

PUNISHING THOUGHTS TOO CLOSE TO REALITY: A NEW SOLUTION TO PROTECT CHILDREN FROM PEDOPHILES

I. INTRODUCTION

Freedom from unnecessary governmental restraint has been an underlying principle of the United States legal system since the nation's inception. From this principle sprang the Constitution and the Bill of Rights, the latter granting all citizens fundamental rights of freedom. Of course, these rights are not absolute. Courts have crafted numerous exceptions by balancing the severity of a particular constitutional violation against the purpose served by the constitutional protection.¹

No group of citizens has found itself on the light end of that balancing test more often than pedophiles.² Disturbing recidivism rates, coupled with the shameful modus operandi typically employed, distinguish pedophiles from other criminals and support their special treatment in our legal system. By providing law enforcement more effective tools to combat the unique threat pedophiles pose, sexual violence against children will likely be minimized.

Congress and state legislatures have recently promulgated innovative measures to restrain pedophiles, including sex offender registration,³ and chemical castration.⁴ Because the

1. *See, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971) (discussing the categorical exemption of "fighting words" from First Amendment protection); *Cent. Hudson Gas and Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980) (discussing the government's ability to shut down commercial speech that is either misleading or related to illegal activity).

2. Experts in the field of child victimization have distinguished child molesters from pedophiles based on established mental health diagnosis. KENNETH V. LANNING, *CHILD MOLESTERS: A BEHAVIORAL ANALYSIS* 19 (4th ed. 2001) available at http://www.missingkids.com/en_US/publications/NC70.pdf. For the purposes of this note, however, both terms will be used interchangeably to describe an adult who engages in sexual activity with a person significantly younger and who is under the age of legal maturation.

3. *See, e.g.*, The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (2000) [hereinafter Registration Act].

need to protect children from the possibility of sexual assault trumps any interest a pedophile might have in individual liberty, these original solutions have consistently survived constitutional challenges.

In the latest federal case concerning this issue, *Doe v. City of Lafayette*,⁵ law enforcement took the additional step of punishing a repeat sex offender for merely thinking about committing a crime against a child. The *Doe* court upheld a preemptive action taken by local political officials to ban a convicted sex offender from all city parks and schools.⁶ The ban was issued after Doe admitted in group therapy to stopping by a nearby park on his way home from work and fantasizing about the children playing there.⁷ Doe *thought* about committing a crime – he did not actually commit one on this particular occasion.⁸ Yet, the Seventh Circuit Court of Appeals upheld the ban as constitutional.⁹

The city-issued ban was an appropriate sanction in light of the overwhelming evidence documenting the recidivist nature of pedophiles and should encourage other jurisdictions to take similar measures specifically tailored to preventing the victimization of more children by repeat offenders. The recent legislative and judicial trends of punishing convicted sex offenders by limiting their mobility, thoughts, and due process rights illustrate the understanding that pedophiles such as Doe simply cannot be rehabilitated.

Part II of this note explores the recidivist nature of pedophiles by examining post-conviction and behavioral studies supporting the contention that pedophiles require different treatment in the legal system. Part III discusses creative measures enacted in the last decade to curb the recidivism of convicted sex offenders, including relaxation of evidentiary rules in sex offense trials, chemical castration, and sex offender registries; and explores their approval by various courts. Part IV then examines two cases that exhibit public policy's movement

4. CAL. PENAL CODE § 645 (West Supp. 1997).

5. 377 F. 3d 757 (7th Cir. 2004).

6. *Id.*

7. *Id.* at 759.

8. *Id.*

9. *Id.* at 774.

2005]

PUNISHING THOUGHTS TOO CLOSE TO REALITY

toward punishing sex offenders for fantasizing about committing an act of pedophilia, but only if the fantasy involves a real child. Finally, Part V explains why punishing the thoughts of pedophiles is likely to, and should, survive scrutiny under evolving Supreme Court jurisprudence.

II. THE RECIDIVIST NATURE OF PEDOPHILES

The nature of pedophiles and the secrecy associated with the crimes they commit make accurate statistical analysis difficult.¹⁰ Some studies suggest a person who molests a child is likely to repeat the offense sixty-five percent of the time,¹¹ while others estimate a recidivism rate as high as ninety-five percent.¹² Such high percentages of recidivism, combined with the psychological profile and modus operandi of pedophiles, vigorously support the strength of the government's interest in protecting children and serve as a powerful justification for enacting and upholding the legislation discussed below.

A. *The Mind of the Pedophile*

Although some pedophiles¹³ discreetly act on their urges by undressing a child, exposing themselves, or gentle touching and fondling, others use more violent means for arousal, such as forceful penetration or coercing the child into receiving or performing oral sex.¹⁴ If the offender is related to, or knows the child, he¹⁵ will typically rationalize the interaction to his victim

10. LANNING, *supra* note 2, at 20.

11. David Van Biema, *A Cheap Shot at Pedophilia? California Mandates Chemical Castration for Repeat Child Molesters*, TIME MAGAZINE, Sept. 9, 1996, at 60.

12. Mike Smith, *General Assembly Sex-Offender Registry OK'd Bill Targeting Juveniles Passes Senate*, JOURNAL GAZETTE (Fort Wayne, Indiana), Feb. 20, 1996, at 1c.

13. Pedophilia is classified as a particular type of paraphilia, which is defined as "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other non-consenting persons that occur over a period of at least six months." Of all paraphilias, sex offenses against children represent a significant proportion of all reported sex offenses. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV-TR 566, 571 (American Psychiatric Association 2000) [hereinafter DSM-IV].

14. *Id.*

15. For purposes of this Note, the term "sex offenders" references only male sex offenders.

by explaining it was educational or convincing the child s/he enjoyed the interaction.¹⁶ Many pedophiles are not particularly troubled by their preference for children,¹⁷ which may explain why they are so inclined to repeat the crime.

More alarming are the extreme measures to which pedophiles resort in order to gain access to a child. Retired Federal Bureau of Investigation agent Kenneth V. Lanning spent twenty years in the FBI Behavioral Science Unit researching violent crimes throughout the nation.¹⁸ Based on his findings, Lanning established a motivational continuum of child sex offenders to aid law enforcement officers in identifying, investigating, and prosecuting such offenses. On one end of the spectrum are situational-motivated sex offenders, who tend to be more impulsive and opportunistic.¹⁹ Although they typically prefer adult sexual partners, situational-motivated offenders prey on children as a substitute, due to either lack of self-esteem or inability to find an adult partner.²⁰

Conversely, preferential-motivated offenders tend to be more ritualistic and premeditated when committing their crimes.²¹ Unlike situational-type offenders, they do have an affirmative sexual preference for children and typically are better educated, have higher socio-economic backgrounds, and may be respected members of the community.²² The pattern of seduction, sometimes known as grooming, mirrors that of one adult courting another – showering with gifts and attention over a prolonged period of time to secure trust, and slowly lowering the child's inhibitions.²³ When seducing younger children, the preferential-motivated offender may integrate the sexual act into a game, making it difficult for the child to even identify what is occurring as abuse.²⁴ This offender often does not have just one victim, but rather preys on a number of vulnerable children, often suffering from broken homes, lack of attention, or

16. DSM-IV, *supra* note 13, at 571.

17. *Id.*

18. LANNING, *supra* note 2, at 24.

19. *Id.* at 22.

20. *Id.* at 24.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

2005]

PUNISHING THOUGHTS TOO CLOSE TO REALITY

emotional neglect.²⁵

B. Recidivism Studies

Pedophiles prey on the naiveté and helplessness of child victims through means unthinkable to many. Once a pedophile has gained access to one child victim, many others will likely follow. A survey of pedophiles revealed the average offender commits 282 illegal acts with 150 different victims.²⁶ Such astounding numbers strongly justify legislatures and courts in taking drastic measures to minimize the ability of repeat child sex offenders to strike again.

One of the most comprehensive and detailed studies on sex offenders' recidivism rates was conducted by the Department of Justice.²⁷ The study followed approximately ten thousand convicted sex offenders released from prison in 1994 and measured their rate of re-arrest, reconviction, and re-imprisonment during the three year period following release.²⁸ Of the sex offenders tracked, approximately 4,300 had committed sex offenses against children.²⁹

First, the study revealed that child molesters are at slightly more of a risk to re-offend than sex offenders in general.³⁰ The studied sex offenders with two or more prior sex offense arrests³¹ were *nearly* twice as likely to be arrested after their 1994 release as those whose only conviction was the one leading to their 1994 prison release.³² Offenders classified as child molesters with two or more sex offenses, however, were *more than* twice as likely to

25. *Id.*

26. Michael G. Planty & Louise van der Does, *Megan's Laws Aren't Enough*, WALL ST. J., July 17, 1997, at A22.

27. PATRICK A. LANGAN ET AL., RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (U.S. Department of Justice Office of Justice Programs 2003, NCJ 198281), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf> (November 2003).

28. *Id.* at 1.

29. *Id.*

30. *Id.*

31. In addition to the conviction that resulted in their 1994 prison release, 29% of the child molesters studied, not all of whom committed the offense against children, had at least one prior sex offense on their record. This percentage is slightly higher than the 28.5% of all sex offenders, including those classified as child molesters, who had at least one prior sex offense on their records. LANGAN ET AL., *supra* note 27, at 28.

32. *Id.*

be re-arrested for another sex offense as child molesters with only one prior conviction.³³ The difference between the recidivism rate of sex offenders, generally, and that of child molesters in particular, supports the Diagnostic and Statistical Manual of Mental Disorders' finding that sex offenses against children represent a significant proportion of all reported sex offenses.³⁴

Second, the number of prior convictions a child molester has strongly correlates with the likelihood of re-arrest.³⁵ Child molesters with two or more molestation convictions are twice as likely to re-offend as a child molester with only one molestation conviction. Of the child molesters with multiple sex offenses, 7.3% were re-arrested for molesting another child; whereas child molesters with only one prior offense were re-arrested for molesting a child at a rate of 2.4%.³⁶

A separate study conducted by the Department of Justice about sex offense victims revealed that prepubescent child victims are most often attacked by a family member.³⁷ In almost half of the cases where the victim was a child, the offender was a family member. Conversely, only 11% of adult victims were related to their offender.³⁸ Likewise, only 7% of the inmates serving time for a sex offense against a child reported their child victim was a stranger, whereas 34% of adult sex offense victims were strangers to their attackers.³⁹ In one-third of cases where the inmate was imprisoned for a sex offense against a child, the victim was the inmate's own child or stepchild.⁴⁰

Taken as a whole, these studies reveal prison does not rehabilitate child sex offenders. Rather, once released, child molesters are actually more likely to repeat the crime, and probably against a family member to whom they have ready

33. *Id.* Compare 8.4% of those child molesters who had multiple offenses were rearrested, to only 3.8% of those child molesters rearrested, whose 1994 release was for their first sex offense.

34. DSM-IV, *supra* note 13, at 566.

35. LANGAN ET AL., *supra* note 27, at 2.

36. *Id.* at 32.

37. Of the 73,000 sex offense victims studied nationwide, 70% were under the age of eighteen, while 36% were under the age of thirteen. *Id.* at 36.

38. *Id.* at 32.

39. *Id.* at 36.

40. *Id.*

2005]

PUNISHING THOUGHTS TOO CLOSE TO REALITY

access. Punishing a child molester every time he commits an offense, allowing him to serve the sentence, and releasing him to the public is simply a repetitive cycle which the legislatures and courts must break.

III. CREATIVE MEASURES ALREADY ENACTED

Creative measures affecting pedophiles have been implemented at each stage of the criminal justice process. At the trial stage, Federal Rules of Evidence 414⁴¹ and 415⁴² allow evidence of past, similar acts of child molestation to be admitted in criminal and civil cases where the accused faces a child molestation allegation. This renders prosecution much easier. At the sentencing stage, some states offer or even require as a condition of probation, administration of the drug Depo-Provera, which renders a person impotent, thereby eliminating the threat repeat sex offenders pose.⁴³ Once an offender is released from treatment or prison, he then must register as a convicted sex offender with the local police department. These listings are available to the public and are used by the police to investigate future cases of crimes against children.⁴⁴

A. *Federal Rules of Evidence 414 and 415*

Enacted in 1994 to aid in the prosecution and sentencing of repeat child sex offenders, Federal Rules of Evidence 414 and 415 allow evidence of past, similar child molestation acts to be introduced in federal civil and criminal cases against a person accused of such acts.⁴⁵ Not only are convictions admissible, but so too are accusations and acquittals.⁴⁶ Before the enactment of these rules, such evidence was completely barred by Rule 404(b), which prevents the use of character evidence to prove the defendant acted in conformity with that character on a

41. FED. R. EVID. 414 (1994).

42. FED. R. EVID. 415 (1994).

43. 34 AM. JUR. TRIALS *Representing Sex Offenders and the "Chemical Castration Offense"* § 2 (1987).

44. Registration Act § 14071 (2000).

45. FED. R. EVID. 414 (1994); FED. R. EVID. 415 (1994).

46. ANTHONY J. BOCCHINO & DAVID A. SONENSHEIN, PRACTICE COMMENTARIES-FRE 34-36 (National Institute for Trial Advocacy 2004) (construing FED. R. EVID. 413-415).

particular occasion.⁴⁷ Although evidence of past sexual offenses must withstand a balancing test to determine if its probative value outweighs its prejudicial effect,⁴⁸ Rules 414 and 415 are nonetheless significant. They are the first federal evidence rules allowing the introduction of propensity evidence.

In their brief histories, Rules 414 and 415 have already survived both equal protection⁴⁹ and due process⁵⁰ challenges.⁵¹ The defense in *U.S. v. LeMay* argued the Rules deprive child molestation defendants a right all other criminal defendants enjoy, namely, the right to exclusion of similar, past act evidence.⁵² The defense claimed the historical ban on propensity evidence in criminal trials is so ingrained in American jurisprudence it has become a fundamental right protected by the Due Process Clause of the Constitution.⁵³

Although propensity evidence has been historically excluded from criminal trials, the *LeMay* court recognized courts have tended to relax the application of that principle in cases involving sexual misconduct.⁵⁴ This distinction suggests that, even prior to the enactment of Rules 414 and 415, courts were conscious of the recidivist nature of sex offenders and applied evidentiary rules accordingly. Consequently, the *LeMay* court held Rules 414 and 415 constitutional, finding the admission of propensity evidence not to be fundamentally unfair, so long as Rule 403 safeguards against admitting potentially damaging evidence with little probative value.⁵⁵

If Rule 403 does, indeed, protect against bad propensity

47. FED. R. EVID. 404(a) (1975).

48. FED. R. EVID. 403 (1975) (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

49. U.S. CONST. amend. XIV, § 1 (“[n]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.”).

50. U.S. CONST. amend. XIV, § 1 (“[n]or shall any State deprive any person of life, liberty, or property, without due process of law.”).

51. See, *U.S. v. LeMay*, 260 F.3d 1018 (9th Cir. 2001), *cert. denied*, 534 U.S. 1166; *U.S. v. Castillo*, 140 F.3d 874 (10th Cir. 1998).

52. 260 F.3d at 1024.

53. *Id.*

54. *Id.*

55. *Id.* at 1026.

2005]

PUNISHING THOUGHTS TOO CLOSE TO REALITY

evidence, then why not allow propensity evidence in all criminal prosecutions? Courts have routinely suggested a jury might be overly influenced by propensity evidence and convict a defendant regardless of the merits of the case.⁵⁶ The passage of Rules 414 and 415 may represent congressional willingness to accept the reality that a pedophile-defendant who has been accused of a similar act in the past is, actually, likely to have committed the crime again. Alternatively, the passage of these rules may imply the legislature simply wanted to provide prosecutors a powerful tool with which to convict repeat child molesters. In either case, sex offense prosecutions are now subject to more lenient rules than all other prosecutions.

Fourteenth Amendment claims that Rule 414 and 415 violate equal protection principles by impermissibly burdening a class of individuals, namely pedophiles, also fail because pedophiles are not considered a suspect class, and the rules do not affect a fundamental right.⁵⁷ Accordingly, the Rules are only subject to rational basis review. Because corroborating evidence is often difficult to obtain in child sexual assault cases, and the only available proof may be the child victim's testimony, courts have held Rules 414 and 415 to bear a rational relation to the legislative objective of more effectively prosecuting child sex offenses.⁵⁸

The Tenth Circuit also rejected the argument that these rules violate the Eighth Amendment's safeguard against cruel and unusual punishment by punishing a status rather than an act.⁵⁹ The court held the Rules do not actually impose a criminal punishment. Although they may have a strong prejudicial effect likely leading to a determination of guilt, the court trusted Rule 403 and the jury system to sufficiently mitigate or eliminate that undesired effect.⁶⁰ The court believed jurors can decipher bad propensity evidence in cases where it is admissible,⁶¹ despite the fact other courts have frequently held, regardless of limiting

56. *See, e.g.*, *Old Chief v. United States*, 519 U.S. 172 (1997); *Michelson v. United States*, 335 U.S. 469 (1948); *McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).

57. *United States v. Castillo*, 140 F.3d 874, 883 (10th Cir. 1998).

58. *Id.*; *see also*, *U.S. v. Withorn* 204 F.3d 790 (8th Cir. 2000).

59. *Castillo*, 140 F.3d at 884.

60. *Id.*

61. *Id.*

instructions, jurors will assume such evidence insinuates guilt.⁶²

B. Chemical Castration

Recognizing that pedophilia and deviant sexual behavior may be attributable to a biochemical or psychological disorder, legislatures and courts have begun requiring chemical and psychological treatment, either in lieu of prison time or as a condition to probation.⁶³ Dr. Fred S. Berlin of Johns Hopkins Hospital opined, when a sex offender's acts are fueled by chemical, hormonal, or genetic imbalances, a combination of medication and therapy can successfully extinguish the offender's inclinations.⁶⁴ Berlin found injections of the female hormone Depo-Provera⁶⁵ drastically reduce male hormone levels, thereby eliminating sexual urges.⁶⁶

California was the first state to incorporate mandatory chemical castration into its penal code.⁶⁷ The bill was introduced after a convicted sex offender in Texas made the disconcerting statement that he wanted to be castrated because he had molested over two hundred children and, unless prevented, would continue to do so when released.⁶⁸ Under the statute, a person convicted of a sex offense against a child *may* be treated with Depo-Provera or a similar drug upon parole, while a parolee guilty of a second offense *must* undergo chemical castration treatment.⁶⁹ It is significant to note California's chemical castration law qualifies pedophiles, unlike general sex offenders, for chemical castration absent any outward violence or force toward the victim.⁷⁰

62. See e.g., *Old Chief*, 519 U.S. 172 (1997); *Michelson*, 335 U.S. 469 (1948); *McKinney*, 993 F.2d 1378 (1993).

63. CAL. PENAL CODE § 645 (West Supp. 1997); *McKune v. Lile*, 536 U.S. 24 (2002); *United States v. Ahlemeier*, 391 F.3d 915 (2004).

64. 34 AM. JUR. TRIALS *Representing Sex Offenders and the "Chemical Castration Offense"* § 10 (1987).

65. Depo-Provera is the commercial brand name that is commonly used to refer to the drug. The scientific name of the hormone found in Depo-Provera is medroxyprogesterone. *Id.*

66. *Id.*

67. CAL. PENAL CODE § 645 (West Supp. 1997).

68. BIEMA, *supra* note 11, at 60.

69. CAL. PENAL CODE § 645 (West Supp. 1997).

70. *People v. Superior Court (Johannes)*, 82 Cal. Rptr. 2d 852 (Cal. Ct. App. 1999); *People v. Chambless*, 88 Cal. Rptr. 2d 444 (Cal. Ct. App. 1999).

2005]

PUNISHING THOUGHTS TOO CLOSE TO REALITY

California's bold measure has raised the eyebrows of more than a few critics, most notably the American Civil Liberties Union, which has condemned the law as cruel and unusual punishment.⁷¹ Because the California law was enacted recently and imposition of treatment does not begin until parole, there are a limited number of decisions available addressing its constitutionality. One court that has addressed the issue decided the case on other grounds, but noted in dicta that California's chemical castration statute likely does not violate the Eighth Amendment.⁷² Citing favorable public sentiment toward chemical castration and the temporary nature of its administration, the court suggested it is appropriate and proportionate, rather than cruel and unusual, punishment.⁷³

C. Sex Offender Registration

Seven-year-old Megan Kanka lived in New Jersey's "Shining Star," the forty square mile community of Hamilton Township with a little over 90,000 residents.⁷⁴ Lured by the promise to meet a puppy, Megan unsuspectingly entered the home of her neighbor – twice-convicted pedophile Jesse Timmendequas.⁷⁵ Once inside, Timmendequas raped, beat, and suffocated Megan before dumping her body at a nearby park.⁷⁶ When police identified Megan's attacker as a recently released pedophile who had just moved into the neighborhood, community residents and Megan's parents demanded to know why they were not informed a convicted pedophile had moved across the street.⁷⁷

71. BIEMA, *supra* note 11, at 60.

72. *People v. Steele*, No. C044408, 2004 Cal. App. Unpub. LEXIS 11378, at *5 n.1 (Dec. 15, 2004).

73. *Steele*, 2004 Cal. App. Unpub. LEXIS 11378, at *5 & n.1.

74. Official website of Hamilton, New Jersey Municipal Government, at <http://www.hamiltonnj.com> (last visited Mar. 21, 2005) (on file with Thomas Jefferson Law Review).

75. *Beware the Killer Next Door*, DAILY NEWS, (New York), May 07, 1997, at 40. Jesse Timmendequas was convicted in 1997 and sentenced to death for Megan's killing. Associated Press, *Man Guilty of Murder in Megan Kanka Killing*, SAINT LOUIS POST-DISPATCH, (Missouri), June 21, 1997, at 21 [hereinafter GUILTY OF MURDER].

76. *Guilty of Murder*, *supra* note 75.

77. Megan Nicole Kanka Foundation, *Our Mission*, at <http://www.meganni-colekankaoundation.org/mission.htm> (last visited Mar. 21, 2005) (on file with Thomas Jefferson Law Review).

Prompted by over four hundred thousand signatures seeking legislation requiring convicted sex offenders to identify themselves with local law enforcement agencies, the first version of “Megan’s Law” was enacted faster than any other law in New Jersey’s history.⁷⁸ Various forms of sex-offender registration and notification statutes have since been enacted across the country, requiring convicted sex offenders to register with the local police department.⁷⁹

Just as the New Jersey legislature was quick to respond to the public outcry following Megan’s murder, constitutional challenges were quick to follow the new legislation. Sex offender registration and notification statutes have been attacked on grounds of ex post facto violation, double jeopardy, procedural due process, the right to privacy, and equal protection.⁸⁰ Still, such challenges have done little more than water down peripheral provisions of the statutes, allowing the registries to continue alerting parents to the presence of pedophiles in the neighborhood.⁸¹

The Ex Post Facto Clause⁸² forbids the state from applying a new punitive measure to a crime already consummated.⁸³ A violation occurs either where a law retroactively criminalizes an act, increases the penalty for a crime after time has been served, or eliminates a defense that was available at the time the crime was committed.⁸⁴ Convicted sex offenders have used the second category to challenge registration and notification laws, claiming registration is a form of punitive punishment which a convict should not have to endure once his sentence has been served.⁸⁵

In *People v. Logan*, the appellate court of Illinois held the

78. *Id.*

79. *See, e.g.*, CAL. PEN. CODE § 290 (West 1997); ARIZ. REV. STAT. ANN. § 13-3821 (West 1997); GA. CODE ANN. § 42-1-12 (1997).

80. Carol Schultz Vento, Annotation, *Validity, Construction, and Application of State Statutes Authorizing Community Notification of Release of Convicted Sex Offenders*, 78 A.L.R. 5th 489, 503 (2000).

81. *See, e.g.*, State v. Bani, 36 P.3d 1255 (Haw. 2001) (holding Hawaii sex offender registration laws are required to have a provision allowing a convict notice and an opportunity to be heard prior to public notification).

82. U.S. CONST. art. I, § 10, cl. 1 (“No state shall . . . pass . . . ex post facto Law . . .”).

83. *Kansas v. Hendricks*, 521 U.S. 346, 370 (1997).

84. *In re William M.*, 84 Cal. Rptr. 2d 394, 396-398 (Cal. Ct. App. 1999).

85. *People v. Logan*, 705 N.E.2d 152, 157 (Ill. App. Ct. 1998).

2005]

PUNISHING THOUGHTS TOO CLOSE TO REALITY

purpose of the Illinois sex-offender registration statute was not to impose an additional punishment, but to further the legitimate public interest of protecting the public.⁸⁶ Other jurisdictions also have found the registries not to violate ex post facto principles in general, but have nonetheless invalidated certain peripheral provisions, such as details about the public's range of access to registration records and the legality of retroactive application.⁸⁷

Sex offenders subject to registration have also claimed it violates double jeopardy⁸⁸ principles, which prohibit the imposition of multiple criminal punishments for the same offense.⁸⁹ Double jeopardy challenges, like ex post facto challenges, have failed because courts have determined notification and registration are not intended to be punitive, but instead are a civil sanction designed to protect the general public from unknowingly living in the same area as a convicted offender.⁹⁰ As with the ex post facto challenges, when courts have found a violation, it has been limited to a particular aspect of the statute.⁹¹

In evaluating forms of sex offender registries under procedural due process,⁹² most courts have held that the sex offender failed to show actual deprivation of a liberty or property interest, since the information gathered is already public record, and the statutes merely require organization of the information to make it more readily accessible.⁹³ Although sex offender registration does not generally violate procedural due process, some courts have found a violation in a particular aspect of the statute. For example, a sex offender subject to

86. The court applied the intent-effects test in reaching their conclusion. The intent-effects test requires the court to first consider the legislative intent behind the statute at issue and if the intent appears to be non-punitive, the court must then determine whether the statute has a punitive effect despite the intent. *Logan*, 705 N.E.2d at 157-161.

87. *Roe v. Farwell*, 999 F. Supp. 174 (D. Mass. 1998); *Doe v. Gregoire*, 960 F. Supp. 1478 (W.D. Wash. 1997).

88. U.S. CONST. amend. V (“[n]or shall and person be subject for the same offense to be twice put in jeopardy of life or limb. . .”).

89. *Lanni v. Engler*, 994 F. Supp. 849 (D. Mich. 1998).

90. *Id.* at 852.

91. *Roe v. Farwell*, 999 F. Supp. 174 (D. Mass. 1998).

92. See *supra* text accompanying note 50. To succeed on a procedural due process claim, the plaintiff must show the law deprives him of a protected liberty or property interest. See, e.g., *Lanni*, 994 F. Supp. at 855.

93. *Id.* See also, *State v. Lance*, 1998 WL 57359 (Ohio Ct. App. 1998).

registration must be afforded judicial review of his classification as a registered offender, or if he receives the heightened classification of violent sexual predator,⁹⁴ then notice and a hearing are required.⁹⁵

Similarly, the nature of the information collected precludes finding a violation of the implied right to privacy,⁹⁶ since the information gathered is already available to the public and, therefore, not constitutionally protected.⁹⁷ Furthermore, a sex offender's home address is not within the "constitutionally protected zone of privacy."⁹⁸

In reviewing sex offender notification and registration laws under the Fourteenth Amendment's Equal Protection Clause,⁹⁹ courts apply a rational basis standard of review,¹⁰⁰ which merely requires a legal classification in the law to rationally further a legitimate state interest.¹⁰¹ Because minimizing the harm posed by recidivist sex offenders is a rational reason for the legislature to enact the statute, courts typically find no Fourteenth Amendment violation.¹⁰²

The fact that sex offender registries have survived each of these constitutional challenges, brought in many different courts, exemplifies the judicial and societal disdain for repeat sex offenders. Courts adjudicating the challenges have focused on the recidivist nature of sex offenders to justify the enactment of such statutes. Sex offender registration and notification laws originated as a direct result of the public's outcry for more knowledge. Regrettably, the Kanka family believes they may

94. A violent sexual predator is someone who has been convicted of a sexually violent offense as defined by state law and who is determined to be a sexually violent predator due to a mental abnormality or disorder that makes the person likely to engage in predatory sexually violent offenses. See *Pennsylvania v. Williams*, 733 A.2d 593, 595 (1999). This definition can vary from state to state.

95. *Id.* See also, *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997).

96. See, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing a right to privacy implied under a penumbra of the Bill of Rights).

97. *Patterson v. State*, 985 P.2d 1007 (Alaska Ct. App. 1999); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997).

98. *People v. Logan*, 705 N.E.2d 152, 161 (Ill. App. Ct. 1998).

99. See *supra* text accompanying note 49.

100. *Vento*, *supra* note 80, at 520.

101. *Lanni v. Engler*, 994 F. Supp. 849, 855 (D. Mich. 1998).

102. *Id.*

2005]

PUNISHING THOUGHTS TOO CLOSE TO REALITY

have been able to prevent Megan's death if they had known a convicted sex offender had moved in next door.¹⁰³

IV. MOVING TOWARD THE FUTURE

Two recent appellate court decisions have gone even further than the creative measures already discussed by upholding preemptive penalties rather than requiring a child to be harmed before imposing punishment. The *Dalton* court,¹⁰⁴ for the first time, held a piece of writing can be classified as child pornography and, therefore, can be regulated without violating the constitutionally implied right to freedom of thought, if the writing depicts a real child.¹⁰⁵ Similarly, in *Doe v. City of Lafayette*, the court reasoned the city-issued ban from all parks and schools that Doe received after sitting in a park and fantasizing about children was punishing Doe for his actions, not his thoughts.¹⁰⁶ These two cases show how thought regulation can be an appropriate measure when dealing with repeat child sex offenders whose fantasies fuel the sexual urges they are incapable of controlling.

A. *State v. Dalton*

While in his late teens, Brian Dalton was convicted of pandering obscene material involving children after maintenance workers in his home reported seeing photographs of children having sex which Dalton had downloaded from the internet.¹⁰⁷ The items recovered from Dalton's home included his journal, with an entry describing the brutal rape of a young girl.¹⁰⁸ Although Dalton informed the police the girl in the journal was fictional, he later confessed to his parents that she was actually his ten-year-old cousin, whom he did not brutally rape, but had fondled when he was fifteen years old.¹⁰⁹ Dalton was not prosecuted for this journal entry, nor was he tried for assaulting his cousin. Instead, he was sentenced to eighteen months in jail

103. Megan Nicole Kanka Foundation, *supra* note 77.

104. *State v. Dalton*, 793 N.E.2d 509 (Ohio Ct. App. 2003).

105. *Id.* at 516.

106. *Doe v. City of Lafayette*, 377 F.3d. 757 (7th Cir. 2004).

107. Stephen Buckley, *Weighing Personal Rights against Perversion in Ohio*, ST. PETERSBURG TIMES, Aug. 12, 2001, at 1A; *Dalton*, 793 N.E.2d at 512.

108. Buckley, *supra* note 107.

109. *Id.*

for violating two Ohio statutes prohibiting possession of obscene material involving children.¹¹⁰

After serving four months of his sentence, Dalton was released, with a number of conditions.¹¹¹ His parole was revoked when he failed to attend his mandatory sex offender treatment program.¹¹² At about that time, his parents found another journal in his apartment, this one describing the torture and sexual assault in a basement of two fictional children, who were kidnapped from imagined drug-addicted parents.¹¹³ The contents were so vivid and disturbing that some grand jurors cried and asked the prosecutor to stop reading from the journal.¹¹⁴

For this fictional story, Dalton was charged with two counts of pandering obscene material involving a minor.¹¹⁵ Dalton's attorney mistakenly thought Dalton was being prosecuted for his first recovered journal describing a real incident with a real child, which would be actionable unlike the fictitious journal.¹¹⁶ Accordingly, she counseled Dalton to enter a guilty plea because he had no defense.¹¹⁷ The Ohio appellate court ultimately agreed with Dalton's contention - that his trial counsel was deficient in failing to argue penalizing Dalton for a journal entry describing fictional children, as opposed to real children, was unconstitutional.¹¹⁸

Although the dismissal of Dalton's conviction for his second journal may appear as a blow to the effort to punish pedophiles,¹¹⁹ the court left wide open the possibility of

110. *Id.*

111. *Id.*

112. *Dalton*, 793 N.E.2d at 512.

113. Buckley, *supra* note 107.

114. *Id.*

115. *Dalton*, 793 N.E.2d at 512. First Dalton was charged under a statute prohibiting a person from creating, reproducing, or publishing obscene material involving a minor as a participant or observer. OHIO REV. CODE ANN. § 2907.321(A)(1) (West 1989). The second charge was for violating a statute prohibiting buying, procuring, possessing, or controlling such obscene material. OHIO REV. CODE ANN. § 2907.321(A)(5) (West 1989).

116. *Dalton*, 793 N.E.2d at 515.

117. *Id.*

118. *Id.* at 518.

119. State v. Dalton, No. 01CR-02-1159 (Ohio Dist. Ct. Franklin County 2004).

2005]

PUNISHING THOUGHTS TOO CLOSE TO REALITY

punishing a defendant for a writing depicting a real child, even if only partially true. The court emphasized the distinction between Dalton's two journals. In his first journal, Dalton incorporated additional fantasies into a real incident with his cousin. Because the depiction was of a real child, the court implied the journal entry constituted child pornography, which is actionable.¹²⁰ Thus, while the entirely fictional second journal entry is constitutionally protected, the one based on partially true events is not.¹²¹

Although this may seem like a bright line distinction, the court approaches a slippery slope since there is some aspect of reality in almost any fictitious writing. For example, if Dalton knew two children with drug addicted parents, but the children in his second journal were given different names and descriptions, then the court could go either way in deciding if real children are being depicted.

Instead of evaluating the degree of reality in the incidents being portrayed, the court focused on the child being portrayed and whether he or she was real.¹²² The *Dalton* court forewarned, if a fantasy is based on a real child, even if the child suffered no actual physical injury, and is committed to paper, the fantasy can be a basis for prosecution. The court's focus on the reality of the child, rather than the fantasy's proximity to an actual event, is significant because the court is protecting real children from being actors in pedophiles' fantasies. The court established that a child who has never been physically injured can be a victim because inappropriate thoughts about the child, alone, are injurious.

B. Doe v. City of Lafayette

Doe's history of pedophile-related convictions dates back to 1978, when he performed oral sex on a ten-year-old boy in a school locker room.¹²³ Doe's last conviction¹²⁴ occurred after a 1990 incident when he offered three adolescent boys oral sex and

120. *Id.*

121. *Dalton*, 793 N.E.2d at 516.

122. *Id.*

123. *Doe v. City of Lafayette*, 377 F.3d. 757, 758 (7th Cir. 2004).

124. Doe's criminal history includes multiple arrests and convictions for child molestation, attempted child molestation, voyeurism, exhibitionism, and peeping. *Id.* at 758.

exposed himself to them.¹²⁵ Just as his probation expired, Doe's probation officer received an anonymous call informing him Doe had gone to a local park where he sat and watched three children playing.¹²⁶ In Doe's own recollection of the event, he said:

When I saw the three, the four kids there, my thoughts were thoughts I had before when I see children, possibly expose myself to them, I thought about the possibility of, you know, having some kind of sexual contact with the kids, but I know with four kids there, that's pretty difficult to do. It's a wide open area. Those thoughts were there, but they, you know, weren't realistic at the time. They were just thoughts.¹²⁷

As a result of the incident, city officials issued Doe a letter, banning him from all city parks and schools.¹²⁸ The ban had no termination date and covered the entire city.¹²⁹ Doe did not object to being banned from schools, but did object to the ban on all public parks because he liked to attend work outings, play softball, and take walks with friends there.¹³⁰ Doe argued the city was punishing him for his thoughts.¹³¹ The court, in upholding the city's ban, reasoned Doe was not being sanctioned for mere thoughts, but rather for acting on his thoughts by going to the park and watching children.¹³²

The Supreme Court has held the First Amendment¹³³ prevents the government from regulating mere thought.¹³⁴ If, however, a regulation is aimed primarily at conduct, and has only an incidental effect on one's thoughts, then the First Amendment is not violated.¹³⁵ The court reasoned Doe's inappropriate thoughts, in conjunction with his proceeding to a nearby park to watch children, satisfied the thought plus conduct

125. *Id.*

126. *Id.* at 759.

127. *Id.* at 760.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 765.

132. *Id.* at 767.

133. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

134. Courts have interpreted freedom of speech to include preventing the government from interfering with one's thoughts. (*See, Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67-68 (1973)).

135. *City of Lafayette*, 377 F.3d at 767.

2005]

PUNISHING THOUGHTS TOO CLOSE TO REALITY

requirement.¹³⁶ However, had Doe simply gone to the park and sat to watch children, absent inappropriate thoughts, the ban would not have been issued. Thus, punishment for his thoughts was not incidental because his thoughts were precisely what prompted the ban. The court stated that Doe was free to have such fantasies in his own home, but by going to the park, he “brought himself to the brink of committing child molestation.”¹³⁷

Although the court’s reasoning that Doe was punished for his actions, not his thoughts, may be weak, both the city and the court appropriately acknowledged Doe’s propensity to commit a sex offense against another child. Doe’s history shadows the behavioral and psychological characteristics of the pedophiles studied above. He openly admits he will probably always have inappropriate thoughts about children, and his psychiatrist agrees he will likely re-offend¹³⁸ and there is no cure.¹³⁹ The city’s preemptive measure was the result of officials aptly recognizing a pedophile’s thoughts can be an immediate precursor to sexual offenses against children in the vicinity. The city’s action eliminated the risk Doe posed when it first came to their attention rather than waiting for a child to be assaulted.

C. Reconciling Dalton and Doe

The *Doe v. City of Lafayette* court completed what the *Dalton* court failed to do – issue a punishment for inappropriate thoughts that may very well lead to the sexual exploitation of a child. Because Dalton’s first journal was found among actual child pornography, the prosecution focused its attention on the photos rather than the journal. The second journal was not actionable because it depicted entirely fictional children. Accordingly, the *Dalton* court never had the opportunity to convict Dalton for an offense based on either journal. Doe had similar inappropriate thoughts about real children with no corresponding crime committed, yet he was punished. Acknowledging Doe’s propensity to commit acts of pedophilia, the city took immediate action against Doe’s inappropriate

136. *Id.*

137. *Id.*

138. *Id.* at 761.

139. *Id.* at 773-774.

thoughts.

This could explain the distinction made in *Dalton* between writings that depict fictional children and those that depict actual children. The latter may indicate a pedophile's thoughts are turning from pure fantasy to a reality he wishes to perpetrate on a real child. Either way, the government is seeking to regulate the pedophile's thoughts when they come too close to reality. Had Doe fantasized in the privacy of his own home, the government could not restrain him from doing so;¹⁴⁰ but since he incorporated real children into his imagination when he sat at the park, his thoughts crossed into an area the court saw fit to regulate. These two cases illustrate a move in the direction of imposing immediate penalties when a pedophile's thoughts mutate into too realistic a fantasy.

Dalton and *Doe*, when considered with the U.S. Department of Justice study on recidivism rates of child sex offenders,¹⁴¹ are examples of how thought regulation serves as an effective tool to prevent future attacks on children. The study showed the more sex offenses for which a pedophile has been convicted, the more likely he is to repeat the crime.¹⁴² *Doe* fits into this statistic. He has numerous convictions for crimes against children, dating back thirty years,¹⁴³ and has admitted he will always have inappropriate thoughts.¹⁴⁴ *Dalton*, on the other hand, has only one sex offense on his record.¹⁴⁵ The Justice Department's study suggested if an offender has only one child sex offense conviction on his record, like *Dalton*, then the chances of re-offending are dramatically lower.¹⁴⁶

The study also suggested, however, *Dalton*'s youth may predict his recidivism rate. Of the child molesters studied, almost twenty percent were eighteen to twenty-four years old at the time of the offense.¹⁴⁷ *Dalton* is in his early twenties.¹⁴⁸ His age group represented the highest percentage of men re-arrested

140. *Id.* at 767.

141. See discussion *supra*, Part II.B.

142. LANGAN ET AL., *supra* note 27 at 32.

143. *City of Lafayette*, 377 F.3d. at 758-759.

144. *Id.* at 758-762.

145. Buckley, *supra* note 107.

146. LANGAN ET AL., *supra* note 27 at 32.

147. *Id.*

148. Buckley, *supra* note 107.

2005]

PUNISHING THOUGHTS TOO CLOSE TO REALITY

for another sex crime against a child within three years of their 1994 parole.¹⁴⁹ This could imply the earlier in a pedophile's life that he is convicted for a sex crime against a child, the more likely he is to commit another shortly after release. Alternatively, this statistic could simply reflect the commonly recognized increased sex drive males within this age group experience. Either way, Dalton's second journal was presumably written after he was released from his first conviction, meaning his time in prison had no deterring effect on his inappropriate fantasies about children.

Dalton and Doe are at different stages in their perpetration of pedophilia. Dalton has only one child sex offense on his criminal record, but his age has not yet allowed him to accumulate a record like Doe's. He is still exploring his fantasies with child pornography, fondling his cousin, and writing down his fantasies, while Doe has already created a trail of child victims. The question becomes, was Brian Dalton's fictitious second journal a precursor to his next assault? Some experts have claimed the behavior of sex offenders is progressive, and writing down a fantasy, as Dalton did, may indicate intent to act.¹⁵⁰

The commonality between the two men is their thoughts. As Doe was sitting at that park, he was not contemplating his prior assaults; he was fantasizing about sexually assaulting the children playing in front of him.¹⁵¹ Similarly, Dalton's first journal about his cousin did not describe just the actual incident, but took it a step further by describing the girl's imaginary, brutal rape.¹⁵² The thoughts in either of these two scenarios may very well have led to an eventual violent attack, adding more names to the list of sexually assaulted children in our country.

V. THOUGHT REGULATION IS LIKELY TO BE UPHELD BY THE SUPREME COURT

There is a special place in the hearts of legislatures and the judiciary for children. They are a different kind of victim whom the courts have sought to protect, even at the cost of infringing

149. LANGAN ET AL., *supra* note 27 at 32.

150. Buckley, *supra* note 107.

151. Doe v. City of Lafayette, 377 F.3d. 757, 760 (7th Cir. 2004).

152. Buckley, *supra* note 107.

on the constitutional rights of a pedophile.¹⁵³ The Supreme Court is no exception to the notion that child victims deserve special treatment throughout the legal process.¹⁵⁴ The best indication of the Supreme Court's likeliness to uphold cases involving thought regulation is found in judicial interpretation of pornography legislation.

A. Regulation of Thought Found in Writings

In general, pornography¹⁵⁵ can only be banned if it is obscene.¹⁵⁶ Although the law can regulate the distribution and creation of obscene material,¹⁵⁷ it cannot regulate mere possession of such material in the privacy of the home.¹⁵⁸ Child pornography, however, is an exception to this general principle, due to the harm caused to children in the creation of such material.¹⁵⁹ Federal law prohibits the distribution, creation *and possession* of child pornography, whether or not it is obscene.¹⁶⁰

Under current obscenity law,¹⁶¹ the depiction of the violent rape of a woman may be classified as obscene in some jurisdictions, and may also cause harm to the woman depicted. Nevertheless, possession of such material in one's own home remains constitutionally protected.¹⁶² The same is not true for a

153. *See, e.g.*, *Maryland v. Craig*, 497 U.S. 836 (1990) (holding an alleged child victim of sexual abuse may testify via camera if the trial court finds the procedure necessary to protect the child from the trauma of testifying in the defendant's presence. The Court noted the Sixth Amendment reflects a preference for face-to-face confrontations at trial, yet sometimes this preference must yield to public policy considerations such as protecting sexually abused children from further traumatizing.).

154. *Id.*

155. Pornography is material (such as writings, photographs, and movies) depicting sexual activity or erotic behavior in a way that is designed to arouse sexual excitement. Pornography is protected speech under the First Amendment unless it is determined to be legally obscene. BLACK'S LAW DICTIONARY 1181 (7th ed. 1999).

156. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 240 (2002) (explaining that a work is obscene if, when taken as a whole, it appeals to prurient interests, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value).

157. *Miller v. California*, 413 U.S. 15, 18 (1973).

158. *U.S. v. Reidel*, 402 U.S. 351, 354 (1971).

159. Child Pornography Prevention Act of 1996 § 18 U.S.C. § 2251 (1996).

160. *Id.*

161. *See supra* note 156.

162. *Reidel*, 402 U.S. at 354.

2005]

PUNISHING THOUGHTS TOO CLOSE TO REALITY

visual depiction of a real child naked, even if the image is not obscene.¹⁶³ Regardless of the consequence or injury to the child, it is illegal to possess it, even in one's own home,¹⁶⁴ a place usually regarded as being safe from governmental intrusion.¹⁶⁵

If, however, the image does not involve a real child, but instead portrays a simulated child, *Ashcroft v. Free Speech Coalition* held the image cannot be constitutionally regulated.¹⁶⁶

In *Ashcroft*, the Court was faced with determining whether images of computer-generated children, or images of adults who look like children, fall within the category of child pornography prohibited by federal law.¹⁶⁷ The Court held to be unconstitutional the portions of the 1996 Child Pornography Prevention Act that regulated the possession of all works of *virtual* child pornography and works that *depict* a minor engaging in sexual activity, both of which are constitutionally protected after *Ashcroft*.¹⁶⁸

The *Ashcroft* Court was concerned that those portions of the Act would have a chilling effect on works with artistic or literary merit, citing the examples of such films as "American Beauty" and "Traffic."¹⁶⁹ These two films portrayed sexual conduct between minors and adults, which under a strict reading of the Act, could constitute a *depiction* of child pornography.¹⁷⁰ Appreciating the artistic worth of these two films, the Court sought to prevent similar works from being shut-down by the overly broad language of the Act.¹⁷¹

The Court ultimately found the government's interest in protecting children was not directly served by banning virtual child pornography, since no actual child was harmed in its creation.¹⁷² However, the Supreme Court has taken a much different approach if the pornography involves a real child. Even if the child victim is not physically or mentally harmed in

163. 18 U.S.C. § 2251 (1996).

164. *Id.*

165. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

166. *Id.*

167. *Ashcroft*, 535 U.S. at 239.

168. *Id.* at 257.

169. *Id.* at 268.

170. Child Pornography Prevention Act of 1996 § 18 U.S.C. § 2251 (1996).

171. *Ashcroft*, 535 U.S. 234 at 248.

172. *Id.* at 251.

the creation of the pornography, is unaware s/he is being exploited, or does not know the image is in distribution, the Court has found injury per se to the child.¹⁷³ The mere circulation of the inappropriate photograph creates a permanent record of participation and fuels the market for child pornography.¹⁷⁴

Based on its reasons for banning child pornography, the Supreme Court is prone to uphold convictions for writings similar to Dalton's, so long as an actual child is depicted. In fact, the *Dalton* court applied *Ashcroft's* reasoning in determining Dalton could be prosecuted for a journal that depicted real children, but not for a journal that depicted fictional children.¹⁷⁵ Under the 1996 Child Pornography Act, a person can be prosecuted for possession of an otherwise innocent photo of a child in a bathtub, even if the child is not aware s/he is being exploited, or that the photo is in circulation.¹⁷⁶ The Court is likely to take the same stance if faced with a writing describing a real child. Even if the child was not actually harmed, being a character in the writing ultimately produces a permanent record of a pedophile's fantasy, thereby exploiting a real child.

B. Watering Down the Thought Plus Conduct Requirement

If presented with a *Doe v. City of Lafayette* scenario, the Supreme Court may endorse what the Seventh Circuit court did and find 'plus conduct' anywhere possible so as to justify keeping a pedophile away from child victims. Clearly, the Court cannot constitutionally punish a person based on thoughts alone.¹⁷⁷ However, regulations punishing conduct, while only incidentally regulating thoughts, do not violate a person's constitutional freedom of thought.¹⁷⁸ Although the Supreme Court has mentioned freedom of thought in numerous cases,¹⁷⁹ it has not

173. *New York v. Ferber*, 458 U.S. 747, 759 (1982).

174. *Id.*

175. *State v. Dalton*, 793 N.E.2d 509, 516 (Ohio Ct. App. 2003).

176. Child Pornography Prevention Act of 1996 § 18 U.S.C. § 2251 (1996).

177. *Ashcroft*, 535 U.S. 234 at 252.

178. *Doe v. City of Lafayette*, 377 F.3d. 757, 765 (7th Cir. 2004).

179. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003) (stating liberty includes freedom of thought); *Wooley v. Maynard*, 430 U.S. 705 (1977) (stating freedom of thought includes the right to speak freely and the right not to speak at all).

2005]

PUNISHING THOUGHTS TOO CLOSE TO REALITY

laid out a clear test for when a violation has occurred.¹⁸⁰ The Court's interpretation of freedom of thought in obscenity cases may predict how the Court would hold in Doe's case.

In *Paris Adult Theatre I v. Slaton*, the Court rejected a freedom of thought challenge to a law prohibiting the distribution and display of obscene material.¹⁸¹ The petitioners in *Paris* argued the government was impermissibly attempting to control the minds of patrons who frequented a theatre displaying obscene pornographic films.¹⁸² The Court found the law sought to regulate the display and distribution of obscene materials, and had only an incidental effect on freedom of thought.¹⁸³ Viewing or thinking about the obscene material is not illegal, whereas distributing or displaying it is.

The Supreme Court has also held perusing obscene material in one's own home cannot be government regulated, because it comes too close to thought regulation.¹⁸⁴ Still, decisions such as *Paris* found a way around impermissible thought regulation by criminalizing the distribution and display of obscene material. This indirect regulation may have an effect on eliminating the market for such material, and ultimately result in the government controlling the prurient interests of individuals.

Where children are involved, the Supreme Court is more willing to allow government regulation that would otherwise be considered unconstitutionally intrusive.¹⁸⁵ The distribution *and possession* of child pornography involving real children is banned altogether, whether or not obscene.¹⁸⁶ Since the government cannot control the minds of pedophiles who peruse child pornography, the legislature simply criminalized the conduct of possessing it.¹⁸⁷

This trend of legislation and judicial validation insinuates the Supreme Court may be more willing to find conduct in issues

180. *Recent Case: Constitutional Law – Freedom of Thought – Seventh Circuit Upholds City's Order Banning Former Sex Offender from Public Parks*, 118 HARV. L. REV. 1054, 1057 (2005).

181. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

182. *Id.* at 67.

183. *Id.*

184. *Stanley v. Georgia*, 394 U.S. 557 (1969).

185. *New York v. Ferber*, 458 U.S. 747, 759 (1982).

186. Child Pornography Prevention Act of 1996 § 18 U.S.C. § 2251 (1996).

187. *Id.*

attached to the possible exploitation of a child. In discussing Doe's freedom of thought argument, the Seventh Circuit found conduct in Doe's going to the park and determined he "brought himself to the brink of committing child molestation."¹⁸⁸ However, the court admitted Doe's condition as a pedophile who continues to have sexual urges toward children played a role in its decision.¹⁸⁹ The Supreme Court has long accepted the principle that a person cannot be punished based on their status in society.¹⁹⁰ Thus, the Seventh Circuit had to be creative in upholding the city's ban because it recognized pedophiles such as Doe are a danger to society, but Doe's mere classification as a pedophile could not permissibly lead to a punishment.

Yet the language used in the decision suggests Doe's case was taken as a whole, with his inappropriate thoughts and history of pedophilia justifying a finding of "conduct" in his going to the park to watch children.¹⁹¹ Absent a more comprehensive freedom of thought test, the Supreme Court would likely similarly rationalize the city's ban. In recognizing the Supreme Court's willingness to employ extreme measures to protect children, such as in cases banning child pornography, the Court will find conduct in Doe's case, even if it requires a stretch.

In *New York v. Ferber*, the Supreme Court stated, "we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of Constitutional rights."¹⁹² Following this lead, the Court will undoubtedly balance the pedophile's right to freedom of thought against the government's interest in protecting children and find in favor of the children. Whether punishing pedophiles for their status, actions, or thoughts, the Court will tailor its decision toward protecting children.

188. *Doe v. City of Lafayette*, 377 F.3d. 757, 767 (7th Cir. 2004).

189. *Id.*

190. *Robinson v. California*, 370 U.S. 660 (1962).

191. *City of Lafayette*, 377 F.3d. at 767.

192. *New York v. Ferber*, 458 U.S. 747, 757 (1982).

2005]

PUNISHING THOUGHTS TOO CLOSE TO REALITY

VI. CONCLUSION

The great legal scholar William Blackstone said, “Law is the embodiment of the moral sentiment of the people.”¹⁹³ Considering the abundance of data attesting to the recidivist nature of pedophiles and society’s growing intolerance of child abuse, the disparate manner in which our justice system treats this type of felon is unsurprising. The judicial and legislative systems are increasingly acknowledging our children are not safe so long as pedophiles are deviously lying in wait among them.

Each of the creative measures enacted in the last decade finds support in statistical and psychological analyses of pedophiles. Experts have acknowledged the difficulty in prosecuting child molesters because of the secretive nature of such offenses, especially when the child victim is likely to be related to the offender. Thus propensity evidence is admissible, making prosecution easier. Chemical castration laws find support in the psychological research documenting the only way to stop a pedophile from re-offending is to eliminate his sexual appetite, since he harbors no guilt for his criminal transgressions. Sex offender registries alert parents to the presence of a pedophile in their neighborhood and enable the parent to prevent the pedophile from easily accessing their child.

Thought regulation is the next step for the Supreme Court and Congress to take in order to protect children from pedophiles who cannot be cured. A convicted pedophile is proof that not all can, or want to, control their fantasies. The government must assume the responsibility of protecting those who will suffer as a result. Doe and Dalton may have repulsive thoughts and fantasies, but neither you nor I would ever have heard of those fantasies, but for the child victims exploited in the process. The Supreme Court should support thought regulation as the next preventative measure for repeat pedophiles, because

193. *State v. Kinney Building Drug Stores Inc.*, 151 A.2d 430, 432 (Essex County Ct. 1959).

THOMAS JEFFERSON LAW REVIEW

[Vol. 27:393]

their disturbing fantasies can easily mutate into a horrific threat to the nation's children.

*Jennifer B. Siverts**

* B.A. Law and Society, University of California, Santa Barbara, 2003; J.D. candidate, Thomas Jefferson School of Law, May 2006. I wish to thank my parents and Shaun P. McGrady for their continued love and support. I also thank Shannan Leelyn, Chris Shanahan, Andy Moher, Professor Marybeth Herald, and Professor Linda Berger for all their help throughout the writing process. Lastly, a warm thank you to Charles Pickett and all my friends at the National Center for Missing and Exploited Children who dedicate day after day to protecting and helping our nation's children.