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Measure for Measure: Sexting, District Attorneys and Restraining Orders

Parenting has never been easy. Since cell phones starting having cameras, parents have had to talk to their teenage children about the dangers of “sexting.” For those who have never heard of this practice, it is taking photos of a sexual nature and sending them via text message. There is no shortage of cases with youth under 18 being charged as sex offenders for this practice.

The proper legal deterrent for “sexting” is the subject of debate. Some people think charging 15 year olds as felony sex offenders is the appropriate deterrent, with serious ramifications on college selection, job applications and just moving for at least a decade. Some take a “do nothing” approach. Others are looking for a middle ground. It is only a matter of time before state legislatures take this issue up to determine the appropriate legal deterrent for “sexting.”

The case *Miller v. Skumanick*, 2009 U.S. Dist. LEXIS 27275 (M.D. Pa. Mar. 30, 2009) is the story of a temporary restraining order being issued against a District Attorney from charging multiple teenage girls for felony child pornography from texting. A preliminary injunction hearing is schedule for June 2, 2009.

Thoughts on being a District Attorney

To be fair to District Attorneys, I think the DA in this case is the exception and not the norm. Being a DA has to be hard. The job can be demanding and stressful in protecting communities from crime. I remember a DA joking to us in law school that new all DA's get a concealed weapons permit and a bullet proof vest.

Many states have also adopted the Model Rules of Professional Conduct Rule 3.8 for prosecutors, which states in relevant part:

Rule 3.8 Special Responsibilities Of A Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense...

Factual Overview: Threat of Prosecution from the District Attorney

The District Attorney in *Miller* sent letters to the parents of 20-some students who had been identified in cell phone photos. Three of the students (later Plaintiffs) had photos of themselves in bras and the other in a swim suit.

The DA's letter promised child pornography charges would be dropped against the youth if they completed a 6 to 9 month "re-education" program (which was reduced to 5 weeks) and drug testing. Those who did not attend the "re-education" program and drug testing would be charged as sex offenders. *Miller*, 4.

The District Attorney held a meeting at the Wyoming County Courthouse with everyone who received the letter. This meeting consisted of a threat to prosecute the teenage girls in the photos unless they submitted to 1) probation, 2) paid a \$100 program fee and 3) completed the "re-education" program.

The "re-education" program was to instruct the girls on their inappropriate behavior and to "gain an understanding of what it means to be a girl in today's society, both advantages and disadvantages," and "identify non-traditional societal and job roles." They were also required to write a paper on their actions and how they were wrong. *Miller*, 5-6.

"These are the rules. If you don't like them, too bad"

Parents understandably questioned the District Attorney on his methods. One of the girls at issue had photos of herself in a bathing suit. When questioned by the father how swim suit photos were child pornography, the DA explained the youth had posed "provocatively." When questioned on who decided what was "provocative" the DA told the father, "[T]hese are the rules. If you don't like them, too bad." *Miller*, 5. The District Attorney also told the questioning parents he could charge their children with child pornography during the meeting, as obvious leverage for the parents and youth to consent to the "re-education" program. *Id.*

When the parents of the other Plaintiff challenged the District Attorney's child pornography definition, the DA claimed the youth had no right to a jury trial in Juvenile Court, even with felony child pornography charges.

The Civil Lawsuit (Or, this is the US Constitution, if you don't like it, too bad)

The parents of the three Plaintiffs did not give in to the District Attorney's threatened prosecution of their children. The Plaintiffs brought a 1983 action based on 1) retaliation in violation of plaintiffs' First Amendment right to free expression, because the photographs did not violate any obscenity law; 2) retaliation in violation of plaintiffs' First Amendment right to be free from compelled expression, specifically having to write a paper about their actions; 3) retaliation against the parents for exercising their Fourteenth Amendment substantive due process right as parents to direct their children's upbringing, as evidenced by the "re-education" program material. *Miller*, 10-11.

The Temporary Restraining Order

A temporary restraining order is an "extraordinary remedy" that requires a Court to evaluate:

- (1) Whether the moving party has shown a reasonable probability of success on the merits;
- (2) Whether the moving party will be irreparably injured by denial of the relief;
- (3) Whether granting preliminary relief will result in even greater harm to the nonmoving party; and

(4) Whether granting the preliminary relief will be in the public interest. *Miller*, 13, citing *Crissman v. Dover Downs Entertainment Inc.*, 239 F.3d 357, 364 (3d Cir.2001).

The Plaintiffs met all of the requirements for a restraining order against the District Attorney. Moreover, the Court outlined the state law definition of "prohibited sexual act," which did not include "provocative" poses. *Miller*, 25-26. One can wonder if the District Attorney over-stepped his ethical duties as a prosecutor, if he was threatening prosecution not supported by probable cause, let alone advising the accused youth of their right to counsel.

In reviewing the sub-requirement that the Plaintiffs' Constitutionally protected activity caused the retaliation, the Court noted that the District Attorney's threat to charge the youth with felony child pornography was "not a genuine attempt to enforce the law, but instead an attempt to force the minor plaintiffs to participate in the education program." Additionally, the continued threat of prosecution for not participating in the "re-education program" indicated that the charges were "retaliation for their refusal to engage in compelled speech." *Miller*, 24-25.

What is the Appropriate Deterrent?

The actions of the District Attorney in *Miller* were extreme. It will be interesting to see if the preliminary injunction is granted on the June 2, 2009 hearing. Judging by the tone of the Court Order, I would think so.

Cases such as *Miller* may prompt state legislatures to determine the appropriate punishment for a teenager sending or receiving sexually suggestive photos from other teenagers. Some states may find the current child pornography laws are sufficient, because the threat of having to register as a sex offender is a high deterrent. Other states may try finding a lessor punishment.

In the meantime, parents should have very frank discussions with their children about responsibility and consequences.