

Headline: The Child Porn Storm; How One Curious Legal Case ...

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The Child Porn Storm; How One Curious Legal Case Caused a Capitol Hill Stampede
By Lawrence A. Stanley

THE AFTERMATH of *United States v. Knox*, a now-notorious child pornography case, is a textbook study of how political fear can overwhelm due process and careful legal reasoning.

The essential facts of the case are not in dispute. In 1990, Stephen Knox, a graduate student at Penn State, was found in possession of three videotapes from Nather Co., a mail-order business based in Las Vegas. The videos had been taken at amateur model shoots where aspiring models and photographers - mostly teenagers - practiced their intended crafts. While the girls were simply striking modeling poses typical to the fashion industry, the cameraman (unbeknownst to his subjects) was zooming in on various parts of their clothed bodies, sometimes on the face, other times on the legs, chest or crotch. Knox was prosecuted and convicted under the federal child pornography statute that prohibits possessing or receiving depictions of sexual conduct as well as "lascivious exhibition(s) of the genitals or pubic area."

The specific legal question is whether the depiction of clothed minors engaged in non-sexual activities is covered by the law. The district court in Pennsylvania found that Knox's tapes ran afoul of the law by defining the pubic area to include "the uppermost portion of the inner thigh" - which on some of the models was exposed. When Knox appealed the decision, the 3rd Circuit court recognized this obvious error in anatomy, but ruled that the depiction of clothing covering the genitals constituted a "lascivious exhibition." The government proposed that Knox should have known the tapes were criminal - even though those enforcing the law generally did not and no lawmaker had ever even discussed such materials until Knox petitioned the Supreme Court to review his case.

Knox's interest in such video footage may strike some as reprehensible, others as trivial. More relevant to this case is the principle, fundamental to American jurisprudence, that citizens are entitled to notice of what conduct is being criminalized before they can be deprived of their liberty. Until the Knox case, the government had never even indicted anyone for possessing the kind of tapes that he had. In fact, in 1990 the government declined to prosecute the Nather Co., the producer of the videotapes found in Knox's possession, because prosecutors believed the videotapes were legal.

When Knox's case went to the Supreme Court, the government was supported by a conglomeration of right-wing religious and anti-pornography activists, including a number of former officials of the Reagan and Bush Justice Departments. Prior to the Knox case, none of these former officials had ever prosecuted anyone for possessing material depicting clothed minors, nor advocated doing so. For example, Robert Showers, who once directed the Child Exploitation and Obscenity section of the Reagan Justice Department and who now represents the National Law Center for Children and Families, advised a Senate committee in 1991 that the federal child pornography law applied only to "lascivious" depictions in which minors were nude. Showers did not explain in his legal brief to the Supreme Court why Knox should be held to a different standard.

The current political controversy resulted from Solicitor General Drew Day's attempt to inject a bit of sanity into the government's position. In the government's brief to the Supreme Court, Days agreed with the defense that the decision of the 3rd Circuit court

"utilized an impermissibly broad standard for determining whether a videotape can be considered to be a lascivious `exhibition' of the genitals... . We submit that neither the statutory language nor the legislative history will bear such an interpretation" Days was correct on this issue, although he equivocated by suggesting that there could be an "exhibition" where the clothing covering the genitals was "so thin or so tight" as to reveal the "contours" of the genitals.

Such a careful reading of the law didn't stand a chance in the resulting fear-mongering on Capitol Hill.

"Much or even most of the Justice Department's child pornography prosecutions would have to be dismissed under this new standard," declared Sen. William V. Roth (R-Del.) on the Senate floor. There was not a shred of evidence to support such a claim. But by the time the Justice Department advised Congress that not a single prosecution or investigation would be affected by Day's interpretation, the political damage had already been done.

Within a few weeks, the Senate had passed a unanimous, non-binding resolution condemning the Day brief and insisting that Congress had intended all along to criminalize depictions of the type shown in the videotapes at issue. President Clinton caved in quickly. He denounced the reasoning of his own solicitor general and ordered Justice to draft new legislation "to eliminate any conceivable misinterpretations" in the future.

Knox's fate is still uncertain. In the middle of the political flap, the Supreme Court declined to hear the case, sending it back to the 3rd Circuit and requiring the appellate judges to reconsider it in light of Day's brief.

But the larger issues of law remain. If Congress wishes to criminalize depictions of fully clothed minors, it can do so through the legislative process. Given the ubiquity of such images in our society, such legislation will eventually be tested in the courts. However, finding Stephen Knox guilty of violating a law on the basis of interpretations developed expressly for his case is a clear injustice, driven by political imperatives. No amount of posturing can justify confusing libidinous thoughts with harmful acts of actual child abuse.

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