



A libertarian's view of the Barstool/Brady child-porn fiasco

Freedom Watch

By HARVEY SILVERGLATE | August 25, 2011

The airwaves have been filled with speculation as to whether Massachusetts Attorney General Martha Coakley acted improperly when she sent state troopers to David Portnoy's doorstep. Portnoy had earlier posted a photograph on his sports-gossip Web site, barstoolsports.com, showing football star Tom Brady's 20-month-old son Benjamin toddling naked on the beach. Along with the photo, Portnoy posted crude comments about the size of the child's penis. The visit apparently succeeded in convincing him to take down both photo and comments.

Sophisticated First Amendment scholars, lawyers, and media commentators, all of whom are strongly free-speech/free-press supporters, were critical of Coakley for allegedly engaging in a legal bluff — the veiled threat of possible prosecution under the state's child-porn statute — to convince Portnoy to remove the offending and exploitative image from his site. My friend and long-time collaborator in the *Phoenix's* annual July 4 "Muzzle Awards," Dan Kennedy, chastised Coakley for "dispatching police officers to his home to tell him what content was appropriate and inappropriate for his Web site." Jonathan Albano, Massachusetts ACLU activist and the *Boston Globe's* First Amendment lawyer, remarked, "I think it's a real stretch that this is a criminal matter," and, further, that "there's an inherent element of coercion when civilians are faced with police in uniforms." Even Coakley reportedly concluded that Portnoy had not committed a crime, but that she and the police were simply asking him to do the decent thing and take down the exploitative picture. (Tellingly, perhaps, Coakley claimed to lack legal ammunition only *after* Portnoy had already caved in.)

But it's not really that clear-cut. The Massachusetts child-porn statute makes it a felony to disseminate "with lascivious intent . . . any visual material that contains a representation . . . of any posture or exhibition in a state of nudity involving the use of a child who is under 18 years of age." Portnoy did not just post a naked picture on his Web site; he also wrote, "Check out the Howitzer on Brady's kid!"

The media reports seemed very confident that there was no "lascivious intent." But Portnoy's potential legal problems began and ended with his comments on the boy's private parts. That alone would likely have enabled an indictment to survive a motion to dismiss and force the case to go to a jury that would then be tasked with ascertaining the state of mind of the dirty old blogger. A reviewing appellate court *might* throw out a conviction, but it would be foolish to make a prediction that a guilty verdict wouldn't stand up.

I say this with sadness, because I believe that our state (and federal, for that matter) child-porn statutes are excessively vague, broad, and puritanical, and hence pose a substantial threat to press (and artistic) freedoms. But the fact is that, under these laws, lasciviousness is very much in the eye of the beholder. When Coakley and the state police — perhaps with all requisite politeness — suggested that Portnoy take down the image, they likely were making him an offer that they knew he could not refuse. He took the hint, avoiding a test case that would be inconvenient, expensive, and possibly quite dangerous for the blogger, the First Amendment, and any photographer or parent who might take a photograph of a naked child.

Given the laws as they are, Coakley might well have been doing Portnoy a favor by giving him the opportunity to quit rather than fight.