § 11-207(a)(2)<sup>25</sup> for filming a minor engaged in sexual conduct, Count 2 charged S.K. with violating CR § 11-207(a)(4)<sup>26</sup> for distributing child pornography, and Count 3 charged S.K. with violating CR § 11-203(b)(1)(ii)<sup>27</sup> for displaying obscene materials to a minor.<sup>28</sup>

At the April 27, 2017, adjudicatory hearing before the Circuit Court of Charles County, the juvenile court dismissed Count 1, finding that there was no evidence to support the contention that S.K. filmed the video at issue.<sup>29</sup> The court held that S.K. was involved regarding Counts 2 and 3, and subsequently placed S.K. on electronic monitoring and supervised probation between May 18, 2017, and June 9, 2017.<sup>30</sup> During

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 38.

<sup>22</sup> *Id.*

<sup>23</sup> *In re S.K.*, 466 Md. at 38.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*; See MD. CODE ANN., CRIM. LAW § 11-207(a)(2) (2019) ("A person may not . . . photograph or film a minor engaging in an obscene act, sadomasochistic abuse, or sexual conduct").

<sup>26</sup> *In re S.K.*, 466 Md. at 38; See MD. CODE ANN., CRIM. LAW § 11-207(a)(4) (2019) ("A person may not . . . knowingly promote, advertise, solicit, distribute, or possess with the intent to distribute any matter, visual representation, or performance. . . .").

<sup>27</sup> *In re S.K.*, 466 Md. at 38; See MD. CODE ANN., CRIM. LAW § 11-203(b)(1)(ii) (2019) ("A person may not willfully or knowingly display or exhibit to a minor an item . . . that consists of an obscene picture of a nude or partially nude figure").

<sup>28</sup> *In re S.K.* 466 Md. at 38.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 38–39.

this period, S.K. was required to report to a Department of Juvenile Services probation officer, obtain permission prior to moving or leaving Maryland, allow the probation officer to enter her home, complete a weekly drug test, attend and complete an anger management course, and complete a substance abuse assessment.<sup>31</sup> After S.K. completed her probation requirements on September 27, 2018, and her case was ordered closed and sealed, S.K. appealed the juvenile court's delinquency finding to the Court of Special Appeals.<sup>32</sup>

On Count 1, the Court of Special Appeals held that Maryland's child pornography statute, CR § 11-207, does not exempt minors from its purview, and therefore, S.K. was in violation of the statute.<sup>33</sup> On Count 2, the appellate court disagreed with the trial court and held that the video that S.K. sent to K.S. and A.T. did not qualify as an "item" as enumerated by CR § 11-203<sup>34</sup>, and therefore, S.K. was not involved as to the second criminal charge.<sup>35</sup> Following the Court of Special Appeals decision, both the state and S.K. filed petitions for writs of certiorari with the Court of Appeals, which the Court granted on October 9, 2018.<sup>36</sup> The Court agreed with the intermediate appellate court's analysis of the first criminal charge, but the Court disagreed with the intermediate court on the second charge, and found that the video S.K. texted to K.S. and A.T. fell within CR § 11-203's definition of "item"—specifically, the video qualified as a "film," one of the types of media enumerated by the statute.<sup>37</sup> As a result, the Court of Appeals reversed the Court of Special Appeals, finding that S.K. was involved as to both criminal charges.<sup>38</sup>

## II. LEGAL BACKGROUND

Congress passed the Protection of Children Against Sexual Exploitation Act in 1978 in response to increasing concerns among American citizens and their elected representatives about the exploitation of

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<sup>31</sup> *Id.* at 39.

<sup>32</sup> *Id.*

<sup>33</sup> *In re S.K.*, 466 Md. at 39–40 (citing *In re S.K.*, 237 Md. App. 458, 473 (2018)).

<sup>34</sup> *In re S.K.*, 466 Md. at 40; *See* MD. CODE ANN., CRIM. LAW § 11-203(a)(4)(2006) ("Sale or display of obscene item to minor . . . (4)'Item' means a: (i) still picture or photograph; (ii) book, pocket book, pamphlet or magazine; (iii) videodisc, videotape, video game, film, or computer disc; or (iv) recorded telephone message").

<sup>35</sup> *In re S.K.* 466 Md. at 40.

<sup>36</sup> *Id.* at 41.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

minors in the production and distribution of child pornography as well as through child prostitution.<sup>39</sup> The main goal of the legislation was to prevent the recruitment of vulnerable children for the purposes of child pornography and prostitution.<sup>40</sup> The Senate report accompanying the act stated that the children recruited were “frequently [the] victims of child abuse, or of broken homes, or of parents who simply do not care,” and that the exploitation of the children resulted in a “deep psychological, humiliating impact” on the children, and thus jeopardizing “the possibility of healthy, affectionate relationships in the future.”<sup>41</sup> However, cultural shifts regarding sexuality, the explosion of constant cellphone use, as well as the manner in which those seismic societal changes have impacted communication, complicate the act’s original mandate.<sup>42</sup> As a result, courts across the country are now deciding whether to adjudicate minors for voluntarily sending explicit images of themselves under the applicable child pornography statute, if that statute contains no exception for minors.<sup>43</sup>

Part II.A of this note traces the foundational cases that created the Supreme Court’s jurisprudence governing child pornography.<sup>44</sup> Part II.B tracks the evolution of child pornography legislation at the national level.<sup>45</sup> Part II.C provides an overview of the development of Maryland’s laws related to child pornography.<sup>46</sup> Part II.D delves into the increasingly common practice of sexting among minors.<sup>47</sup> Finally, Part II.E outlines several states’ approaches to the issue of combating child pornography in a world where teen sexting is common and where Maryland stands in relation to those approaches.<sup>48</sup>

#### A. *Understanding Child Pornography: Foundational Case Law*

Modern understandings of what legally qualifies as “obscene” can be traced back to the 1973 case *Miller v. California*<sup>49</sup>, where the

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<sup>39</sup> See S. REP. NO. 95-438, at 3–4 (1977).

<sup>40</sup> See *id.* at 8–11.

<sup>41</sup> *Id.*

<sup>42</sup> See Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL’Y & L. 505, 506–07 (2008).

<sup>43</sup> See *id.* at 514–15.

<sup>44</sup> See *infra* Part II-A.

<sup>45</sup> See *infra* Part II-B.

<sup>46</sup> See *infra* Part II-C.

<sup>47</sup> See *infra* Part II-D.

<sup>48</sup> See *infra* Part II-E.

<sup>49</sup> 413 U.S. 15 (1973).

Supreme Court provided a new test under which the producers of certain materials would be criminalized for violating federal obscenity laws.<sup>50</sup> The Court declared that materials would be declared obscene if those materials “taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”<sup>51</sup> Writing for the majority, Chief Justice Burger referenced the purpose of the First Amendment in his opinion, stating that the amendment protected speech and press that were aimed at furthering the exchange of ideas that facilitated valuable political and social shifts.<sup>52</sup> These shifts were desired by the American people, and, unlike explicit sexual images, would advance the nation towards a more enlightened future.<sup>53</sup>

In the 1982 case *New York v. Ferber*<sup>54</sup>, the Supreme Court expanded its *Miller* framework to criminalize child pornography, declaring that child pornography was included within the umbrella concept of “obscene material,” but that a different test must be used.<sup>55</sup> Writing for the majority, Justice White stated that the *Miller* test required adjustment for determining whether obscene materials qualified as child pornography.<sup>56</sup> The *Ferber* Court held that the “trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner, and the material at issue need not be considered as a whole.”<sup>57</sup> In defining child pornography, the Court stated that prohibited depictions included materials featuring minors engaged in “actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.”<sup>58</sup> The Court concluded that child pornography was a sufficiently distinct category of obscene material that was not afforded First Amendment protections.<sup>59</sup> Additionally, the State’s interest in safeguarding the physical and psychological wellbeing of minors is “compelling,” and thus, states must be given greater deference in how they

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<sup>50</sup> *Id.* at 36–37.

<sup>51</sup> *Id.* at 24.

<sup>52</sup> *Id.* at 16, 34–35.

<sup>53</sup> *Id.* at 34–35.

<sup>54</sup> 458 U.S. 747 (1982).

<sup>55</sup> *Id.* at 764.

<sup>56</sup> *Id.* at 749, 764.

<sup>57</sup> *Id.* at 764.

<sup>58</sup> *Id.* at 765.

<sup>59</sup> *Ferber*, 458 U.S. at 765.

regulate child pornography as compared to how they regulate pornographic material featuring adults.<sup>60</sup>

*B. Child Pornography Legislation: National Origins*

The prohibition of the display or distribution of obscene material, especially the exposure of minors to such material, has long been the subject of state and federal legislation.<sup>61</sup> However, in 1977, Congress passed the Protection of Children Against Sexual Exploitation Act to fill in the gaps of existing federal obscenity statutes.<sup>62</sup> The Act was designed to amend Title 18 of the United States Code, which made it illegal to produce materials, including “any film, photograph, negative, slide, book, or magazine” in which minors were engaged in sexually explicit conduct.<sup>63</sup> The Act featured language that included the prohibition of sexual exploitation of children, as well as coercion or enticement of a minor into prostitution.<sup>64</sup>

Congress believed that the existing federal legislation neglected to protect some of the most vulnerable minors within the United States and this oversight resulted in the sexual exploitation of those minors, resulting in those minors being forced into prostitution or child pornography.<sup>65</sup> The Senate Judiciary Committee’s report that accompanied the legislation noted that “federal authorities initiated pornography investigations only if the case involved a large manufacturer or distributor or if the case involved a connection with organized crime. Thus, many of the sources of child pornography never came within the purview of federal investigators.”<sup>66</sup> The report further stated that there was no federal legislation that expressly prohibited the manner in which children were exploited to produce child pornography and the need for such federal laws was underscored by the lack of state laws banning the use of children to create pornography.<sup>67</sup>

Ultimately, the Protection of Children Against Sexual Exploitation Act attempted to prevent the use of children in the production of pornographic materials in three major capacities: first, by criminalizing the creation of pornography portraying children in an obscene manner

<sup>60</sup> *Id.* at 756–58.

<sup>61</sup> *Outmezguine v. State*, 97 Md. App. 151, 159 (1993).

<sup>62</sup> *See* S. REP. No. 95-438, at 9–10 (1977).

<sup>63</sup> *Id.* at 1.

<sup>64</sup> *Id.* at 2.

<sup>65</sup> *Id.* at 8–9.

<sup>66</sup> *Id.* at 9–10.

<sup>67</sup> *See* S. REP. No. 95-438, at 10 (1977).



as a new category of child abuse; second, by expanding legislation prohibiting the interstate trafficking of minors to include male minors; and third, by “go[ing] as far as constitutionally possible to ban the sale and distribution of child pornography.”<sup>68</sup> Congress hoped that the passage of the Act would arm prosecutors with a more robust assortment of tools with which they could protect children and punish those who abuse them.<sup>69</sup>

*C. The State Follows Suit: The Development of Maryland’s Child Pornography Law*

In 1978, the Maryland General Assembly (General Assembly) enacted the state’s first law regulating child pornography; the law was part of the larger national trend of legislation aimed at fighting child pornography production.<sup>70</sup> The Maryland law made it illegal to cause, force, or knowingly permit a minor under the age of 16 to be featured in pornographic material.<sup>71</sup> Additionally, the law criminalized the act of either filming or photographing a minor who was engaged in obscene activity.<sup>72</sup> In the bill file accompanying the statute, testimony from stakeholders such as members of the National Conference of State Legislatures and State Attorney General’s Office explained that the purpose of the state law was to complement the federal child pornography statute and incarcerate predators involved in the production and distribution of child pornography.<sup>73</sup>

Over the years, the General Assembly strengthened the child pornography statute—in 1985, the state legislature broadened the existing law to include a provision that made it illegal to “knowingly distribute, promote, or possess with intent to distribute materials” depicting a minor “engaged as a subject in sexual conduct,” conduct that may or may not qualify as “obscene.”<sup>74</sup> The legislature amended the Maryland child pornography statute again in 1986 to include a prohibition on photographing minors under 16 years of age who were engaged in sexual

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<sup>68</sup> *Id.* at 18.

<sup>69</sup> *Id.*

<sup>70</sup> See Leighton Aiken, *The Legal Ramifications of Child Pornography in Maryland*, 10 U. BALT. L. FORUM. 27, 28 (1980); see also MD. CODE ANN. art. 27, § 419A (1978) (current version at MD. CODE ANN., CRIM. LAW § 11-207 (2019)).

<sup>71</sup> See art. 27, § 419A (current version at CRIM. LAW § 11-207).

<sup>72</sup> See *id.*

<sup>73</sup> See *Moore v. State*, 388 Md. 446, 461 (2005).

<sup>74</sup> *Outmezguine v. State*, 97 Md. App. 151, 164 (1993).

activity.<sup>75</sup> The General Assembly increased the age of who qualified as a “minor” to 18 in 1989.<sup>76</sup> The legislature expanded the list of what could qualify as a prohibited “item” containing child pornography in 1995, where the statute was revised to include “film” and “computer disc,”<sup>77</sup> and later, in 2006, to include “video games.”<sup>78</sup>

In 2019, the General Assembly passed a law that amended the definition of “sexual conduct” to include “lascivious exhibition of the genitals or pubic area of any person” and expanded what qualified as child pornography possession, making possession of computer-generated images of minors under the age of sixteen “that are indistinguishable from an actual child” illegal.<sup>79</sup> The intention behind these expansions and revisions was clear—by broadening the legal definition of “minor” and “sexual conduct”, as well as types of conduct criminalized by the child pornography statute, the General Assembly was attempting to make it easier for prosecutors to put predators who were engaged in the production and distribution of child pornography in prison.<sup>80</sup>

However, Maryland’s child pornography law contains no exception for minors who produce and distribute material featuring minors engaged in sexual activity.<sup>81</sup> In 2019, Delegate C.T. Wilson introduced legislation in response to the Maryland Court of Special Appeals’ opinion on S.K.’s case.<sup>82</sup> In his testimony before the House Judiciary Committee, Delegate Wilson stated that while minors engaged in sexting could be described as involved in “voluntary self-exploitation,” those minors have brains that are still developing, with “prefrontal cortexes that are definitely not evolved to the point where they understand problem-solving, impulse control, weighing options...”, and it is unjust to

<sup>75</sup> See 1986 Md. Laws 602.

<sup>76</sup> 1989 Md. Laws 2797.

<sup>77</sup> 1989 Md. Laws 1798.

<sup>78</sup> 2006 Md. Laws 1822.

<sup>79</sup> H.B.1027, 2019 Leg., 440th Sess. (Md. 2019).

<sup>80</sup> See H.B. 1027, 2019 Leg., 440th Sess. (Md. 2019) (statement of Del. Lesley Lopez), [http://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=jud&ys=2019RS&clip=JUD\\_3\\_6\\_2019\\_meeting\\_1&url=http%3A%2F%2Fmgahouse.maryland.gov%2Fmga%2Fplay%2F8cf4e781-7536-4f0c-ba8d-d42731d1efd5%2F%3Fcatalog%2F03e481c7-8a42-4438-a7da-93ff74bdaa4c%26playfrom%3D4424000](http://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=jud&ys=2019RS&clip=JUD_3_6_2019_meeting_1&url=http%3A%2F%2Fmgahouse.maryland.gov%2Fmga%2Fplay%2F8cf4e781-7536-4f0c-ba8d-d42731d1efd5%2F%3Fcatalog%2F03e481c7-8a42-4438-a7da-93ff74bdaa4c%26playfrom%3D4424000) (explaining that the purpose of H.B. 1027 was to “strengthen current child porn laws by elevating them to the federal standard,” thus empowering state law enforcement “to go after those who might otherwise slip through the cracks”).

<sup>81</sup> *In re S.K.*, 466 Md. 31, 57 (2019) (stating that the plain meaning of the Maryland child pornography statute does not distinguish between whether an adult or a minor is distributing the material at issue).

<sup>82</sup> *Id.* at 57–58 n. 24.

subject those minors to the same harsh punishments as adults.<sup>83</sup> While Delegate Wilson's bill did not pass during the 2019 legislative session, Delegate Wilson and several of his fellow legislators proposed new bills during the 2020 legislative session that would exempt minors from the child pornography statute, under specific conditions.<sup>84</sup> Despite the legislators' efforts, none of the bills were made into law.<sup>85</sup>

*D. Cellphones and Generation Z: The Complicating Factor of Sexting Among Minors*

After the first child pornography laws were passed at the federal level, as well as the state level in Maryland, a staggering number of technological advances have taken place. But perhaps the most dramatic shift of all has been to the ubiquitous use of cellphones by virtually every millennial and member of Generation Z.<sup>86</sup> According to a 2019 report from the Pew Research Center, smartphone ownership is up by 81% from the first time Pew conducted a smartphone ownership survey in 2011.<sup>87</sup> The report further noted that smartphone dependency has grown over time, with 1 in 5 Americans now living as "smartphone-only" internet users, using their smartphones as their exclusive means of accessing the internet at home.<sup>88</sup> Finally, a 2018 Pew survey measuring teen internet use found that an increasing number of teens use the internet "on a near-constant basis" with "45% of teens say[ing] they use

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<sup>83</sup> H.B. 1049, 2019 Leg., 440th Sess. (Md. 2019) (statement of Del. C.T. Wilson), [http://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=jud&ys=2019RS&clip=JUD\\_3\\_6\\_2019\\_meeting\\_1&url=http%3A%2F%2Fmgahouse.maryland.gov%2Fmga%2Fplay%2F8cf4e781-7536-4f0c-ba8d-d42731d1efd5%2F%3Fcatalog%2F03e481c7-8a42-4438-a7da-93ff74bdaa4c%26playfrom%3D4652000](http://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=jud&ys=2019RS&clip=JUD_3_6_2019_meeting_1&url=http%3A%2F%2Fmgahouse.maryland.gov%2Fmga%2Fplay%2F8cf4e781-7536-4f0c-ba8d-d42731d1efd5%2F%3Fcatalog%2F03e481c7-8a42-4438-a7da-93ff74bdaa4c%26playfrom%3D4652000).

<sup>84</sup> See H.B. 1049, Md. Gen. Assembly, <http://mgaleg.maryland.gov/mgawebsite/Legislation/Details/HB1049?ys=2019rs> (last visited Apr. 17, 2020); see H.B. 931, 2020 Leg., 441st Sess. (Md. 2020); see H.B. 501, 2020 Leg. 441st Sess. (Md. 2020); see H.B. 1245, 2020 Leg., 441st Sess. (Md. 2020).

<sup>85</sup> See *id.*

<sup>86</sup> See *Mobile Fact Sheet*, PEW RES. CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/mobile/>; see also *Defining Generations: Where Millennials End and Generation Z Begins*, PEW RES. CTR. (Jan. 17, 2019), <https://www.pewresearch.org/fact-tank/2019/01/17/where-millennials-end-and-generation-z-begins/> (defining "millennial" as the cohort of individuals born between 1981 and 1996 and "Generation Z" as the cohort of individuals born between 1997 and 2012).

<sup>87</sup> *Mobile Fact Sheet*, supra note 86.

<sup>88</sup> *Id.*

the internet ‘almost constantly,’ a figure that has nearly doubled from the 24% who said this in the 2014-2015 survey.”<sup>89</sup>

The exponential increase in cellphone use has had profound implications on the way young Americans communicate, especially Generation Z (“Gen Z”), the cohort of Americans born after 1996 (which includes S.K., K.S., and A.T.). Gen Z strongly prefers to text rather than call, and accordingly, use the texting app on their phones as their primary means of communicating with others.<sup>90</sup> The constant connection offered by texting exposes Gen Z to instant gratification, as well as immediate frustration if someone responds ambiguously or there is no response.<sup>91</sup> Members of the Gen Z cohort have mixed feelings about texting, with some teens stating that while texting can be an easier mode of communication for those who are shy, “one issue is that translating tone of voice through text is difficult (sarcasm, empathy, etc.) . . . [i]t is impersonal, and people can’t tell or read your emotions.”<sup>92</sup>

Complicating the already mixed effects of smartphone use among the Gen Z cohort is the rise of sexting as a type of digital communication. Sexting has increased on a large scale in recent years, and the practice increases in prevalence as a young person ages.<sup>93</sup> Today, 1 in 4 teens have received a sext, and 1 in 7 teens have sent a sext.<sup>94</sup> Studies have linked the increasing pervasiveness of sexting to the ubiquitousness of smartphone use, which is underscored by findings that rates of sexts sent and received via smartphone are much higher than those sent and received via computer.<sup>95</sup> As the rise of sexting is relatively recent, the impact of the practice on youth has just started to be studied in the past decade.<sup>96</sup> However, sexting may lead to emotional distress for those pressured into sending photos, as well as for those who receive photos (especially if the recipient did not consent to have the photos sent

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<sup>89</sup> Monica Anderson & Jingjing Jiang, *Teens, Social Media & Technology 2018*, PEW RES. CTR. (May 31, 2018), [https://www.pewinternet.org/wp-content/uploads/sites/9/2018/05/PI\\_2018.05.31\\_TeensTech\\_FINAL.pdf](https://www.pewinternet.org/wp-content/uploads/sites/9/2018/05/PI_2018.05.31_TeensTech_FINAL.pdf).

<sup>90</sup> See Daniel Wayne Long, *Exploring Generational Differences in Text Messaging Usage and Habits* (Oct. 12, 2018) (unpublished Ph.D. dissertation, Nova Southeastern University) (on file with NSUWorks, College of Engineering and Computing).

<sup>91</sup> *Id.* at 106.

<sup>92</sup> *Id.* at 107–108.

<sup>93</sup> Sheri Madigan, et. al, *Prevalence of Multiple Forms of Sexting Behavior Among Youth: A Systematic Review and Meta-Analysis*, 172 JAMA PEDIATRICS 327, 328 (2018).

<sup>94</sup> *Id.* at 332.

<sup>95</sup> *Id.*

<sup>96</sup> See Long, *supra* note 90.

to them).<sup>97</sup> Additionally, if sexts are circulated widely throughout a school, or on the internet, there can be serious mental health repercussions for those involved.<sup>98</sup>

*E. When Technology Outpaces the Law: States Attempt to Reconcile Child Pornography Legislation with Teen Sexting*

One of the most problematic aspects of the rise of sexting among Gen Z is the inconsistent manner in which different courts respond to the practice.<sup>99</sup> At the federal level, any sexually suggestive image featuring a minor qualifies as child pornography, and the government can prosecute someone for the production, distribution, and possession of such images, without any exemptions for minors or sexting.<sup>100</sup> However, states vary widely in how they treat sexting within the context of their child pornography laws: only 20 states specifically address sending sexts to a minor or receiving sexts from a minor, and those states have vast differences on whether they consider sexting involving minors to be a strict liability crime, whether sexting involving minors requires punitive action, whether a resulting conviction should be a violation, misdemeanor, or felony, and how to treat sexts that are being sent and received exclusively by minors.<sup>101</sup>

The law's sluggish and incoherent response to the advent of sexting has produced a great deal of harm, especially to minors like S.K., who are criminalized for violating child pornography laws, due to their participation in the increasingly common practice of sexting.<sup>102</sup> Slowly, prosecutors are realizing that minors engaging in sexting should not be punished under child pornography laws.<sup>103</sup> William Fitzpatrick, former president of the National District Attorneys Association, and the district

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<sup>97</sup> Megan A. Moreno, *What Parents Need to Know About Sexting*, 172 JAMA PEDIATRICS 400, 400 (2018).

<sup>98</sup> *Id.*

<sup>99</sup> See Haley Zapal, *State-by-State Differences in Sexting Laws*, BARK BLOG, <https://www.bark.us/blog/state-by-state-differences-in-sexting-laws/> (last updated Aug. 5, 2019).

<sup>100</sup> *Id.*

<sup>101</sup> *See id.*

<sup>102</sup> *See infra* text accompanying notes 104–09.

See Amy Roe, *Teens Who Engage in 'Sexting' Should Not Be Prosecuted as Sex Offenders*, ACLU BLOG (Apr. 19, 2017), <https://www.aclu.org/blog/privacy-technology/teens-who-engage-sexting-should-not-be-prosecuted-sex-offenders>.

<sup>103</sup> See Erik Eckholm, *Prosecutors Weigh Teenage Sexting: Folly or Felony?*, N.Y. TIMES (Nov. 13, 2015), <https://www.nytimes.com/2015/11/14/us/prosecutors-in-teenage-sexting-cases-ask-foolishness-or-a-felony.html>.

attorney of Onondaga County in New York, urged his fellow district attorneys to be extremely careful when handling teen sexting cases, and to favor less severe punishments as opposed to criminal charges whenever possible.<sup>104</sup> Mr. Fitzpatrick, as well as many legal scholars, have tried to lobby state legislatures to pass laws that are a better fit for the current technological landscape.<sup>105</sup> While some states have passed laws in an attempt to remedy this issue, Maryland is not one of them.<sup>106</sup>

Legal scholars have offered a variety of different solutions in recent years, including proposing model amendments to child pornography laws that carve out protections for minors who sext other minors of their own volition, while still prosecuting adults who attempt to obtain explicit material from minors.<sup>107</sup> However, other scholars have criticized these amendments as oversimplifying the complexity of sexting, as the amendments do not address other issues, such as the convergence of sexting and revenge porn, or when minors upload sexts to websites that display child pornography.<sup>108</sup> Ultimately, many prosecutors and scholars have reached the same understanding: adjudicating minors as delinquent under child pornography laws for sexting each other is harmful in a variety of ways; and more nuanced laws, offering specific remedies tailored to prevent the harm caused by child pornography, revenge porn, coerced sexting, and receiving non-consensual sexts must be passed as soon as possible.<sup>109</sup>

### III. THE COURT'S REASONING

The Court of Appeals determined whether the intermediate appellate court erred in finding S.K. to be involved in the offense of distributing child pornography as articulated by CR § 11-207(a)(4) and whether the court erred in finding S.K. involved in offense of displaying

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<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> Sameer Hinduja & Justin W. Patchin, *State Sexting Laws*, CYBERBULLYING RES. CTR., <https://cyberbullying.org/state-sexting-laws> (last updated Nov. 26, 2018).

<sup>107</sup> *See* Bryce G. Westlake, *Delineating Victims from Perpetrators: Prosecuting Self-Produced Child Pornography in Youth Criminal Justice Systems*, 12 INT. J. OF CYBER CRIMINOLOGY 255, 255–56 (2018).

<sup>108</sup> *See id.* at 256.

<sup>109</sup> *See* Eckholm, *supra* note 103 (reporting that 20 states have adopted laws that offer a variety of remedies to address consensual sexting among minors, and that prosecutors such as William Fitzpatrick, former president of the National District Attorneys Association, advocate for such laws); *see also* Westlake, *supra* note 107, at 263 (recommending that less severe remedies such as restorative justice programs, treatment, counseling, fines could be incorporated into new laws governing consensual sexting among minors).

an obscene item to a minor as outlined by CR § 11-203(b)(1)(ii).<sup>110</sup> In a 6-1 decision, the Court held that the text of Maryland's child pornography statute was unambiguous and contained no exemption for minors, and thus, S.K. qualified as one who knowingly distributed child pornography under CR § 11-207(a)(4).<sup>111</sup> Judge Joseph M. Getty, writing for the majority, further held that the type of digital media S.K. sent to her friends—a text-messaged video—qualified as a “film” under the statute and therefore, S.K.'s conduct fell within the purview of the CR § 11-203(b)(1).<sup>112</sup>

In explaining its holding, the Maryland Court of Appeals highlighted three sources that bolstered their decision: the conclusions other state courts have reached after adjudicating cases similar to S.K.'s, the plain language of Maryland's child pornography laws, and the type of conduct covered by Maryland's child pornography laws.<sup>113</sup> The Court began with an overview of *State v. Gray*,<sup>114</sup> a decision out of the Washington Supreme Court where the majority upheld the conviction of a seventeen-year-old boy for sexting an adult woman.<sup>115</sup> The *Gray* court declared that the language of Washington statute at issue was unambiguous: “[a] person commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the second degree when he or she . . . [k]nowingly . . . disseminate[s] . . . any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct . . . .”<sup>116</sup>

The *Gray* court declined to make an exception for minors, holding that the scope of the statute was clear.<sup>117</sup> While the *Gray* court acknowledged the policy issues surrounding the prosecution of minors for consensually sexting explicit images, and that there was a breakdown between state law and rapidly changing technological innovations, the court stated: “our duty is to interpret the law as written and, if ambiguous, apply its plain meaning to the facts before us.”<sup>118</sup> In its discussion of *State v. Gray*, the Court of Appeals noted that after the Washington Supreme Court decided the case, the Washington Legislature

<sup>110</sup> *In re S.K.*, 466 Md. 31, 41 (2019).

<sup>111</sup> *Id.* at 65.

<sup>112</sup> *Id.*

<sup>113</sup> *See id.* at 45–64.

<sup>114</sup> *Id.* at 45–46.

<sup>115</sup> *State v. Gray*, 402 P.3d 254, 261 (Wash. 2017).

<sup>116</sup> *Id.* at 257 (citing WASH. REV. CODE § 9.68A.050(2)(a)(i) (2019)).

<sup>117</sup> *Id.* at 258.

<sup>118</sup> *Id.* at 342.

subsequently amended the state's child pornography statute to address the issues presented by consensual sexting among minors.<sup>119</sup>

The Court of Appeals also referenced a recent decision out of the Colorado Supreme Court, *People in Interest of T.B.*,<sup>120</sup> in which the court upheld the conviction of a minor, who had been sexting two other minors.<sup>121</sup> The male teenager facing charges, T.B., had been arrested on an unrelated charge for sexual assault, and the arresting officers discovered explicit images on the teenager's cellphone.<sup>122</sup> The state filed charges against T.B. on two counts of sexual exploitation of a child under Colorado law, *Section 18-6-403(3)(b.5)*, *C.R.S.*, as well as charges related to the alleged sexual assault.<sup>123</sup> As the Washington Supreme Court had decided in *State v. Gray*, the Colorado Supreme Court held that the plain language of the applicable statute was unambiguous and declined to create an exception for minors facing charges for violating the statute, stating that "nothing . . . suggests that such harms are lessened or do not exist merely because the sexually exploitative material is made, possessed, or distributed by a juvenile rather than an adult."<sup>124</sup> After discussing the outcome of *People in Interest of T.B.*, the Court of Appeals noted that the Colorado General Assembly had passed a new law addressing sexting among minors, creating the civil offense of "exchange of a private image by a juvenile".<sup>125</sup> Minor offenders would be subject to either a \$50 fine or mandatory participation in education programs addressing the risks of sexting.<sup>126</sup> Following their exploration of the outcomes of both *State v. Gray* and *People in Interest of T.B.*, the Court of Appeals emphasized that the General Assembly had not updated the state's child pornography statute to address the issues presented by minors engaged in consensual sexting, but acknowledged that a bill had been introduced in the 2019 legislative session to decriminalize the production or distribution of child pornography by a minor.<sup>127</sup>

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<sup>119</sup> *In re S.K.*, 466 Md. at 46 n.16 (referencing WASH. REV. CODE § 9.68A.053 (2019)). See also Tom James, *Washington Sexting Bill Aims to Shield Teens from Adult Law*, ASSOCIATED PRESS (Apr. 11, 2019), <https://apnews.com/aca6cd0e197042a183b2cc5223610276> (explaining that the new law creates a separate class of crimes intended for minors who are found to be sexting other minors, with lesser penalties for certain offenses, as well as exceptions for images of certain sexual activities).

<sup>120</sup> *In re S.K.*, 466 Md. at 46.

<sup>121</sup> *People ex rel. T.B.*, 445 P.3d 1049, 1051–52 (Colo. 2019).

<sup>122</sup> *Id.* at 1052.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1058.

<sup>125</sup> *In re S.K.*, 466 Md. at 47 n. 17.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 47; see also *id.* at 58 n. 24; see *supra* pp. 9–10 (discussing Del. Wilson's bill).



The Court then turned to the plain language of Maryland’s child pornography laws—specifically, the language of CR § 11-207(a)(4).<sup>128</sup> Judge Getty noted that precedent instructed the Court to interpret the statute’s terminology using “popular understanding of the English language.”<sup>129</sup> To determine whether a statute is ambiguous, Judge Getty stated that precedent further directed the Court to discern whether there is “more than one reasonable interpretation” or whether “the words are clear and unambiguous when viewed in isolation, but become ambiguous when read as part of a larger statutory scheme.”<sup>130</sup> Finally, the Court noted when the majority finds a statute to be ambiguous, the statute’s meaning and purpose must be examined within the broader context of legislative intent.<sup>131</sup>

With the foundation of their statutory analysis established, the Court delved into the amended child pornography statute, CR § 11-207(a)(4)(i), which declares it illegal for a “person” to “knowingly promote, advertise, solicit, distribute, or possess with intent to distribute any matter, visual representation, or performance . . . that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct . . .”<sup>132</sup> While S.K. argued that the statute contained two areas of ambiguity—that the phrase “a minor engaged as a subject” should be interpreted to preclude minors able to legally consent to sexual conduct, and that the “person” who is being prosecuted cannot both be the perpetrator while being “a minor engaged as a subject” at the same time—the Court disagreed.<sup>133</sup> Finding that the Court of Special Appeals’ definition of the term “subject” aligned with the ordinary usage of the word, the Court of Appeals rejected S.K.’s contention that the phrase “engaged as a subject” necessarily meant being subjugated by someone else.<sup>134</sup> The Court of Appeals further found that the term “person” includes both adults and minors, and therefore, the purview of the child pornography statute encompassed minors such as S.K.<sup>135</sup>

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<sup>128</sup> *In re S.K.*, 466 Md. at 48.

<sup>129</sup> *Id.* at 49 (citing *Schreyer v. Chaplain*, 416 Md. 94, 101 (2010)).

<sup>130</sup> *Id.* at 49–50 (citing *State v. Bey*, 452 Md. 255, 266 (2017)).

<sup>131</sup> *Id.* at 50 (citing *Stachowski v. Sysco Food Servs. of Balt., Inc.* 402 Md. 506, 517 (2007)).

<sup>132</sup> MD. CODE ANN., CRIM. LAW § 11-207(a)(4)(i) (2019).

<sup>133</sup> *In re S.K.* 466 Md. at 54–55.

<sup>134</sup> *Id.* (citing *In re S.K.*, 237 Md. App. 458, 469 (2018), where the Court of Special Appeals found that if a minor is “engaged as a subject”, the minor is participating in sexual conduct, or is the object of such conduct).

<sup>135</sup> *Id.* at 53.

The Court proceeded to bolster its holding by citing the legislative history of the statute.<sup>136</sup> Finding that the General Assembly has repeatedly amended the child pornography law to expand the power of the state in furtherance of its interest in preventing the production and distribution of child pornography, the Court noted that the General Assembly had consistently updated the statute without carving out any exceptions for minors.<sup>137</sup> Accordingly, the Court held that the plain meaning of the statute, as well as the law's legislative history, supported the conclusion that the statute criminalized the conduct of both minors and adults.<sup>138</sup> Therefore, S.K. was not exempted from being adjudicated as delinquent under CR § 11-207(a)(4)(i).<sup>139</sup>

Next, the Court turned to the question of whether S.K.'s conduct fell within the purview of CR § 11-203(b)(1)(ii), which prohibits the willing or knowing display of obscene items to a minor.<sup>140</sup> Specifically, the Court discussed whether the contents of S.K.'s sext could be classified as obscene under Maryland law.<sup>141</sup> The Court also addressed whether S.K.'s text-messaged video, or sext, qualified as the type of obscene "item" contemplated by the statute, which listed still pictures or photographs, books, pocket books, pamphlets, magazines, videodiscs, videotapes, video games, films or computer discs, and recorded telephone as prohibited items.<sup>142</sup> Ultimately, the Court decided that S.K.'s video qualified as obscene under the *Miller* test, as the video featured images that portrayed minors in a sexualized manner, engaged in sexual conduct.<sup>143</sup>

In addition, the Court found that S.K.'s video was indeed an "item" as contemplated by the child pornography law because the video qualified as a "film."<sup>144</sup> In explaining their decision, the Court outlined the intent of the legislature as it pertained to the statute, citing numerous occasions where the Maryland General Assembly revised the statute to prevent any potential loopholes for technological advances.<sup>145</sup> The

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<sup>136</sup> *See id.* at 57.

<sup>137</sup> *Id.*

<sup>138</sup> *In re S.K.*, 466 Md. at 56–57.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 58.

<sup>141</sup> *Id.* at 59.

<sup>142</sup> *Id.* at 58–59.

<sup>143</sup> *In re S.K.*, 466 Md. at 60–62.

<sup>144</sup> *Id.* at 61–62.

<sup>145</sup> *Id.* at 62–63 (explaining that when the General Assembly revised the statute in 1995 to include "film" and "computer disc", the bill file included language stating that the revision was an attempt[t] to "close the loopholes that modern technology have handed to the purveyors of pornography").

Court held that the emergence of new technology that allowed for digital communication did not prevent the statute from applying to those new mediums through which obscene material is distributed.<sup>146</sup> The Court explained that the concept of “film” has evolved over the years from film played by movie projectors to videotapes to DVDs to digital files, now played on a variety of devices.<sup>147</sup> As a result, the Court found that the term “film” was broad enough to include text-messaged videos played on a smartphone.<sup>148</sup> Because “film” was an “item” listed as prohibited by the applicable child pornography statute, and S.K.’s sext was included within the purview of that statute and therefore violating CR § 11-203(b)(1).<sup>149</sup>

In her dissenting opinion, Judge Michele D. Hotten argued that S.K. did not distribute child pornography by sending a sext to her friends and did not commit the offense of displaying an obscene item to a minor.<sup>150</sup> Judge Hotten began her dissent by arguing that it is not the function of CR § 11-207(a)(4) to prosecute sexual activity between consenting minors.<sup>151</sup> Rather, the purpose of the statute is to protect minors from predators, and therefore, it is illogical for a minor to be their own predator or their own child pornographer.<sup>152</sup> To support her argument, Judge Hotten delved into the grammar of the statute, finding that the law’s use of colons would create redundancy if one were to read the law in a manner that made a “person” and a “minor” the same individual.<sup>153</sup> Additionally, Judge Hotten noted that the majority conceded that under the *subsection (a)(1)*, the same individual cannot be the “minor” and the “person” at the same time, yet held that under *subsections (a)(2)-(a)(5)*, no distinction between a “minor” and a “person” was needed.<sup>154</sup> Judge Hotten argued that the majority’s analysis was inconsistent in its application and therefore contrary to canons of statutory construction, “which dictate that one should avoid interpreting a provision in a manner that is inconsistent with the structure of the statute.”<sup>155</sup>

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<sup>146</sup> *Id.* at 63.

<sup>147</sup> *Id.*

<sup>148</sup> *In re S.K.*, 466 Md. at 64.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 75 (Hotten, J. dissenting).

<sup>151</sup> *Id.* at 66.

<sup>152</sup> *Id.* at 66–69.

<sup>153</sup> *In re S.K.*, 466 Md. at 67 (Hotten, J. dissenting) (noting that in the law, “the noun ‘person’, which precedes [a] colon, applies equally to all of § 11-207(a)’s subsections” and therefore, “reading ‘person’ and ‘minor’ to be the same individual would create redundancy in the statute”).

<sup>154</sup> *Id.* at 67–68.

<sup>155</sup> *Id.*

Next, Judge Hotten examined the purpose of Maryland's child pornography law, citing both Supreme Court case law as well as decisions out of the Court of Appeals.<sup>156</sup> After explaining that the purpose of the child pornography laws at both the federal and state level was to protect minors from sexual exploitation, Judge Hotten asserted that S.K.'s actions were completely different from the conduct contemplated by the child pornography laws.<sup>157</sup> Judge Hotten noted that S.K. was allegedly participating in sexual conduct that was consensual in nature, as opposed to conduct in which she was being hurt or exploited—meaning that S.K.'s conduct was outside the scope of activity that child pornography laws are intended to prevent.<sup>158</sup> She emphasized this point by citing the dissent in *State v. Gray*, which stated that Washington's child pornography statute was "specifically intended to protect children depicted in pornography," and it was only logical for the children who are depicted to be exempted from prosecution, as the prosecutorial process can cause further harm to those children.<sup>159</sup>

Finally, Judge Hotten disagreed with the majority's conclusion that S.K.'s text-messaged video qualified as a "film."<sup>160</sup> Instead, Judge Hotten asserted that the term "film" does not refer to the contents of the medium, but rather, the medium itself: "a thin, flexible strip of plastic or other material coated with light-sensitive emulsion for exposure in a camera, used to produce photographs or motion pictures."<sup>161</sup> Judge Hotten further stated that "if the General Assembly wanted to amend the language of CR § 11-203 to include digital files, it would have done so," and concluded that the majority had erred in their decision to adjudicate S.K. as delinquent under Maryland law.<sup>162</sup>

#### IV. ANALYSIS

*In re S.K.* was incorrectly decided by the Court of Appeals because their holding failed to advance the legislative intent underlying child pornography legislation at both the state and federal levels.<sup>163</sup> In addition, the Court was overly broad in characterizing a digital file as a

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<sup>156</sup> *Id.* at 69–72 (citing *Outmezguine v. State*, 335 Md. 20 (1994) & *New York v. Ferber*, 458 U.S. 747 (1982)).

<sup>157</sup> *Id.* at 72.

<sup>158</sup> *In re S.K.*, 466 Md. at 72 (Hotten, J., dissenting).

<sup>159</sup> *Id.* at 73.

<sup>160</sup> *Id.* at 75–77.

<sup>161</sup> *Id.* at 76.

<sup>162</sup> *Id.* at 77–79.

<sup>163</sup> *See infra* Part IV-A.

film and stretched the language of the statute beyond the bounds of legal permissibility to make S.K.'s conduct fit the law's purview.<sup>164</sup> Finally, the Court had the opportunity to reconcile technological realities with an antiquated statute but declined to do so, leading to an absurd legal outcome that failed to promote justice.<sup>165</sup>

*A. The Court Failed to Advance the Legislative Intent Underlying the Child Pornography Statute*

When Congress passed the Protection of Children Against Sexual Exploitation Act in 1977, the purpose of the law was clear: to shift previous efforts focused on combating the dissemination of obscenity in general towards more targeted legislation to combat the production and distribution of child pornography.<sup>166</sup> The new law was passed with the goal of both eradicating child pornography, as well as preventing the recruitment and exploitation of vulnerable youth forced to work as child prostitutes.<sup>167</sup> The Senate Report that accompanied the law noted that "child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale" and that the "existing Federal laws dealing with prostitution and pornography do not protect against the use of children in these activities...."<sup>168</sup> From the outset, it is clear that Congress's intention behind the federal child pornography law was to prevent the exploitation of vulnerable youth through child pornography and child prostitution. As for Maryland's child pornography laws, the bill file accompanying the first state child pornography laws demonstrates that the state statute was passed to further the same goals of the federal law.<sup>169</sup>

In contrast, S.K., acting on her own volition, sent a video of herself engaged in consensual sexual activity to her friends.<sup>170</sup> S.K.'s actions were not out of the ordinary; she was simply participating in a form of communication that has become increasingly common among her

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<sup>164</sup> See *infra* Part IV-B.

<sup>165</sup> See *infra* Part IV-C.

<sup>166</sup> See *Outmezguine v. State*, 97 Md. App. 151, 159–60 (1993).

<sup>167</sup> See S. REP. No. 95-438, at 3 (1977).

<sup>168</sup> *Id.* at 5.

<sup>169</sup> *Moore v. State*, 388 Md. 446, 461 (2005) (noting that the bill file accompanying Maryland's first child pornography law "contain[ed] a letter from an Assistant Attorney General describing the bill as 'legislation which is designed to prohibit the production and distribution of [child pornography] within the boundaries of this State . . . complement[ing] the federal bill'").

<sup>170</sup> *In re S.K.*, 466 Md. 31, 36 (2019).

peers.<sup>171</sup> Legal scholars have noted that when sexted images are not obtained through coercion, “the immediate psychological, physical, and emotional harm” to a child “that is the foundation of the child protection rationale is decidedly absent.”<sup>172</sup> Furthermore, it is the production and distribution of obscene images of minors among adults, not among minors, that fuels exploitative child pornography and child prostitution industries.<sup>173</sup> Given that S.K.’s conduct falls beyond the scope of activities the federal and state child pornography statutes were designed to prevent, the Court erred in deciding that S.K. had violated the state pornography statute.

*B. The Court Was Overly Broad in Characterizing a Text Message Video as a “Film”*

Over the years, the General Assembly has amended the state’s child pornography legislation, attempting to remain in stride with rapidly evolving technology.<sup>174</sup> The last time the legislature updated the statute was in 2006, when “video games” were added to the list of media covered by CR § 11-203.<sup>175</sup> When the Court heard S.K.’s case, the statute included the following media as qualifying “items”: still pictures or photographs, books, pocket books, pamphlets, magazines, videodiscs, videotapes, video games, films, computer discs, or recorded telephone messages.<sup>176</sup> While the Court held that the child pornography statute’s inclusion of “film” makes the law broad enough to encompass a cell-phone video as a type of covered media, there is no language within the statute to support that decision.<sup>177</sup> On the contrary, the legislature listed very specific types of media in the statute, none of which include digital

<sup>171</sup> See Madigan, et. al., *supra* note 93, at 332.

<sup>172</sup> Sarah Wastler, *The Harm in “Sexting”?: Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J. L. & GENDER 687, 698 (2010).

<sup>173</sup> See U.S. DEP’T OF JUST., THE NATIONAL STRATEGY FOR CHILD EXPLOITATION AND INTERDICTION: A REPORT TO CONGRESS 2–3 (Aug. 2010), available at <https://www.justice.gov/psc/docs/natstrategyreport.pdf> (explaining that that adult predators use the cover of Internet anonymity to obtain child pornography or coerce children into engaging in sexual behavior); see also U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES FOR SEX OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 5 (Jan. 2019), available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190102\\_Sex-Offense-Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190102_Sex-Offense-Mand-Min.pdf) (noting that the average age for those who are convicted as a child pornography offender is 42).

<sup>174</sup> See *In re S.K.*, 466 Md. at 62.

<sup>175</sup> *Id.*

<sup>176</sup> MD. CODE ANN., CRIM. LAW § 11-203(a)(4) (2019).

<sup>177</sup> See *In re S.K.*, 466 Md. at 62–63.

files, text messages, or cellphone videos.<sup>178</sup> Rather than acknowledge that the plain language of the child pornography law did not encompass the type of digital media that S.K. sent to her friends, the Court departed from the statutory language and used an overly broad interpretation of the word “film” to convict S.K.

In addition to finding no support within the plain language of CR § 11-203, the Court’s holding is at odds with the recent legislative history of Maryland’s child pornography laws. After the Court of Special Appeals issued their decision regarding S.K.’s case, Delegate Kathleen M. Dumais introduced House Bill 97 (which was cross-filed with Senate Bill 1003, sponsored by Senator Susan C. Lee) to revise the list of “items” in CR § 11-203 to include video files, video images, and video recordings.<sup>179</sup> Delegate Dumais’s bill passed in the House, but both the House and Senate bill failed to pass in the Senate’s Judicial Proceeding Committee.<sup>180</sup> The General Assembly had the opportunity to update the statute to reflect the type of media S.K. used when sending a sext to her friends, but declined to make any amendments in accordance with technological advances.<sup>181</sup> By including cellphone videos within the purview of CR § 11-203, the Court acted in a legislative capacity, rather than fulfilling the judicial obligation of interpreting existing law.

*C. The Court Neglected to Reconcile Technological Realities with the Antiquated Statute*

Throughout the majority opinion in *In re S.K.*, there are acknowledgments of the major disconnect between the technological realities of modern communication and Maryland law.<sup>182</sup> The majority notes that “[u]nlike the Silent Generation, Baby Boomers, Generation X, or Millennials, Generation Z has never known life without access to a smartphone” and that is “[c]onsistent 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,” concluding that the trend that will likely continue to increase over time.<sup>183</sup> The majority further states that “S.K., albeit unwisely, engaged in the

<sup>178</sup> *See id.*

<sup>179</sup> *See id.* at 78 (Hotten, J., dissenting); H.B. 97, 2019 Leg., 439th Sess. (Md. 2019); S.B. 1003, 2019 Leg., 439th Sess. (Md. 2019).

<sup>180</sup> *In re S.K.*, 466 Md. at 78 (Hotten, J., dissenting).

<sup>181</sup> *Id.*

<sup>182</sup> *See id.* at 62–64 (majority opinion).

<sup>183</sup> *Id.* at 42–43.

same behavior as many of her peers” and that “there may be compelling policy reasons for treating teenage sexting different from child pornography.”<sup>184</sup> Rather than make a decision that comports with those compelling policy reasons, the Court simply suggests that legislation to address this glaring legal oversight should be passed by the state legislature at some point in the future.<sup>185</sup>

However, by failing to meaningfully address the technological realities of cell phone use among minors, the Court missed an opportunity to reconcile modern communication trends with the out-of-date child pornography law through a First Amendment analysis. The Court had the chance to use the framework of free speech to examine whether or not consensual sexting among minors qualifies as child pornography, yet declined to apply this lens to S.K.’s case. The First Amendment of the United States Constitution states that “Congress shall make no law . . . abridging the freedom of speech.”<sup>186</sup> However, over time, the Supreme Court has clarified which content is worthy of First Amendment protection and which is not—in *Chaplinsky v. New Hampshire*<sup>187</sup>, the Supreme Court stated that content or speech that is so lacking in value that “any benefit that may be derived from them is clearly outweighed by the social interest in order and morality” is beyond constitutional protection.<sup>188</sup> Child pornography has since been declared unprotected speech by the Supreme Court.<sup>189</sup>

But two questions remain - does sexting qualify as child pornography? If not, is sexting worthy of First Amendment protection? There is certainly a compelling argument that sexting does not comport with the federal definition of child pornography, as articulated by the Supreme Court in *New York v. Ferber*.<sup>190</sup> In *Ferber*, the Supreme Court focused on the harm caused by child pornography in their decision, stating that the production of the obscene material resulted in a “permanent record” of the abuse, as well as an “economic motive” to continue to produce the pornography.<sup>191</sup> In the context of sexting—specifically, when a minor voluntarily sends a sext to another minor, the rationale

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<sup>184</sup> *Id.* at 57.

<sup>185</sup> See *In re S.K.*, 466 Md. at 47–49.

<sup>186</sup> U.S. CONST. amend. I.

<sup>187</sup> 315 U.S. 568 (1942).

<sup>188</sup> *Id.* at 572.

<sup>189</sup> See *New York v. Ferber*, 458 U.S. 747, 764 (1982).

<sup>190</sup> *Id.* at 759–64 (defining “child pornography” as “works that *visually* depict sexual conduct by children below a specified age” and prohibiting such materials because they are “intrinsicly related to the sexual abuse of children”).

<sup>191</sup> *Id.* at 759–61.



behind categorizing the material as unworthy of First Amendment protection falls away.<sup>192</sup> There is no sexual abuse taking place, and there is no economic motive present (unless the minor recipient attempts to sell the explicit material, which did not occur in S.K.'s case).<sup>193</sup> While there may be emotional and psychological harm when a minor sexts another minor, this is far from the abuse and economic incentive that results from the production and dissemination of child pornography.<sup>194</sup> As a result, the constitutional support for outlawing child pornography does not easily encompass the prosecution of minors for voluntarily sexting each other.<sup>195</sup> In neglecting to examine the technological reality of sexting from a constitutional standpoint, the Court of Appeals failed to reconcile the First Amendment issues presented by equating sexting with child pornography.<sup>196</sup>

## V. CONCLUSION

In their recent decision, *In re S.K.*, the Maryland Court of Appeals held that S.K., a minor who texted her friends a video in which she was filmed engaging in a consensual sex act, had violated Maryland laws prohibiting the distribution of child pornography, as well as the display of obscene materials to minors.<sup>197</sup> The Court incorrectly decided this case because their holding failed to comport with the legislative intent underlying the Maryland child pornography statute.<sup>198</sup> In addition, the Court's characterization of S.K.'s text-messaged video as a "film" in the context of the child pornography statute was overly broad.<sup>199</sup> Furthermore, the Court's analysis neglected to use a constitutional framework to examine the technological realities of cellphone use in the modern world—specifically, the common practice of sexting among Generation Z.<sup>200</sup> As a result, S.K. was punished by the very law designed to protect minors like her, which is a chilling outcome that must not be mistaken for justice.

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<sup>192</sup> Wastler, *supra* note 172, at 696.

<sup>193</sup> *Id.* at 696–97.

<sup>194</sup> *See id.* at 698.

<sup>195</sup> *See id.*

<sup>196</sup> *See In re S.K.*, 466 Md. 31, 61 (2019).

<sup>197</sup> 466 Md. 31, 35–36 (2019).

<sup>198</sup> *See supra* Part IV-A.

<sup>199</sup> *See supra* Part IV-B.

<sup>200</sup> *See supra* Part IV-C.