# Virtual Rape

James Maxwell was convicted of aggravated sexual assault even though his only contact with his 10-year-old victim was by phone. His case may change the way we think of rape. **By Wendy Kaminer**

Like many criminal offenders, James Maxwell is not a particularly appealing character. At worst, he's a dangerous sexual predator; at best, he's a sexual deviant. Maxwell, a 51-year-old New Jersey resident, likes talking dirty to children. In April, he acknowledged making obscene phone calls to 12 girls, ranging in age from 8 to 14, and pleaded guilty to multiple counts of child endangerment. This would have been an unsavory but unremarkable case, except that in one instance, Maxwell was also charged with aggravated sexual assault. The victim was a 10-year-old girl known in court documents as S.M. During one phone call, in which Maxwell posed as her mother's gynecologist, he persuaded S.M. to insert her finger into her vagina.

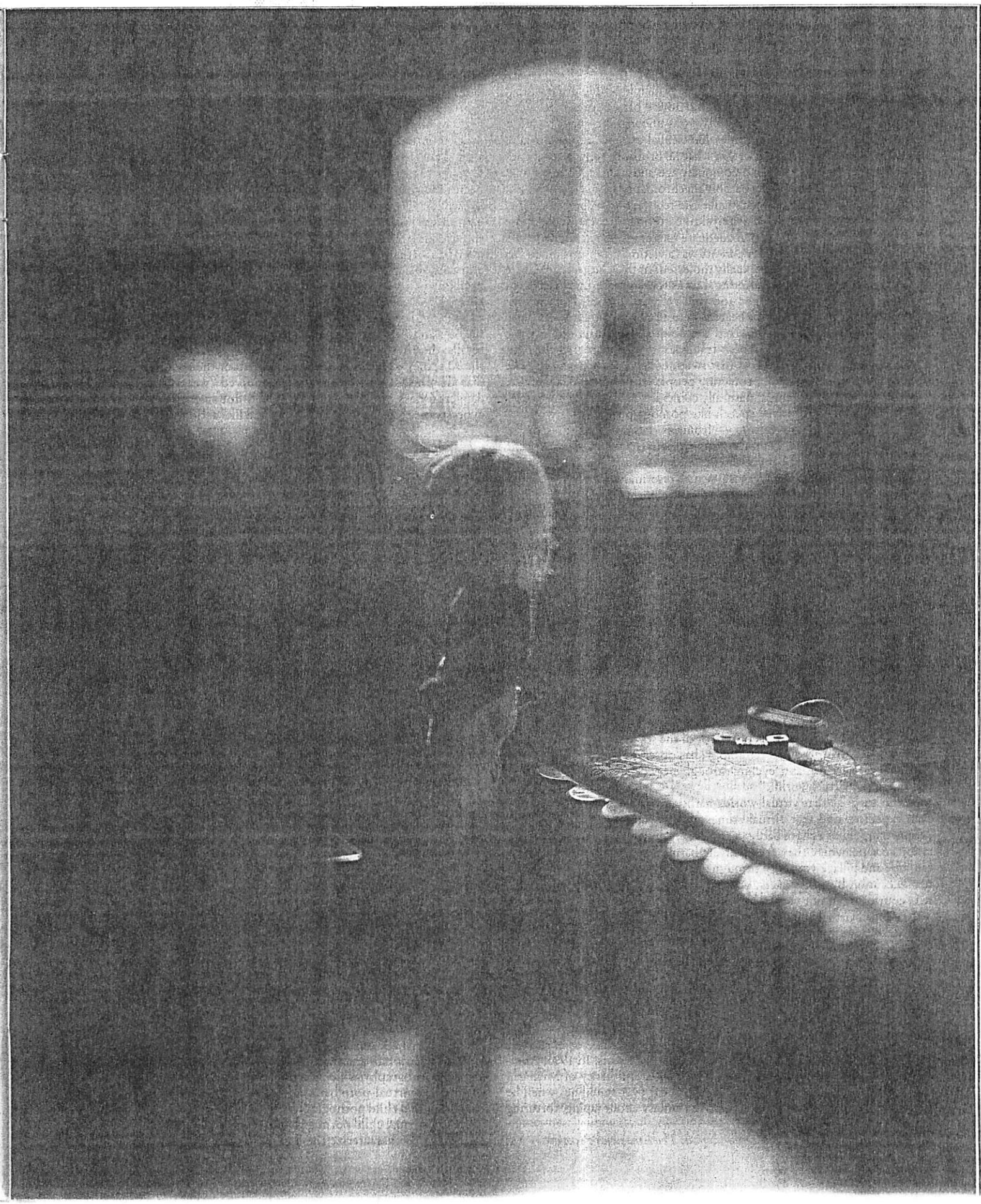
Maxwell never even met his victim, making the charge of aggravated sexual assault unprecedented. But it's not entirely surprising, considering pervasive concern about electronic or virtual sex involving unsuspecting children. This case is a testament to the presumed power of the Internet and law enforcement's efforts to tame it. The application of sexual assault laws to cases involving children who are duped over the phone into fondling or penetrating themselves would greatly facilitate the prosecutions of people who engage in sexually explicit conversations in chat rooms, especially with minors. So it hardly matters that Maxwell used a telephone instead of a computer. Thirty years ago, he might have been dismissed as a dirty old man; now he's more likely to remind people of a pedophile prowling the Net.

Still, New Jersey's sexual-offense statute was enacted in 1979, long before legislators were terribly concerned about the Internet. The law defines sexual assault as "sexual penetration, either by the actor or upon the actor's instructions." Penetration involving a child is aggravated sexual assault, with a maximum sentence of 20 years. Maxwell's victim acted on his instructions and under coercion (at 10 years old, she was incapable of consenting to phone sex). Joseph Del Russo, the chief assistant prosecutor for the case, considers the absence of physical or even visual contact between the offender and his victim irrelevant: Maxwell is "equally culpable as the guy who gives a girl $5 to lure her into his car and gets her to penetrate herself digitally," he explained.

Superior Court Judge Marilyn C. Clark, a former sex-crimes prosecutor, apparently agreed with Del Russo and declined to dismiss the charge. Maxwell pleaded guilty to aggravated sexual assault and child endangerment, retaining the right to appeal, and earlier this month received a 12-year sentence, part of which will be served at the state sex-offender treatment center in Avenal, N.J. Edward A. Jerejian, Maxwell's attorney, promises to take this case to the highest court that will hear it. "The fight is just beginning," he says. Essentially, his client was guilty of making "phony phone calls," Jerejian says, and "they're treating him like a serial murderer." Jerejian argues that the definition of sexual assault as penetration "upon the actor's instructions" was intended to cover cases involving multiple victims, in which the offender instructs one victim to assault another.

Creative prosecutions are staples in fictional courtrooms (it's easy to imagine a fictive James Maxwell turning up on "Law and Order"),

**Photographs by David Levinthal**



but in real life, they arguably violate a basic principle of due process: that the law provide clear, reasonably specific notice of prohibited behavior. Jerejian claimed that the New Jersey law was unconstitutionally vague as applied to Maxwell: "Violent crimes like sexual assault require physical presence," he instructed the court, in what he probably considered an appeal to common sense. But, in a computer age and a therapeutic culture, Jerejian's notion of assault may be a bit anachronistic.

It has been more than 10 years since the recovery movement declared verbal haranguing as traumatic as physical battering, defining child abuse broadly to include any form of "inadequate nurturance." A child who was ignored or belittled by his or her parents was a victim of abuse as much as a child who had been beaten or sexually molested. In this culture, there were no degrees or hierarchies of suffering, just as there were no hierarchies of addictions. People who shopped too much or drank too much, people who were verbally excoriated or beaten, were all equals in their pain.

Popular therapies that emphasized the ubiquity of abuse, our psychic fragility and the inevitability of post-traumatic stress disorders helped rationalize the political correctness that swept college campuses in the late 80's and 90's and focused on protecting people from verbal assaults. The rise of the recovery movement naturally coincided with campaigns to prohibit "hateful" or "offensive" speech like pornography. "Words wound," denizens of high and low culture — from progressive law professors to pop therapists — agreed. Feminist antiporn activists who emerged in the 80's did not differentiate between virtual and actual assaults. In their view, pornography did not merely cause sexual discrimination and violence: pornography *was* sexual discrimination and violence.

The 12-step movement has long been the subject of satire; the antiporn movement failed to achieve one of its primary objectives — passage of laws prohibiting speech that allegedly subordinated women — and speech codes on campus have been ridiculed. But even as these movements were falling out of fashion, they were successfully imprinting popular culture and the courts with their ideals. The concept of employment discrimination was expanded to include instances of purely verbal harassment or the use of words and images to create a "hostile environment." Hate-crime legislation enlisted the penal law in the campaign against hateful thoughts by enhancing penalties for crimes allegedly motivated by prejudice, instead of, say, greed.

So distinctions between words and deeds, verbal and physical abuse, or actual and metaphoric assaults were already blurred when the cyberculture emerged, offering a virtual life that rivaled the real. For some residents of cyberspace, real life now requires its own logo, "R.L.," to distinguish it from life online. Sherry Turkle, professor of the sociology of science at the Massachusetts Institute of Technology, has observed that some Netizens "experience their lives as a 'cycling through' between the real world (R.L.) and a series of virtual worlds."

It's no surprise that virtual worlds harbor virtual criminals; you might even expect to find that virtual crimes greatly outnumber actual crimes. People tempted to behave badly in real life are apt to give in to their temptations online, where they are relatively harmless and generally legal. You can rape and pillage your way through a computer game and risk only virtual execution by other users; you are not likely to be prosecuted in an R.L. court, at least not yet.

Of course, virtual freedoms are hardly absolute, as high-school students discovered a few years ago, when school administrators began policing online speech. After the shootings at Columbine High, some school administrators clamped down on students who made "offensive" remarks in chat rooms or maintained Web sites that didn't enjoy official approval. In one not-atypical case in Missouri, a student was suspended for expressing his belief that an attack *could* occur in his school. And yet, not all prosecutions of speech on the Net can be dismissed as mere hysteria.

You may be liable for threatening or stalking people online, as in real life. The First Amendment does not protect intentional threats. In 1995, Abraham Jacob Alkhabaz, also known as Jake Baker, a University of Michigan student, was prosecuted for transmitting a threat over state lines when he posted to an Internet news group a horrific fantasy about raping, torturing and killing a woman who shared the name of a female classmate. The young woman named in Baker's murder story was reportedly quite frightened by it (who wouldn't be?), but a federal court held that the story was not posted in order to intimidate her and did not qualify as a "true threat." The charges against Baker were dismissed.

Baker's fantasy would have been just as chilling, and just as legal, had it been published in a pamphlet and distributed on street corners or delivered in a monologue at a comedy club. But it probably would not have garnered as much attention. As Internet use has soared in the past decade, so have efforts to prosecute Internet offenses and apply actual punishments to virtual crimes, especially those involving children. For civil libertarians, it's an extremely worrisome trend. Harvey Silverglate, who has been practicing criminal defense and civil liberties law for nearly 35 years, sees the prosecution of virtual crimes as a step toward thought control of a type that has gained cultural legitimacy on college campuses. During the 60's and 70's, students were disciplined for what they did, Silverglate recalls; then in the 80's they began to be disciplined for what they said; by the 90's, they were liable to be disciplined for their attitudes. In one popular view, he adds, computers are considered "weapons that magnify the dangerousness of bad thoughts," so it's not surprising that thoughts in cyberspace are in danger of being treated like actions in the real world.

The F.B.I. has been aggressively policing the Internet for several years, through its Innocent Images National Initiative (I.I.N.I.), established in 1995, with a $10 million annual budget. Seeking out pedophiles and child pornographers, F.B.I. agents have posed as teenagers online and arranged trysts with suspected child molesters, who are promptly arrested when they travel out of state to meet their "prey." These methods are controversial because of their potential for entrapment, but the number of I.I.N.I. cases of "travelers" and people accused of disseminating child pornography increased 1,264 percent from 1996 to 2000. Less work by the F.B.I. would produce even more convictions if mere conversations constituted sexual assaults.

Dispensing with the notion that physical assaults involve physical proximity is no great leap for law enforcement today. The F.B.I. apparently wants to go even further than the prosecutor in the Maxwell case, who can at least point to an actual, not virtual, instance of sexual penetration. Maxwell was not prosecuted simply for talking to his victim; he was prosecuted for the actions he persuaded her to take. The F.B.I. has suggested that people should be prosecuted for thoughts as well as actions. As Thomas T. Kubic, deputy assistant director of the F.B.I.'s Criminal Investigative Division, testified before Congress in June, "The F.B.I. fully supports the Department of Justice's view that any legislation affecting the Internet should: 1) treat physical activity and 'cyber' activity in the same way."

It generally goes unnoticed that the F.B.I. has essentially adopted the radical feminist view of pornographic images as the equivalent of pornographic acts. Fear of pornography and sexual predators online has spawned a new generation of child protectors, right and left, intent on policing conversation and publication on the Net. In recent years, Congress has repeatedly tried to impose special restrictions on Internet speech in order to protect children. In 1995, it passed the Communications Decency Act, which was struck down by the Supreme Court; Congress responded by enacting the Child Online Protection Act, which the court will review this term. In 1996, Congress passed the Child Pornography Prevention Act, criminalizing virtual child pornography — sexually explicit images that only appear to involve children. Computer-simulated images of virtual children engaged in virtual sex are included in this ban, as are pictures of 20-year-old models who appear to be 14.

The Supreme Court will decide the constitutionality of the virtual-porn prohibition this term. (No one is defending the production of actual child pornography, which involves the abuse of actual children.) Advocates of the virtual-porn ban claim that it's necessary, partly because virtual and actual child pornography can be hard to tell apart. And they presume that virtual child pornography causes actual child abuse. It is no exaggeration to characterize the ban on virtual porn as a ban on thought:

*Wendy Kaminer is a senior correspondent at The American Prospect.*

under the Child Pornography Prevention Act, online fantasies can land you in real-life prisons.

In the future, Americans may have to watch not only what they say, but also what they imagine. Consider the case of Brian Dalton. Dalton, a 22-year-old Ohio man, was on sex-offender probation for possessing child pornography when his parents discovered that his handwritten personal journal contained fantasies about abusing children. They turned him in to his probation officer in the hope that he'd receive treatment. Instead, his probation was revoked, and he was indicted on two obscenity charges. On July 3, Dalton pleaded guilty to one count of obscenity and received a seven-year sentence, to be served consecutively with a three-year term for his probation violation. Dalton's case received much publicity; like the assault charge based on Maxwell's obscene phone call, it is unprecedented. There was no evidence that Dalton intended to show his journal to anyone or distribute it. He was convicted of entertaining bad thoughts.

It's easy to imagine a creative prosecutor charging Dalton with assault if someone acted on fantasies that he published. In Massachusetts, the North American Man-Boy Love Association (Nambla) is being sued for civil damages because exposure to Nambla literature allegedly inspired one of two pedophiles who murdered a child (and are now serving life sentences). Jerejian, Maxwell's lawyer, sees the assault charge against his client as the first step down a path that will lead to prosecutions of people "who create books or films or television with some sort of questionable content that a child views." That frightening prospect is possible, of course, but not inevitable. Maxwell is not being prosecuted for the attenuated, unforeseen and unintended consequences of his phone call. There's no question that he intended to exploit his victim sexually, even if the exploitation was long distance. Indeed, he called her back some three months later, told her he had taped their first conversation and threatened to play it for her friends if she did not perform for him again. And he had not called S.M. at random. He selected his victims, culling feature articles about young girls from local papers.

It's fair to call Maxwell a predator, although his degree of dangerousness — the likelihood of his committing an in-person assault — is unknown. (He has no record of violence.) Even Del Russo does not claim that this case is the equivalent of an assault as it is traditionally understood. He "appreciates" the "qualitative difference" between being tricked into touching yourself and being forcibly touched by another. "But just because this case is not as bad as the worst-case scenario contemplated by the statute doesn't mean it can't be captured by the statute." Del Russo has a point: a pickpocket who knocks someone down and steals his wallet and an armed man who breaks into a convenience store are both guilty of robbery. But he adds, "I hear defense attorneys say this all the time, 'There are robberies and there are robberies.'"

"The term sexual assault is like brain surgery," says Ben Saunders, director of the family-and-child program at the Medical University of South Carolina. "The term 'sexual offender,'" Saunders explains, "can cover everyone from a father who fondles his daughter, feels terrible about it and turns himself in for treatment, to Ted Bundy." Saunders considers the assault charge against Maxwell justified. "From a psychological standpoint," he says, he sees "no difference at all" between the Maxwell case and a case where the offender is physically present. "We're talking about someone exploiting a child against her will for his own sexual gratification. She would feel violated and abused. If that's not an assault, what is? It's not the same as being raped by a motorcycle gang in front of St. Patrick's, but it's still an assault."

Other victim advocates like Linda Williams, a director of the National Violence Against Women Prevention Research Center at Wellesley College, demur. "Without a physical presence, it's hard to see how you can have an assault," Williams observes. Like Jerejian, she worries about where a prosecution like this will lead. Will we criminalize "CD's with lyrics that tell a child to do something?"

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You may consider the criminalization of popular entertainments unlikely (although Congress periodically threatens the entertainment industry with sanctions for its "toxic" products), and you can easily distinguish Maxwell, who lacked even creative pretensions, from Eminem. But concern about the precedent that may be set by the Maxwell case points to the limits of a therapeutic approach to justice: an accurate psychological perspective on assault is not necessarily an appropriate legal one.

Both Ted Bundy and a man who fondles his 12-year-old daughter and repents are sex offenders, but they're not guilty of the same crime and don't deserve similar punishments — no matter how much the 12-year-old is traumatized. The assertion that "there are robberies and there are robberies" is an argument for the defense, not the prosecution. Someone who makes an obscene phone call and tricks a child into having phone sex should not — and need not — be treated like the participant in a gang rape. It's simply not necessary to stretch the law and convict James Maxwell of aggravated sexual assault in order to imprison him. He could have been convicted of child endangerment with relative ease and sentenced consecutively on several counts.

Del Russo acknowledges that he didn't charge Maxwell with assault in order to ensure his imprisonment. He invoked the assault statute, he says, in the belief that it described Maxwell's behavior most accurately, although he now understands that people believe he was "overreaching, going after a rabbit with a howitzer." Jerejian suggests that the prosecutor intended to overreach, recognizing that this case presented an opportunity to expand the definition of sexual assault and facilitate prosecutions of suspected pedophiles on the Internet.

It's difficult to predict Maxwell's fate, even if he prevails on appeal in the New Jersey state courts. If his assault conviction is overturned, the state could conceivably proceed against him again on the endangerment charges (which are likely to survive an appeal), or he could negotiate a plea to time served. He has already spent two years in prison and may serve at least another year before his appeal is decided in state court. So even if he wins his appeal in an early round, Maxwell will not go unpunished: he will have been imprisoned for at least three years and classified as a sexual offender for making a series of obscene phone calls. That will probably disappoint his prosecutor, but the intricacies of Maxwell's appeal and its eventual effect on his sentence may not matter much to his primary victim. "It probably doesn't matter to the child how the guy is prosecuted," Lucy Berliner, director of the Harborview sexual assault program in Seattle, observes. "She just wants him to get into trouble and be held to account."

If the question posed by this appeal — can a phone call constitute a sexual assault — seems like a legal technicality, so are many questions involving fundamental rights. Technicalities, like the rules that govern the right to appeal a murder conviction or the scope of a police officer's authority to stop and search people, determine the parameters of freedom. Viewed in isolation, the sordid case of State v. Maxwell may seem to implicate nothing so noble as freedom. (Maxwell was never legally free to target young girls with obscene calls.) But this case does not exist in isolation. It owes its existence to the Internet and the dissolution of boundaries between the virtual and the real. People who feel active and alive in cyberspace may find this dissolution alluring, but they have the most to lose in it. The intrusion of police and prosecutors into diaries, chat rooms and e-mail, the equation of bad thoughts with bad deeds, will leave us no refuge. As surveillance becomes nearly ubiquitous, as action is sharply curtailed, as fear imprisons us, we need more than ever to be virtually free. ■

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