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Constitutional Law—First Amendment and Freedom of Thought—Banishing Sex Offenders: Seventh Circuit Upholds Sex Offender's Ban from Public Parks after Thinking Obscene Thoughts about Children. Doe v. City of Lafayette, 377 F.3d 757 (7th Cir. 2004).

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CONSTITUTIONAL LAW—FIRST AMENDMENT AND FREEDOM OF THOUGHT—BANISHING SEX OFFENDERS: SEVENTH CIRCUIT UPHOLDS SEX OFFENDER'S BAN FROM PUBLIC PARKS AFTER THINKING OBSCENE THOUGHTS ABOUT CHILDREN. *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004).

I. INTRODUCTION

Sexual assaults and rapes occur with alarming frequency in the United States.[1] According to one study, a woman is raped every two minutes in the United States.[2] Children are often victims, also, with the number of sexually abused children estimated at 100,000 to 500,000 each year.[3] The rising numbers of sex crime convictions and the long-term traumatic effects for victims have prompted legislators and other government officials to find innovative methods to combat sex crimes.[4] Pressure from various political and social forces has prompted lawmakers to enact legislation designating sex offenders as a separate category of criminals and authorizing procedures outside the established criminal procedures.[5] Efforts to regulate sex offenders and prevent future offenses include civil commitment, registration and notification requirements, mental and behavioral therapy, and mandatory drug treatments.[6] These efforts must be balanced, however, with the equally important task of protecting the constitutional rights of offenders, including the right to think and communicate without government interference, even if the government finds those thoughts offensive.[7]

This note discusses the latest development in the regulation of sex offenders by examining the Seventh Circuit decision in *Doe v. City of Lafayette*,[8] in which the court upheld a sex offender's banishment from public parks after he admitted he went to a park, observed some children playing, and had sexual thoughts about them.[9] The note begins by examining the historical development of sex offender legislation, from the sexual psychopath laws that dominated much of the twentieth century to the more recent

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1. Caroline M. Wong, Comment, *Chemical Castration: Oregon's Innovative Approach to Sex Offender Rehabilitation, or Unconstitutional Punishment?*, 80 OR. L. REV. 267–68 (2001).

2. *Id.*

3. *Id.* at 269.

4. *Id.* at 267–68.

5. Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43, 53 (1998).

6. *See infra* Part III.

7. Doe v. City of Lafayette, 377 F.3d 757, 785 (7th Cir. 2004) [hereinafter *Doe III*] (Williams, J., dissenting).

8. *Id.* at 757.

9. *Id.* at 759–74.

turn towards regulating offenders after incarceration through various civil remedies, including sex offender registration and community notification.[10] Next, the note explains the reasoning of the Seventh Circuit in *Doe*[11] and concludes with an examination of the significance of the decision.[12]

II. FACTS

John Doe, a resident of Lafayette, Indiana, is a repeat sex offender with a long history of convictions.[13] The majority of Doe's criminal convictions resulted from sex offenses perpetrated against children.[14] From 1978 to 1991, he was convicted of numerous sexually related offenses, including child molestation, voyeurism, exhibitionism, and peeping.[15] His most recent conviction occurred in 1991, when he was convicted of attempted child molesting and attempted child solicitation.[16] Doe was sentenced to house arrest from January 1992 to January 1996 and was then on probation until early January 2000.[17]

In late January 2000, Doe parked his car at a city park and observed several children in their early to mid teens playing on a baseball field.[18] Doe watched the children for fifteen to thirty minutes and had sexual thoughts about them, but he recognized the thoughts as inappropriate and left the park.[19] Doe was upset and immediately informed his therapist of the incident and later discussed it with his support group—Sexual Addicts Anonymous.[20] In response to the incident, Doe voluntarily began hormonal treatments (Depo-Provera) to help suppress his sexual urges.[21]

On January 20, 2000, Doe's former probation officer received a phone call from a confidential source, informing him that Doe had been in the park

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10. *See infra* Part III.

11. *See infra* Part IV.

12. *See infra* Part V.

13. *Doe III*, 377 F.3d at 758. John Doe was a name given to the offender by the courts to protect his anonymity. Joe Gerrety, *Parks Ban Sparks Lawsuit, Debate Over Sex Offenders*, J. & COURIER (Lafayette, Ind.), April 4, 2004, at 18A. Although his real name had appeared in print before, the local newspaper also elected to use the pseudonym in reporting on the case. *Id.*

14. *Doe III*, 377 F.3d at 758–59.

15. *Id.* at 758–59; *see also* Joe Gerrety, *'Paying For Being Honest'*, J. & COURIER (Lafayette, Ind.), Apr. 4, 2004, at 8A (providing a detailed timeline of John Doe's arrests and charges for sex offenses in Lafayette).

16. Gerrety, *supra* note 15, at 8A.

17. *Doe III*, 377 F.3d at 759.

18. *Id.*

19. *Id.* at 774 (Willams, J., dissenting).

20. *Id.* at 775 (Williams, J., dissenting). According to his therapist, Doe's ability to identify and control his urges was a positive step in his rehabilitation. *Id.*

21. *Id.* (Williams, J., dissenting).

watching young children.[22] The probation officer forwarded the information to the Lafayette police department, which in turn contacted the superintendent of the Lafayette Parks and Recreation Department and the superintendent of the Lafayette School Corporation.[23] The police chief advised the superintendents to issue a ban ordering Doe not to enter the city's parks or schools.[24] In early February 2000, Doe received letters from both superintendents informing him he was prohibited from entering the city's parks or coming onto school grounds.[25] The city offered no pre-issuance review or hearing before imposing the bans, and Doe was not given an opportunity to appeal the decisions.[26] The bans were imposed under threat of arrest for trespass.[27] Neither of the bans were limited in duration or geographical area within the city park system.[28]

Doe filed suit against the city, alleging the ban from public parks violated his First Amendment rights and Fourteenth Amendment due process rights.[29] Specifically, Doe argued that he was being punished for his thoughts in violation of the First Amendment,[30] and the ban violated his substantive due process rights by denying him his "fundamental right to enjoy and wander through a public park."[31] Both parties filed for summary judgment,[32] and the district court granted summary judgment for the city.[33] With regard to the First Amendment claim, the district court concluded that Doe had not identified any form of expressive conduct that was impinged by the ban, and "any incidental impact upon Doe's 'thoughts' does not bar the city of Lafayette's legitimate interests in protecting its youth."[34] In response to Doe's due process argument, the court ruled that he had failed to identify a fundamental liberty interest,[35] and under a rational basis standard

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22. *Id.* at 759.
23. *Doe III*, 377 F.3d at 760.
24. *Id.*
25. *Id.*
26. *Id.* at 775 (Williams, J., dissenting).
27. *Id.* (Williams, J., dissenting).
28. *Id.* at 760. The city has an extensive park system which includes several parks, a zoo, a golf course, pools, a baseball stadium, and a sports complex. *Id.* at 775 (Williams, J., dissenting). Bans from city parks are usually issued for a week or in some cases for a summer, given to those who have vandalized or interfered with park patrons. *Id.* (Williams, J., dissenting).
29. Doe v. City of Lafayette, 160 F. Supp. 2d 996, 996 (N.D. Ind. 2001) [hereinafter *Doe I*].
30. *Id.* at 1000.
31. *Id.* at 1001.
32. *Id.* at 997.
33. *Id.* at 1004.
34. *Id.* at 1001.
35. *Doe I*, 160 F. Supp. 2d at 1002 (rejecting the notion that there is a fundamental right to intrastate travel or freedom of movement).

of review, the ban was narrowly tailored and served a strong and legitimate city interest in securing the safety of its minor citizens.[36]

Doe appealed to the United States Court of Appeals for the Seventh Circuit, and a majority of a three-member panel of judges reversed the district court's ruling.[37] The court framed the issue: "[M]ay a city constitutionally ban one of its citizens from public property based on its discovery of that individual's immoral thoughts?"[38] The court answered the question in the negative and ruled that the ban punished Doe for his thoughts in violation of the First Amendment.[39] The city petitioned for a rehearing before the full Seventh Circuit, and the court granted the petition.[40]

III. BACKGROUND

Courts and lawmakers have long struggled to find appropriate and effective ways to control sexually deviant behavior.[41] In the colonial United States, most sexual behavior was considered morally reprehensible and therefore illegal.[42] Public punishment, such as public beatings, branding, or use of a pillory, was used to prevent recurrence, deter others, and humiliate the offender.[43] Public humiliation eventually fell out of use as society progressed and many of the previous methods of punishment were found to be cruel and unusual in violation of the Eighth Amendment to the Constitution.[44] Instead, sex offenders were convicted and sentenced to prison much like any other criminal offender.[45] At that time, "it was not considered necessary to differentiate sex offenders from other offenders in terms of punishment."[46] During the early twentieth century, an apparent increase in the frequency of sex offenses and the widespread publicity the crimes received

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36. *Id.* at 1004.

37. Doe v. City of Lafayette, 334 F.3d 606, 613 (7th Cir. 2001) [hereinafter *Doe II*].

38. *Id.* at 608. The city admitted that Doe's revelation of his thoughts, and not any outward indication of his thinking, was the basis for its action. *Id.*

39. *Id.* at 613 ("[T]he fact that this court or the City of Lafayette finds Doe's thoughts offensive does not limit the amount of First Amendment protection they are afforded.").

40. *Doe III*, 377 F.3d at 757.

41. *See generally* Lieb, *supra* note 5, at 53–84.

42. Michelle Pia Jerusalem, Note, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's "Right" To Know*, 48 VAND. L. REV. 219, 224 (1995).

43. *Id.* at 224–25. The most famous illustration of humiliation as punishment is Nathaniel Hawthorne's *A Scarlet Letter*, in which a woman was forced to wear a scarlet "A" on her chest as punishment for committing adultery. *Id.* at 224.

44. *Id.* at 225.

45. *Id.*

46. *Id.*

led to new formulations of law recognizing that sex offenders "require[ed] special consideration for [their] own sake and the sake of society."[47]

Over the past hundred years, sex offender laws have developed throughout three distinct periods of legislation and public attention on sex offenders.[48] The first period, spanning from the early twentieth century through the 1970s, concentrated on the civil commitment and treatment of sex offenders in lieu of punishment.[49] Castration was also an acceptable form of treatment for criminals, including sex offenders, at least during the first half of the twentieth century.[50] The second period began in the 1970s and was led by the feminist movement, which advocated rape law reforms and better treatment for rape victims.[51] The third period began in late 1980s and early 1990s and focused on controlling, monitoring, and treating sex offenders after incarceration.[52]

A. Treatment, Not Punishment, of Sex Offenders

A series of sexually motivated murders in the 1930s spawned the first wave of sex offender legislation.[53] In Michigan, the discovery of a young girl's mutilated body in a trunk, found in the apartment of a sex offender who had previously been committed to a mental institution, triggered the passage of the first so-called "sexual psychopath" law in 1937.[54] A typical statute defined a sexual psychopath as someone who was "predisposed to the commission of sex crimes and who is dangerous to society."[55] These statutes authorized the civil commitment of a person classified as "sexually dangerous" for an indefinite period of time.[56] The statutes allowed the government to achieve the dual goals of removing the sex offender from the community and treating the underlying mental condition of the offender.[57] These goals reflected the "buoyant therapeutic optimism" of the time; the idea that these offenders could be removed from society and "cured" had

47. *Id.* at 225–26.

48. Lieb, *supra* note 5, at 53.

49. *See* Jerusalem, *supra* note 42, at 226; Lieb, *supra* note 5, at 53–56.

50. *See* Wong, *supra* note 1, at 271.

51. *See* Lieb, *supra* note 5, at 53–54; Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119, 120–29 (1999).

52. Lieb, *supra* note 5, at 65–83.

53. *Id.* at 53.

54. *Id.* at 55. *See* MICH. STAT. ANN. §§ 780.501 to .509 (Callaghan 1937) (repealed 1967).

55. Carol Veneziano & Louis Veneziano, *An Analysis of Legal Trends in the Disposition of Sex Crimes: Implications for Theory, Research, and Policy*, 15 J. PSYCHIATRY & L. 205, 206 (1987).

56. *Id.* at 206–07.

57. Lieb, *supra* note 5, at 55.

tremendous appeal to both the public and the mental health community.[58] By 1970, twenty-nine states had enacted some form of sexual psychopath law.[59]

Sexual psychopath statutes "were principally viewed as civil in nature, therefore necessitating fewer procedural rights than criminal law."[60] These laws were challenged, however, on a number of constitutional grounds, including procedural and substantive due process, equal protection, and the Eighth Amendment right against cruel and unusual punishment.[61] For most courts, "in determining the constitutionality of the sex psychopath statutes, the crux of [their] consideration rest[ed] upon the judicial determination of whether the proceedings under the act [were] criminal or civil."[62]

The United States Supreme Court made its first ruling regarding a sexual psychopath statute in *Minnesota ex rel. Pearson v. Probate Court.*[63] The statute in question authorized indefinite civil commitment for those with "psychopathic personality disorder."[64] The Court found no violation of due process[65] and concluded that Minnesota was acting within its rights by identifying such psychopaths as "a dangerous element in the community."[66]

Almost thirty years later, the Supreme Court changed its views when it decided the landmark case of *Specht v. Patterson.*[67] The Court was faced with the issue of whether a defendant could be convicted for indecent liberties under the Colorado criminal law but then sentenced under the Colorado Sex Offenders Act, which authorized the commitment of the defendant for an indefinite term of one day to life without notice or a full hearing.[68] The Court concluded that the "commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Four-

58. *Id.* at 56.

59. Veneziano & Veneziano, *supra* note 55, at 206.

60. Lieb, *supra* note 5, at 62–63.

61. Veneziano & Veneziano, *supra* note 55, at 208.

62. *Id.* at 209 (quoting In re Keddy, 233 P.2d 159 (Cal. Dist. Ct. App. 1951); In re Bevill, 442 P.2d 679 (Cal. 1968); People v. Chapman, 4 N.W.2d 18 (Mich. 1942)).

63. 309 U.S. 270 (1940). Pearson sought a writ of prohibition commanding the Minnesota courts to desist proceedings to classify him as a "psychopathic personality," and contended that the statute violated his due process and equal protection rights. *Id.* at 271–72.

64. *Id.* at 276. A "psychopathic personality" is defined as a person with "such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts . . . as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons." *Id.* at 272.

65. *Id.* at 277.

66. *Id.* at 275 ("[T]he legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.").

67. 386 U.S. 605 (1967).

68. *Id.* at 607.

teenth Amendment . . . and to the Due Process Clause."[69] A person subject to the Colorado Sex Offenders Act deserved procedural protections, including the right to counsel, the opportunity to be heard, the right to confront witnesses against him, and the right to cross-examine and offer evidence of his own.[70]

Specht did not decide what standard of proof would be necessary in sexual psychopath proceedings.[71] The standard of proof for civil proceedings is usually "preponderance of the evidence," while "proof beyond a reasonable doubt" is the standard of proof for criminal proceedings.[72] In *In re Winship*, the Court applied the "proof beyond a reasonable doubt" standard to a civil proceeding for the first time,[73] citing the substantial deprivation of liberty as a major factor in doing so.[74] The reasonable doubt standard has since been adopted by many jurisdictions for deciding civil commitment cases.[75]

B. Castration to Control Criminal Behavior

Castration was also used as punishment in the first part of the twentieth century.[76] For example, in *State v. Feilen*,[77] the Supreme Court of Washington upheld a defendant's sentence of life imprisonment coupled with a vasectomy after being convicted of raping a little girl.[78] The court held that a vasectomy is not a cruel punishment and noted that the Journal of the American Medical Association recommended "the sterilization of criminals and the prevention of their further propagation."[79] In *Buck v. Bell*,[80] the

69. *Id.* at 608.
70. *Id.* at 610.
71. Veneziano & Veneziano, *supra* note 55, at 210.
72. *Id.*
73. 397 U.S. 358, 368 (1970).
74. *Id.* at 366. The issue in *Winship* was whether the reasonable doubt standard should be applied to the civil adjudication of a juvenile when charged with delinquency for committing what constitutes larceny under the criminal law. *Id.* at 359. The Court rejected the "'civil' label-of-convenience" attached to the proceedings and held that "a proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." *Id.* at 365–66 (quoting In re Gault, 387 U.S. 1, 36 (1967)).
75. Veneziano & Veneziano, *supra* note 55, at 210. "A growing number of jurisdictions have considered commitment proceedings so closely analogous to criminal trials that only proof beyond a reasonable doubt can satisfy due process." *Id.*
76. Wong, *supra* note 1, at 271. "The eugenics movement of the early twentieth century endorsed both castration and sterilization to punish and to 'achieve the elimination of social ills through biological reformation.'" *Id.*
77. 126 P. 75 (Wash. 1912).
78. *Id.* at 76, 78.
79. *Id.* at 77.
80. 274 U.S. 200 (1927).

United States Supreme Court held that a state law which authorized the sterilization of "mental defectives" was not unconstitutional,[81] and the case has never officially been overturned.[82] But by the end of World War II, most likely in response to the atrocities perpetrated in Nazi Germany, the physical castration of criminals had all but ceased.[83] In recent years, however, some courts and lawmakers have turned to the chemical castration of sex offenders to control the offenders' sexual urges and reduce the risk of reoffending.[84]

C. Rape Law Reform

The second era of legislative activity regarding sex crimes was led by the feminist movement of the 1970s.[85] Women's groups, most notably the National Organization of Women, set out to reform traditional rape law.[86] They argued that the law failed to reflect "the changing status of women in American society" and did more to preserve male rights than to protect women.[87] They also drew attention away from "stranger rape" and toward a broader variety of sex crimes, including rape and sexual abuse in families and other intimate relationships.[88] Rape reform, it was believed, would improve the treatment of rape victims, encourage victims of rape to come forward and report the crime, and remove barriers to the successful prosecution of rapists.[89] In 1974, Michigan was the first state to modify its rape statute, and other states soon followed.[90] Almost every state had enacted some type of rape reform legislation by the mid-1980s.[91]

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81. *Id.* at 208. A "mental defective" was a person afflicted with a heredity condition such as insanity or imbecility. *Id.* at 205–06. Sterilizing these individuals allowed society to "prevent those who are manifestly unfit from continuing their kind." *Id.* at 207.

82. *But see* Fieger v. Thomas, 74 F.3d 740, 750 (6th Cir. 1996) (recognizing the abrogation of *Buck*); Matter of Romero, 790 P.2d 819, 821 (Colo. 1990) (calling into doubt the validity of *Buck*'s holding).

83. Wong, *supra* note 1, at 271.

84. *See infra* Part III.D.3.

85. Lieb, *supra* note 5, at 53–54.

86. Spohn, *supra* note 51, at 121.

87. *Id.* For example, the law at that time (1) allowed a victim's prior sexual history to be used to impeach her credibility; (2) required a victim to physically resist the attack throughout the rape, even though resistance often increased the likelihood of serious injury; and (3) required corroboration of a victim's testimony in order to prosecute the offender. *See id.* at 121–26. Additionally, traditional definitions of rape included only penile-vaginal penetration and did not include attacks on male victims, sexual assaults by a spouse, or assaults with an object. *Id.* at 122.

88. Lieb, *supra* note 5, at 54.

89. Spohn, *supra* note 51, at 121.

90. Ronet Bachman, Ph.D. & Raymond Paternoster, Ph.D., *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554, 559 (1993). Changes to rape laws included: (1) replacing the single crime

D. Controlling Sex Offenders Through Post-Sentence Regulations

By the late 1970s, the idea that sex offenders could be "cured" was falling into disfavor.[92] In 1977 the Group for the Advancement of Psychiatry publicly challenged the validity of sexual psychopath laws, and in the early 1980s, a series of sexually motivated child murders were committed by "graduates" of a California sex offender treatment program who had supposedly been cured of their sexual urges.[93] By 1976 twenty-five states had either repealed or significantly modified their sexual psychopath laws.[94]

Community concern and the need for some type of social control continued despite the repeal of sexual psychopath laws.[95] In the wake of a series of highly-publicized sex crimes in the early 1990s, lawmakers formulated laws that focused on controlling the sex offender after incarceration.[96] These laws, known as "sexual predator" laws, focused on three main areas: civil commitment of offenders after incarceration, registration and notification laws, and relapse prevention.[97]

1. *Civil Commitment of Sex Offenders*

Washington was the first state to expressly authorize the postsentence civil commitment of sex offenders.[98] The statute, the Community Protection Act of 1990, was prompted by the kidnapping, rape, and mutilation of a seven-year-old boy by a sex offender released from prison two years earlier.[99] Prison officials knew this offender had plans to abuse other children after his release, but they had no option but to release him after he had

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of rape, which was historically defined as "carnal knowledge of a female, forcibly and against her will," with a series of gender-neutral graded offenses; (2) redefining penetration to include anal intercourse, cunnilingus, fellatio, or any other intrusion of any part of a person's body with an object; and (3) eliminating the spousal exception. Spohn, *supra* note 51, at 122–23.

91. Spohn, *supra* note 51, at 121. The reform of state rape statutes also had an effect on federal law, as evidenced by the 1978 enactment of Rule 412 of the Federal Rules of Evidence, which generally excludes from evidence all reputation and opinion testimony concerning a victim's prior sexual conduct. Bachman, *supra* note 90, at 559.

92. Lieb, *supra* note 5, at 65.

93. *Id.*

94. *Id.* at 63.

95. *Id.* at 65.

96. *Id.* at 65–66.

97. *See id.* at 65–83, 91–94.

98. W. Lawrence Fitch & Debra A. Hammen, *The New Generation of Sex Offender Commitment Laws: Which States Have Them and How Do They Work?*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS 27, 28 (Bruce J. Winick & John Q. La-Fond, eds., 2003).

99. *Id.* The Community Protection Act also established the first sex offender registration system. *Id.* See discussion *infra* Part III.D.2.

served his sentence.[100] The community was outraged,[101] and legislators responded by authorizing the indefinite treatment and confinement of sex offenders who suffer from a mental abnormality or personality disorder that makes the person likely to engage in future predatory acts of sexual violence.[102] Prosecutors can initiate civil proceedings to have an inmate committed before he is released from prison.[103] After the state has proved its case beyond a reasonable doubt, a person can be confined for treatment until he is deemed safe for release.[104] Washington's civil commitment law became the national model,[105] and by the end of the 1990s, fifteen states had similar laws.[106]

Opponents of civil commitment argue that these laws are an *ex post facto* punishment, enacted solely "to extend the period of confinement for prisoners whose terms have already expired under the laws in effect at the time of their offenses."[107] The United States Supreme Court addressed this argument as well as other constitutional arguments against civil commitment in *Kansas v. Hendricks*.[108] The defendant, Hendricks, was a pedophile serving a ten-year sentence for taking "indecent liberties" with two thirteen-year-old boys.[109] Before his scheduled release to a halfway house, the State filed a civil commitment petition pursuant to the Kansas Sexually Violent Predator Act.[110] Hendricks objected on various constitutional grounds and requested a jury trial to determine whether he qualified as a sexually violent predator.[111] After hearing Hendricks's "chilling history of repeated child

100. Lieb, *supra* note 5, at 66.

101. Jerusalem, *supra* note 42, at 228. "A group of citizens called the 'Tennis Shoe Brigade' formed and sent over 15,000 tennis shoes—symbols for victimized children—to Washington's governor in protest of the state's 'lenient' sex offender laws." *Id.*

102. WASH. REV. CODE ANN. § 71.09.010 (WEST 2005). The person must also have at least one prior conviction for a sexually violent offense. *Id.* at § 71.09.030.

103. *Id.* at § 71.09.025. Interestingly, the statute provides that the person at issue in the commitment proceeding shall have all the constitutional rights that are available to defendants at criminal trials. *Id.* at § 71.09.060(2).

104. *Id.* at § 71.09.060(1). Each person committed under the statute is examined annually by the department of social and health services to determine if he is fit for release. *Id.* at § 71.09.070.

105. Fitch & Hammen, *supra* note 98, at 28–29.

106. *Id.* at 27.

107. Howard V. Zonana et al., *In the Wake of* Hendricks: *The Treatment and Restraint of Sexually Dangerous Offenders Viewed From the Perspective of American Psychiatry*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS 131, 143 (Bruce J. Winick & John Q. LaFord, eds., 2003).

108. 521 U.S. 346, 346 (1997).

109. *Id.* at 353. "Indecent liberties" is defined as lewd fondling or touching, or the solicitation of lewd fondling or touching, of a child who is fourteen or more years of age but less than sixteen years of age. *See* KAN. STAT. ANN. § 21-3503 (2003).

110. *Hendricks*, 521 U.S. at 353–54. *See* KAN. STAT. ANN. § 59-29a01 et. seq. (1994).

111. *Hendricks*, 521 U.S. at 354.

sexual molestation and abuse," the jury found beyond a reasonable doubt that Hendricks was a sexually violent predator.[112] Hendricks appealed, claiming violations of the due process, double jeopardy, and *ex post facto* clauses of the Constitution.[113] In a five-to-four decision, the Court upheld the statute's constitutionality.[114] The Court held that the statute did not violate procedural due process, citing the procedural safeguards that governed the civil commitment proceeding,[115] and did not violate substantive due process according to the previously upheld concept that states can, in certain circumstances, provide for the "forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety."[116]

Hendricks argued the civil commitment procedure violated the double jeopardy and *ex post facto* clauses because the procedure was actually a "newly enacted 'punishment'" based upon past conduct.[117] The Court rejected this contention, stating that the Act did not implicate the two primary objectives of criminal punishment—retribution and deterrence.[118] The Court noted the civil confinement of "mentally unstable individuals who present a danger to the public" is a classic example of nonpunitive detention.[119] Justice Kennedy, however, cautioned against the "dangers inherent when a civil confinement law is used in conjunction with the criminal process . . ."[120]

Recently, the Court revisited the Kansas Sexually Violent Predator Act in *Kansas v. Crane*.[121] In that case, the Court acknowledged that sexual predator statutes could be misused to achieve criminal law goals of retribution and deterrence if not properly applied.[122] The Court stressed the "constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.'"[123] The Court clarified its opinion in *Hendricks* by requiring the government to

112. *Id.* at 354–55.
113. *Id.* at 356.
114. *Id.* at 371. Several states quickly took action to enact their own civil commitment legislation after the Court announced its ruling, including the New York Legislature, whose Senate passed similar legislation only two days after the Court's decision. Matthew Purdy, *Wave of New Laws Seeks to Confine Sexual Offenders*, N.Y. TIMES, June 29, 1997, at 11.
115. *Hendricks*, 521 U.S. at 352–53, 371.
116. *Id.* at 357, 371.
117. *Id.* at 361.
118. *Id.* at 361–62.
119. *Id.* at 362–63 (citing United States v. Salerno, 481 U.S. 739, 748–49 (1987)).
120. *Id.* at 371–72 (Kennedy, J., concurring).
121. 534 U.S. 407, 407 (2002).
122. *Id.* at 412.
123. *Id.* (quoting *Hendricks*, 521 U.S. at 360).

prove the offender suffers from "a serious . . . disorder" that consists of a "special and serious lack of ability to control [his] behavior" before he or she can be committed as a sexual predator.[124]

2. *Registration and Notification Laws*

Another key development in the nineties was the proliferation of sex offender registration and community notification laws.[125] Registration ordinances had been used since the 1930s, and California enacted a registration law for sex offenders in 1944.[126] But the use of registration laws as seen today did not begin to develop until the late 1980s, and now every state requires convicted sex offenders to register with law enforcement agencies upon release.[127] In 1994 Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act,[128] which requires states "to create registries of offenders convicted of sexually violent offenses or crimes against children and to establish more rigorous registration requirements for highly dangerous sex offenders . . . ."[129] The Act requires sex offenders to verify their addresses annually for ten years and requires sexually violent predators to verify their addresses for life for certain high risk offenders.[130] States that did not comply with the requirements by September 1997 faced a reduction in federal grant funds for law enforcement.[131]

State registration statutes require released sex offenders to register with the local police department where they live.[132] Usually, offenders must pro-

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124. *Id.* at 412–13.

125. *See* Jerusalem, *supra* note 42, at 226–27; Lieb, *supra* note 5, at 71.

126. Lieb, *supra* note 5, at 71.

127. *Id.* Indiana has a Sex and Violent Offender Directory maintained by the Indiana Criminal Justice Institute (*see* IND. CODE ANN. § 5-2-12 (West 2005)), and the Indiana Sheriffs' Sex Offender Registry, an online directory organized by county of residence that provides the identity, location, and appearance of all registered sex offenders (IND. CODE ANN. § 36-2-13-5.5 (West 2005)). John Doe was not a registered sex offender under either statute, however, because the registration law originally required only those offenders convicted after June 30, 1994 to register with law enforcement authorities. Indiana Sex and Violent Offenders Registry *at* http://www.indianasheriffs.org/default.asp (last visited Aug. 26, 2005). The statute was amended to apply retroactively effective July 1, 2001. *Id.*

128. 42 U.S.C. § 14071 (1994).

129. Lieb, *supra* note 5, at 72. In 1989, Jacob Wetterling was abducted near his home in St. Joseph, Minnesota by an armed, masked man. *Id.* at 114, n.1. He is still missing. National Center for Missing and Exploited Children *at* http://www.ncmec.org/missingkids/servlet/PubCaseSearchServlet (last visited Aug. 26, 2005).

130. 42 U.S.C.§ 14071(b)(6).

131. *Id.* at § 14071(g).

132. Bruce J. Winick, *A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS, 213, 214 (Bruce J. Winick & John Q. LaFond, eds., 2003).

vide information including their name, social security number, age, race, date of birth, height, weight, hair and eye color, permanent and any temporary address, place of employment, and the date and place of each conviction.[133] Offenders must also provide fingerprints, and some states require a photograph of the offender, a blood sample, or a hair sample.[134] This information is available to the public, either on the internet or at the police department or other state offices.[135] Registration statutes have been challenged on constitutional grounds, including due process, double jeopardy, and right to privacy, but most courts have found that "registration is a reasonable exercise of regulatory power and that any potential rights infringements are outweighed by the requirement's contributions to public safety."[136]

Community notification laws first appeared in Washington in 1990, allowing the "release of information to public about released sex offenders judged to pose high risks of reoffending."[137] By 1994 community notification became known as "Megan's Law" after New Jersey passed its notification statute in honor of Megan Kanka, who was raped and killed by a child molester living in her neighborhood.[138] A federal Megan's Law passed in 1996, which provided that state or local law enforcement agencies "shall release relevant information that is necessary to protect the public concerning a specific person required to register."[139] States that did not comply again faced a reduction in federal funding.[140]

A majority of jurisdictions use a tiered system to rank offenders according to their level of risk of reoffending, which determines what level of notification is required.[141]

> All offenders are placed in Tier 1 at a minimum, and details concerning their identity and prior offenses are given to all law enforcement agencies in the state that are likely to encounter them. For offenders placed in Tier 2, those who present a moderate risk of reoffending, notice is given to organizations in the community, including schools and religious and youth organizations with which the offender is likely to have contact. For offenders placed in Tier 3, those who present a high risk of reoffend-

133. *Id.*

134. *Id.*

135. *Id.* In Louisiana, offenders are required to place an ad in the local newspaper with information about their offense and criminal background. *Id.* Louisiana may also require an offender to put a bumper sticker on his car or display labels on his clothing. *Id.*

136. Lieb, *supra* note 5, at 71.

137. *Id.*

138. *Id.* at 72. Megan's killer, Jesse Timmendequas, was a released sex offender sharing a house with two other released sex offenders in the New Jersey suburb where Megan lived. Winick, *supra* note 132, at 213.

139. 42 U.S.C. § 14071(e)(2) (1996).

140. *Id.* at § 14071(g).

141. Winick, *supra* note 132, at 214–15.

ing, notice is also given to members of the community likely to encounter the offender.[142]

Community notification laws have strong public support; for example, a 1997 newspaper poll of adults in Georgia found that seventy-nine percent agreed that the public had a right to know about a sex offender's past, and that right was more important than the privacy rights of the offender.[143] In addition, notification laws have positive psychological effects on community members and law enforcement officials.[144] Notification gives parents and other community members a sense of control and empowerment and provides law enforcement the opportunity to assist the community in preventing future crimes.[145]

Opponents of community notification laws argue that they are unconstitutional in several respects.[146] One argument is that the laws violate the Eighth Amendment's ban on cruel and unusual punishment by attaching a stigma to the offender.[147] Opponents contend that this public humiliation component of the law "does not comport with current standards of decency" and therefore violates "the spirit of the Eighth Amendment."[148] Another argument against notification laws is that they violate an offender's right to privacy.[149] Opponents also argue that registration and notification laws violate the *ex post facto* clause because the laws generally apply retroactively and apply to offenders convicted before the laws were enacted.[150] The lower courts have consistently found that "Megan's Laws are constitutional and that their principal purpose is regulatory in nature and not punitive."[151]

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142. *Id.* at 216.

143. Jane O. Hansen, *Sexual Predators: Why Megan's Law Is Not Enough*, ATLANTA JOURNAL-CONSTITUTION, June 10, 1997, at 11D.

144. *See* Winick, *supra* note 132, at 216–17.

145. *Id.* Critics argue that notification also provokes vigilantism, such as the community action taken in Lynnwood, Washington when residents were told a child rapist was about to be released and move into their neighborhood. James Popkin et al., *Natural Born Predators*, U.S. NEWS & WORLD REPORT, Sept. 19, 1994, at 64. The offender's house was burned to the ground on the day he was scheduled to move in. *Id.* A similar incident occurred in Detroit, where neighbors posted signs saying "Child Molester Lives Here" and flooded the newly rented apartment of an offender by stuffing tissues in his bathtub drain. *Id.*

146. *See* Jerusalem, *supra* note 42, at 241–45; Lieb, *supra* note 5, at 76–79.

147. Jerusalem, *supra* note 42, at 242.

148. *Id.* at 242–43.

149. *Id.* at 244.

150. Lieb, *supra* note 5, at 76.

151. *Id.*; *see, e.g.*, Kellar v. Fayetteville Police Dept., 339 Ark. 274, 5 S.W.3d 402 (1999) (holding that the notification provision of the Arkansas Sex and Child Offender Registration Act did not violate state and federal ex post facto clauses); People v. Logan, 705 N.E.2d 152 (Ill. App. 3d 1998) (holding that sex offender statute did not violate a convicted sex offender's constitutional right to privacy because the sex offender's interest concerning his home address was not within the constitutionally protected zone of privacy); State v. Scott,

The Supreme Court recently addressed these constitutional challenges to registration and notification laws for the first time in two cases, *Connecticut Department of Public Safety v. Doe*[152] and *Smith v. Doe*.[153] In *Connecticut Department of Public Safety*, a convicted sex offender subject to Connecticut's Megan's Law filed suit claiming that the law violated his due process rights under the Fourteenth Amendment.[154] The defendant objected to being labeled as a "dangerous sexual offender," and he argued that the law "deprive[d] him of a liberty interest—his reputation combined with the alteration of his status under state law—without notice or a meaningful opportunity to be heard."[155] The United States District Court agreed and enjoined the public disclosure of the sex offender registry.[156] The Second Circuit Court of Appeals affirmed,[157] but the Supreme Court reversed the judgment.[158] The Court noted that Connecticut's registry, maintained on a state website, included a disclaimer that stated no offender listed on the registry had been declared currently dangerous.[159] The disclaimer further stated that the names were included on the registry "solely by virtue of their conviction record and state law."[160] Therefore, whether the defendant is deemed currently dangerous makes no difference under the law, because "the law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest."[161]

In *Smith* two convicted sex offenders sought to have Alaska's Sex Offender Registration Act declared void as applied to them under the *ex post facto* clause and the due process clause.[162] The offenders were released from prison in 1990.[163] The Alaska law, passed in 1994, contained both a registration requirement and a notification system and was applied retroactively.[164] The United States District Court found against the offenders, but

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961 P.2d 667 (Kan. 1998) (holding the punitive effects of the sex offender statute were not so disproportionate to the offender's sexually motivated crime as to constitute cruel and unusual punishment under the Federal Constitution).

152. 538 U.S. 1 (2003).

153. 538 U.S. 84 (2003).

154. *Connecticut Dep't. of Public Safety*, 538 U.S. at 5–6.

155. *Id.* at 6 (quoting Doe v. Dep't of Pub. Safety ex rel. Lee, 271 F.3d 38, 45–46 (2d Cir. 2001)).

156. *Connecticut Dep't. of Public Safety*, 538 U.S. at 6.

157. *Doe v. Dep't. of Public Safety ex rel. Lee*, 271 F.3d 38, 62 (2d Cir. 2001).

158. *Connecticut Dep't. of Public Safety*, 538 U.S at 8.

159. *Id.* at 5.

160. *Id.* (quoting *Lee*, 271 F.3d at 44).

161. *Id.* at 7.

162. *Smith*, 538 U.S. at 91.

163. *Id.*

164. *Id.* at 90.

the Court of Appeals for the Ninth Circuit reversed.[165] The Ninth Circuit concluded that while the legislature had intended the Act to be a civil, non-punitive regulatory scheme, the effects of the Act were nonetheless punitive and therefore violated the *ex post facto* clause.[166]

The Supreme Court began its analysis by examining the nature of the Act to determine if it was a civil or criminal enactment.[167] The framework for this inquiry was clearly laid out by the Court six years earlier in *Hudson v. United States*.[168] First, a court must ask whether the legislature has indicated the nature of the law in question.[169] Then, even if the legislature has indicated its intent to establish a civil penalty, the court must examine the purpose and effect of the law.[170] If a law is clearly punitive, it will be considered a criminal penalty despite the intent to create a civil penalty.[171] Courts are guided by seven factors when determining whether a law is punitive:

> (1) [W]hether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of a scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.[172]

Only "the clearest proof" of a law's punitive purpose or effect will be enough to override the stated legislative intent.[173]

Using this framework, the Court first observed that "considerable deference" would be given to the intent of the Act as the legislature has stated.[174] In the text of the Act, the Alaska legislature identified "protecting the public from sex offenders" as their primary objective, and further stated that releasing certain information regarding sex offenders to the general public would assist in protecting public safety.[175] The Court, noting their similar ruling in *Kansas v. Hendricks*, stated that imposing restrictive meas-

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165. Doe I v. Otte, 259 F.3d 979, 995 (9th Cir. 2001).
166. *Id.* at 993–94.
167. *Smith*, 538 U.S. at 92–93.
168. 522 U.S. 93 (1997).
169. *Id.* at 99.
170. *Id.*
171. *Id.*
172. *Id.* at 99–100 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963).
173. *Id.* at 100.
174. *Smith*, 538 U.S. at 93.
175. *Id.*

ures on sex offenders who were judged to be dangerous to society had historically been regarded as a legitimate and nonpunitive government objective.[176] The Court then referred to the *Mendoza-Martinez* factors and found that none of them applied as to render the Act punitive in nature.[177] In short, "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment."[178]

3. *Relapse Prevention*

In addition to registration and notification laws, a number of jurisdictions have implemented additional methods designed to monitor and treat sex offenders on probation or parole.[179] These post-institutional treatment methods are designed to "increase the likelihood of rehabilitation when the individual is subjected to the stresses and temptations of resuming life in society."[180] One method utilized by a number of states is the use of hormonal treatments.[181] "First tested in the 1960's, the use of hormone suppressors, i.e., 'chemical castration,' has been very successful in the treatment of sex offenders."[182] The most common treatment used today is a synthetic hormone called medroxyprogesterone acetate (MPA), manufactured under the trade name Depo-Provera.[183] MPA helps control sexually deviant behavior by acting as a "sexual appetite suppressant."[184] It lowers the amount of testosterone in a person's body, thereby diminishing the libido and the functioning of genitalia.[185] Decreasing sexual urges allows an offender to take a "vacation" from his sex drive and benefit from "psycho-sexual realignment" along with counseling.[186]

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176. *Id.*

177. *See id.* at 97–105.

178. *Id.* at 98.

179. Kim English et al., *Community Containment of Sex Offender Risk: A Promising Approach*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS, 265 (Bruce J. Winick & John Q. LaFond, eds. 2003).

180. *Id.* at 277.

181. *See* Audrey Moog, Note, *California Penal Code Section 645: Legislators Practice Medicine on Child Molesters*, 15 J. CONTEMP. HEALTH L. & POL'Y 711, 712–13 (1999); Linda Beckman, Student Work, *Chemical Castration: Constitutional Issues of Due Process, Equal Protection, and Cruel and Unusual Punishment*, 100 W. VA. L. REV. 853, 854–55 (1998). Several states, including California, Georgia, Montana, Florida, and Louisiana, have enacted or are considering legislation that either allows or mandates the use of chemical castration for sex offenders. *Id.*

182. Kimberly A. Peters, Comment, *Chemical Castration: An Alternative to Incarceration*, 31 DUQ. L. REV. 307, 310 (1993).

183. *Id.*

184. Moog, *supra* note 181, at 720.

185. Karen Rebish, *Nipping the Problem in the Bud: The Constitutionality of California's Castration Law*, 14 N.Y.L. SCH. J. HUM. RTS. 507, 516 (1998).

186. *Id.* at 516–17.

Any statute requiring the use of MPA will be subject to several constitutional concerns, including the First Amendment right to mental autonomy, the Eighth Amendment's ban on cruel and unusual punishment, and the Fourteenth Amendment's right to bodily integrity, which encompasses the right to procreate and the right to refuse medical treatment.[187] A small number of cases have challenged MPA treatment on constitutional grounds, specifically alleging an Eight Amendment violation, but the courts bypassed deciding the constitutional issue and instead resolved the appeals on procedural grounds. [188]

Other treatments aimed at relapse prevention begin while the offender is still incarcerated.[189] These treatment programs teach offenders to "recognize and avert the chain of affective, cognitive, and behavioral events" that precede offending.[190] The methods employed include skill training to improve interpersonal relations, aversion therapy to reduce sexual arousal, and therapy to correct distorted attitudes or beliefs concerning sexual relationships.[191] Hormonal therapy is sometimes implemented as well.[192]

Ideally, therapy and other behavior modification treatments will continue once the offender is released.[193] One promising new approach is the "community containment approach."[194] In this approach, an offender is monitored by a specially trained case management team.[195] Team members include a probation or parole officer, a therapy provider, and polygraph examiner, who "act together to decrease or eliminate an individual's privacy, opportunity, and access to potential or past victims."[196] To ensure the team is receiving accurate and truthful information from the offender, periodic polygraphs are added to the treatment plan.[197] This system is designed to increase the efficiency of the team and provide a method by which they can

187. *See* Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 25–52 (Fla. Dist. Ct. App. 1990).

188. *See* Houston v. State, 852 So. 2d 425 (2003) (reversing the portion of the defendant's sentence that required MPA treatment because the trial court did not appoint a medical examiner to determine whether defendant was a candidate for treatment, nor did it specify the duration of treatment, as required by statute); People v. Foster, 101 Cal. App. 4th 247 (2002) (holding that a defendant who agreed to a plea bargain that included the possibility of hormone suppression treatment, and who also agreed to waive the right to appeal any sentence he received within the terms of the agreement, was precluded from appellate review of his sentence imposing hormone suppression treatment upon parole).

189. *See* Lieb, *supra* note 5, at 91–92.

190. *Id.* at 92.

191. *Id.*

192. *Id.*

193. *See* Jerusalem, *supra* note 42, at 253–54.

194. English, *supra* note 179, at 265.

195. *Id.* at 266.

196. *Id.*

197. *Id.*

assess whether the offender is engaging in "high-risk or assaultive behavior."[198] The containment approach also utilizes group therapy as a tool for offenders to help each other recognize and deal with emotional triggers that can lead to reoffending.[199]

IV. REASONING

In *Doe v. City of Lafayette*, the Court of Appeals for the Seventh Circuit sitting *en banc* conducted a *de novo* review of the district court's decision to allow the City of Lafayette to ban a known sex offender from public parks.[200] To reach its decision, the court first examined Doe's First Amendment claim, considering both the freedom of expression and freedom of thought arguments.[201] The court held that Doe's conduct contained no expressive element that would trigger First Amendment scrutiny.[202] The court also rejected Doe's argument that the city was punishing him for his thoughts, stating that (1) the ban was not a punishment, but a civil, nonpunitive measure,[203] and (2) Doe did not just have thoughts, but "brought himself to the brink of committing child molestation."[204]

The court discussed Doe's Fourteenth Amendment claim by describing the liberty interest Doe sought to have protected and determining that interest was not a fundamental right.[205] In the absence of a fundamental liberty interest, the court applied a rational basis standard and held the ban was valid "as the narrowest *reasonable* means for the City to advance its compelling interest of protecting its children from the demonstrable threat of sexual abuse by Mr. Doe."[206] After rejecting Doe's arguments, the Seventh Circuit affirmed the district court's ruling.[207]

The dissent argued the ban was an impermissible violation of the First Amendment by punishing Doe for his thoughts.[208] To support its conclusion, the dissent analyzed three important principles: (1) the First Amendment prohibits government control over a citizen's thoughts, (2) banishment

198. *Id.*
199. *Id.* at 273.
200. *Doe III*, 377 F.3d at 762–63.
201. *Id.* at 763–67.
202. *Id.* at 764.
203. *Id.* at 766, n.8.
204. *Id.* at 767.
205. *Id.* at 768–73.
206. *Doe III*, 377 F.3d at 773–74.
207. *Id.* at 774. Doe decided not to appeal his case to the United States Supreme Court. Dan Shaw, *John Doe Abandons Legal Fight To End Parks Ban*, J. & COURIER (Lafayette, Ind.), February 24, 2005, at 16A.
208. *Doe III*, 377 F.3d at 774 (Williams, J., dissenting).

is a form of punishment, and (3) a citizen may not be punished based on his status alone.[209]

A. The First Amendment Claim

The court began its analysis by acknowledging that the core of the First Amendment is the right of self-expression.[210] The Supreme Court has consistently held that the First Amendment protects not just speech but also conduct that has "a significant expressive element."[211] Doe's banishment from the park only triggers First Amendment scrutiny if he can show "that his conduct in going to the park in search of children to satisfy deviant desires somehow was infused with an expressive element."[212] The court held that there was no self-expression in Doe's actions.[213] Doe did not go to the park to protest, read aloud, display artwork, or perform some other expressive action.[214] Instead, he was looking for children to satisfy his sexual urges and put himself in a situation that substantially increased the possibility of his acting on his sexual impulses.[215] Because there was no expression at issue, the court declared that "First Amendment doctrine simply has no application here."[216]

The court began its freedom of thought analysis by conceding that the government cannot regulate mere thought unaccompanied by conduct.[217] In contrast, "regulations aimed at conduct which have only an incidental effect on thought do not violate the First Amendment's freedom of mind mandate."[218] The court noted the Supreme Court decision in *Paris Adult Theatre I v. Slaton* which rejected a freedom of thought challenge to a Georgia law prohibiting the display of obscene materials.[219] The Supreme Court stated that "the mere fact that...some human 'utterances' or 'thoughts' may be incidentally affected does not bar the State from acting to protect legitimate

209. *Id.* at 776–84 (Williams, J., dissenting).
210. *Id.* at 763.
211. *Id.* (quoting Arcara v. Cloud Books, Inc., 478 U.S. 697, 706 (1986)).
212. *Id.* at 764.
213. *Id.* at 763.
214. *Doe III*, 377 F.3d at 763.
215. *Id.*
216. *Id.* at 764.
217. *Id.* at 765. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67–68 (1973) ("The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution.").
218. *Doe III*, 377 F.3d at 765.
219. *Paris*, 413 U.S. at 67.

state interests."[220] Only those regulations that are aimed at thoughts and mind control will face First Amendment scrutiny.[221]

The court rejected the argument that Doe was being punished for his thoughts, stating that Doe was not banned from having fantasies about children but merely banned from taking steps toward fulfilling those fantasies.[222] The city and the parents were not concerned about Doe's thoughts; they were concerned about him going to the park to act on those thoughts.[223] The court concluded that the city was not required to wait until a child was molested to take action, and the First Amendment did not prohibit the city from taking the action that it did.[224]

The court also took exception to Doe's characterization of the ban as a punishment.[225] The court held that the ban was a civil, and therefore nonpunitive, regulation designed to protect the public.[226] The court asserted that the government has broader powers to operate in the civil context as opposed to the criminal context, and characterized the ban as a form of "civil exclusion."[227] The court held that the Supreme Court has consistently upheld the government's right to restrict dangerous persons, pursuant to certain procedural safeguards, "who are unable to control their behavior and who thereby pose a danger to the public health and safety."[228] The court held that the City of Lafayette had the power to address Doe's actions in a civil law context and did so without violating Doe's rights.[229]

B. The Fourteenth Amendment Claim

The Court of Appeals first noted the two types of protection under due process law: procedural and substantive.[230] Because Doe did not raise any procedural due process arguments, the court expressed no view as to the procedural due process aspects of the city's ban.[231] To analyze Doe's substantive due process argument, the court followed the Supreme Court's

220. *Id.*
221. *Doe III*, 377 F.3d at 765.
222. *Id.* at 766–67.
223. *Id.* at 767.
224. *Id.*
225. *Id.* at 766, n.8.
226. *Id.*
227. *Doe III*, 377 F.3d at 766, n.8.
228. Kansas v. Hendricks, 521 U.S. 346, 357 (1997); *see also* Smith v. Doe, 538 U.S. 84 (2003) (upholding the constitutionality of the Alaska Sex Offender Registration Act as a civil, nonpunitive measure that did not violate the ex post facto clause); Kansas v. Crane, 534 U.S. 407 (2002) (elaborating on *Hendricks*).
229. *Doe III*, 377 F.3d at 766, n.8.
230. *Id.* at 767–68.
231. *Id.* at 768.

mandate that "the inquiry is whether the individual has been subjected to 'the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'"[232] To answer this question, the court first ascertained the nature of the liberty interest Doe was asserting, then determined whether that liberty interest was fundamental and therefore subject to strict scrutiny.[233]

The court explained that when providing a description of an asserted right, a court must be specific and concrete and avoid "sweeping abstractions and generalities."[234] A certain level of specificity is necessary in order to "rein in the subjective elements that are necessarily present in due process judicial review."[235] Characterizing Doe's liberty interest as a generalized right to movement was too broad because it implicated both interstate and intrastate travel.[236] The city asserted that the right at issue was the right to intrastate travel,[237] while Doe argued that the liberty at issue was the "basic right to wander and loiter in public parks."[238] Accepting as true Doe's assertion of the right at stake, the court held that it was not fundamental.[239] When compared with other rights that have been designated as fundamental, including the right to marry,[240] the right to have children,[241] the right to marital privacy,[242] the right to use contraception,[243] the right to refuse unwanted medical treatment,[244] and the right to bodily integrity,[245] Doe's asserted right to enter public parks to loiter "is not on the same footing."[246] The court reasoned that by banning Doe from the parks, the city did not unconstitution-

232. *Id.* (quoting Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819)).

233. *Id.* at 768–73.

234. *Id.* at 769.

235. *Doe III*, 377 F.3d at 769 (quoting Washington v. Glucksberg, 521 U.S. 702, 722 (1997)).

236. *Id.* (citing Johnson v. City of Cincinnati, 310 F.3d 484, 495 (6th Cir. 2002)).

237. *Id.* at 769. At least one circuit court has found that the right to intrastate travel is fundamental; *see Johnson*, 310 F.3d at 498 ("The right to travel locally through public spaces and roadways . . . is an everyday right, a right we depend on to carry out our daily life activities."). *But see* Wright v. City of Jackson, 506 F.2d 900, 902–903 (5th Cir. 2003) (rejecting a fundamental right to intrastate as opposed to interstate travel).

238. *Doe III*, 377 F.3d at 769, n.11.

239. *Id.* at 769–70. A right that is fundamental is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Glucksberg*, 521 U.S. at 721.

240. *Doe III*, 377 F.3d at 770 (citing Loving v. Virginia, 388 U.S. 1 (1967)).

241. *Id.* (citing Skinner v. Oklahoma, 316 U.S. 535 (1942)).

242. *Id.* (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

243. *Id.* (citing Eisenstadt v. Baird, 405 U.S. 438 (1972)).

244. *Id.* (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990)).

245. *Id.* (citing Rochin v. California, 342 U.S. 165 (1952)).

246. *Doe III*, 377 F.3d at 770.

ally restrict Doe's movements, but merely restricted his right to enter the city's parks for recreational purposes, a right that is not fundamental.[247]

Because the liberty interest Doe asserted was not fundamental, the court applied a rational basis standard of review to the city's ban.[248] This level of scrutiny required the ban to be rationally related to a legitimate government interest.[249] The city asserted, and Doe conceded, that the interest of the city in protecting its children was not only legitimate, but compelling.[250] The court easily concluded that Doe's ban from the city parks was rationally related to that government interest.[251]

C. Dissent

The dissent began its discussion by pointing out the unusual nature of the case, stating that "it is a rare case where thoughts, as distinct from deeds, become publicly known."[252] The city acknowledged that Doe's thoughts, as opposed to an action demonstrating his thoughts, were what prompted the ban in question.[253] To support its conclusion that the ban is an unconstitutional violation of the First Amendment, the dissent discussed three distinct principles implicated by the ban.[254] First, the dissent argued that the First Amendment prohibits government control over a citizen's thoughts.[255] Next, the dissent explained that the ban imposed on Doe was indeed a punishment and not a civil, nonpunitive measure as the majority concluded.[256] Finally, the dissent observed that historically, a citizen could not be punished based solely on his status, and the ban in question does exactly that.[257]

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247. *Id.* at 771. The court also noted that Doe had not entered the City's parks since 1990, further showing the relative unimportance of his right to enter the parks. *Id.* The court does not mention that Doe is a former high school athlete who enjoys basketball, softball, and other outdoor activities. Gerrety, *supra* note 13, at 18A. Doe once played softball in the city park softball league with a group of Lafayette attorneys. *Id.*

248. *Doe III*, 377 F.3d at 773.

249. *Id.*

250. *Id.*

251. *Id.* The court also noted that even under a strict scrutiny analysis, which would require the ban be narrowly tailored to a compelling government interest, they would uphold the ban as constitutional. *Id.*

252. *Id.* at 776 (Williams, J., dissenting).

253. *Id.* (Williams, J., dissenting).

254. *Doe III*, 377 F.3d at 776–84 (Williams, J., dissenting).

255. *Id.* at 776–80 (Williams, J., dissenting).

256. *Id.* at 780–82 (Williams, J., dissenting).

257. *Id.* at 782–84 (Williams, J., dissenting).

1. *The First Amendment Prohibits Government Control Over a Citizen's Thoughts*

The dissent began by emphasizing that the Supreme Court has repeatedly acknowledged an individual's freedom to control his or her own thoughts.[258] "[E]ven when an individual's ideas concern immoral thoughts about child pornography, the Court has steadfastly maintained the right to think freely."[259] In *Ashcroft v. Free Speech Coalition*,[260] the federal government sought to criminalize virtual child pornography, in part because the sexual images might encourage pedophiles to have sexual thoughts about children.[261] The Court struck down the statute, stating that "the government 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.'"[262] The dissent reasoned that the ban in question must be analyzed in accord with the importance historically given to freedom of thought cases.[263]

The dissent next examined the city's proffered reason for instituting the ban, which was to protect its youth from a crime that might happen in the future.[264] According to the dissent, the city and the majority mistakenly equated a propensity to commit crime with the inability to control the impulse to commit a crime.[265] The dissent asserted that the city crossed the line between crime prevention and protected speech, noting that "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and *punishment for violations of the law*."[266] When the government prohib-

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258. *Doe III*, 377 F.3d at 776 (Williams, J., dissenting); *see* Lawrence v. Texas, 539 U.S. 558, 562 (2003) (striking down a Texas criminal statute that prohibited homosexual, but not heterosexual sodomy and concluding that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."); Stanley v. Georgia, 394 U.S. 557, 565–66 (1969) (striking down a conviction for possession of obscene materials in the defendant's home and stating that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 643 (1943) (holding that a requirement that schoolchildren participate in the pledge of allegiance impermissibly infringed on "the sphere of intellect and spirit" that the First Amendment protects).

259. *Doe III*, 377 F.3d at 777 (Williams, J., dissenting) (citing Ashcroft v. Free Speech Coalition, 535 U.S. 234, 252–53 (2002)).

260. 535 U.S. 234 (2002).

261. *Ashcroft*, 535 at 241. Virtual child pornography is computer-generated images that portray what appear to be minors engaged in sexual acts. *Id.*

262. *Id.* at 253 (quoting *Stanley*, 394 U.S. at 566).

263. *Doe III*, 377 F.3d at 777 (Williams, J., dissenting).

264. *Id.* (Williams, J., dissenting).

265. *Id.* (Williams, J., dissenting).

266. *Id.* at 777–78 (Williams, J., dissenting) (quoting *Stanley*, 394 U.S. at 566–67); *see also Ashcroft*, 535 U.S. at 253 ("[T]he Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct."); Kansas v. Crane, 534 U.S. 407, 414 (2002) (recognizing that the Constitution does not permit the commitment of a pedophile

its speech, and analogously thoughts, which "records no crime and creates no victims by its production," the First Amendment is violated.[267]

2. *The Ban Imposed on Doe Is a Punishment*

The dissent next questioned the majority's characterization of the ban as a civil and, therefore, non-punitive remedy.[268] The dissent listed several factors a court should review when deciding whether a government action constitutes punishment:

> [W]hether a sanction involves an affirmative restraint, how history has regarded it, whether it applies to behavior already a crime, the need for a finding of scienter, its relationship to a traditional aim of punishment, the presence of a nonpunitive alternative purpose, and whether it is excessive in relation to that purpose.[269]

The dissent applied these factors to the ban and found that in the first place, the ban "unquestionably imposes an affirmative restraint on Doe's liberty of movement."[270] Additionally, the dissent demonstrated the ban's furtherance of the traditional aims of punishment.[271] In particular, "the ban serves the twin goals of deterrence, which are to prevent an individual from repeating conduct as well as preventing similar acts by others."[272] The dissent also noted the similarity between the ban's segregation of Doe from the rest of the community and a form of supervised release or condition of probation, which further indicates the punitive nature of the ban.[273] The dissent determined the ban was excessive in relation to its stated purpose because it had no termination date.[274] Finally, the dissent explained that because the ban is enforced through threat of criminal arrest for trespass, the ban order

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without some lack-of-control determination, therefore acknowledging that a pedophile may control his urges).

267. *Doe III*, 377 F.3d at 779 (Williams, J., dissenting) (quoting *Ashcroft*, 535 U.S. at 250).

268. *Id.* at 780 (Williams, J., dissenting).

269. *Id.* (Williams, J., dissenting) (quoting *Hendricks*, 521 U.S. at 394).

270. *Id.* (Williams, J., dissenting).

271. *Id.* at 781 (Williams, J., dissenting). The traditional aims of punishment are deterrence, incapacitation, retribution, and rehabilitation. *Id.* (citing Stephen B. Reed, *The Demise of Ozzie and Harriet: Effective Punishment of Domestic Abusers*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 337, 358–63 (1991).

272. *Id.* (Williams, J., dissenting).

273. *Doe III*, 377 F.3d at 781 (Williams, J., dissenting).

274. *Id.* (Williams, J., dissenting).

is a "judicially enforceable criminal decree" and cannot be considered a non-punitive civil remedy.[275]

3. *Punishment Based On Status*

Finally, the dissent asserted that the city's ban went beyond the scope of permissible punishment by punishing Doe based on his status as a sex offender.[276] The dissent cited *Robinson v. California*[277] to explain the distinction between punishment levied at a person's conduct and punishment for a person's status, which is impermissible under the Eighth Amendment.[278] In *Robinson* the Supreme Court struck down a California statute that made addiction to narcotics illegal because it criminalized the mere status as a drug addict without requiring any illegal act.[279] The Court held the statute constituted cruel and unusual punishment in violation of the Eighth Amendment.[280]

The dissent further explained that "Doe's going to the park did not rise to the level of an 'action' of sufficient gravity to justify punishment."[281] Going to the park could not be classified as an attempt, nor could it be considered stalking.[282] The dissent made the analogy of a former bank robber standing in the parking lot of a bank and thinking about robbing it, which under the law would not be considered an action that merited punishment.[283] In the same way that the bank robber could not be charged with attempted bank robbery for standing outside the bank and thinking about robbing it, the dissent reasoned that Doe cannot be punished for standing in a public park and thinking sexual thoughts about children.[284]

4. *Conclusion*

In conclusion, the dissent stressed that as a society dealing with the problem of repeat sex offenders, we should encourage sex offenders to seek therapy and not punish them when they speak truthfully in an effort to deal

275. *Id.* at 782 (Williams, J., dissenting).
276. *Id.* at 782–84 (Williams, J., dissenting).
277. 370 U.S. 660 (1962).
278. *Id.* at 666.
279. *Id.* at 666–67.
280. *Id.* at 667. *See also* Powell v. Texas, 392 U.S. 514, 533 (1968) (interpreting *Robinson*'s explanation of the cruel and unusual punishment clause as meaning "criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing . . . .").
281. *Doe III*, 377 F.3d at 783 (Williams, J., dissenting).
282. *Id.* (Williams, J., dissenting).
283. *Id.* (Williams, J., dissenting).
284. *Id.* (Williams, J., dissenting).

with their urges.[285] The dissent predicted a chilling effect that will discourage many offenders from seeking treatment out of fear of banishment or some other civil remedy.[286] "In the City's haste to take action to protect its children, an admirable goal, both the majority and the City fail to apprehend the possible secondary effects of this ban on the very safety it seeks to ensure."[287]

V. SIGNIFICANCE

The significance of the Seventh Circuit's decision in *Doe v. Lafayette* is that it marks the first time a court has allowed a person to be subjected to punishment based only on the content of his thoughts without any accompanying actions that interfere with the rights of others.[288] The immediate effect of this ruling is a clear signal sent to sex offenders that they will face further punishment by seeking treatment and being honest about their problems with inappropriate thoughts and urges.[289] The decision may also encourage city and state legislators to enact similar regulations in their own jurisdictions now that they know the ban has been upheld.[290]

A. A Dangerous Precedent

The Seventh Circuit's decision in *Doe III* establishes a dangerous precedent by allowing a person to be exposed to criminal sanctions based on only the content of his thoughts. There are many people who enter parks on a daily basis who could be thinking offensive thoughts, and at the time the ban was imposed, there were about 100 convicted sex offenders living in the greater Lafayette area, but only Doe has been banned.[291] The majority characterized the ban as a civil measure to avoid the label of punishment,[292] but, similar to a civil order of protection, the violation of the ban triggers a criminal arrest and allows the city to proscribe conduct that is, under normal circumstances, completely lawful.[293] Exposure to criminal sanctions without

285. *Id.* at 784 (Williams, J., dissenting).

286. *Id.* (Williams, J., dissenting).

287. *Doe III*, 377 F.3d at 784 (Williams, J., dissenting).

288. *See infra* Part V.A. *See also* 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, 1060–61 (2005).

289. *See infra* Part V.B.

290. *See infra* Part V.C.

291. Ron Browning, *Pedophiles Prohibition Repealed: 7th Circuit Says Lafayette Cannot Ban Sex Offender From Parks*, IND. LAW., July 16, 2003, at 1.

292. *Doe III*, 377 F.3d at 766, n.8.

293. *See generally* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law*

committing any type of violation undermines society's trust in the criminal justice system as a whole; "[i]t is . . . important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt . . . ."[294] If Doe can be punished after sharing his thoughts with others, simply because the city does not approve of those thoughts, there could be a chilling effect on not just sex offenders' freedom of thought and expression, but the freedom of thought and expression of anyone who wishes to voice an unpopular idea or opinion.

B. Discouraging Rehabilitation

The most significant and immediate impact of the *Doe III* decision is its discouraging effect on sex offenders seeking treatment. Mr. Doe was arguably doing all he could to not reoffend by actively participating in psychological treatment and voluntarily attending group therapy to help him control his fantasies about children.[295] When Doe did have inappropriate thoughts, he took steps to deal with them by contacting his therapist and discussing the incident with his support group.[296] In return for his honesty, Doe was punished by the city, sending a message to other offenders that they would be better off not sharing their thoughts with others.[297] The dissent correctly stated that "[o]nce released back into our society, a former sex offender must feel free to seek therapy and must be supported in his efforts to control his urges rather than penalized."[298] The majority's decision, however, will discourage, not encourage, offenders to discuss their thoughts and problems with others.

C. Encouraging Similar Regulations

The Seventh Circuit's endorsement of the ban will undoubtedly impact the efforts of other cities to control the risk that sex offenders pose to their

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Distinction, 42 HASTINGS L.J. 1325, 1406 (1991) (providing an in-depth look at the use of civil remedies to address criminal behavior).

294. In re Winship, 397 U.S. 358, 364 (1970).

295. *Doe III*, 377 F.3d at 774 (Williams, J., dissenting). Mr. Doe had also practiced aversion therapy by sniffing ammonia capsules when he had improper sexual urges. Gerrety, *supra* note 15, at 8A.

296. *Doe III*, 377 F.3d at 775 (Williams, J., dissenting).

297. Kelly Spencer, Note, *Sex Offenders and the City: Ban Orders, Freedom of Movement, and* Doe v. City of Lafayette, 36 U.C. DAVIS L. REV. 297, 328 (2002).

298. *Doe III*, 377 F.3d at 784. In an interview, one convicted child molester who is also active in rehabilitation efforts stated that without the benefit of counseling, offenders are just as likely to reoffend when released from jail as when they went in. Popkin, *supra* note 145, at 64.

children. Cities will be more willing to impose similar restrictions now that precedent has been established that the ban is constitutional. While *Doe III* was in litigation, another Indiana city, Michigan City, imposed a lifetime ban on all child molesters from entering their city parks.[299] The Indiana Civil Liberties Union challenged the ban, and the city amended the ban to apply to only one sex offender, Robert E. Brown.[300] Brown has filed suit against the city challenging the ban,[301] but now that one ban has been upheld, Brown's chances of defeating the ban have considerably lessened.

The court's approval of the ban may also encourage legislators to pass laws authorizing the use of banishment as a valid restriction on sex offenders. The city park ban became a campaign issue in 2004, with one candidate for the Indiana House of Representatives, Connie Basham, promising to propose a law that bans all child molesters from parks.[302] Basham, the former Tippecanoe County Commissioner, lost her bid for the House of Representatives but still says she would support similar bans in all places where children are without the protection of adults such as bus stops or school property.[303] As publicity concerning sex offenders and their repeat offenses continues to outrage the public, legislators may soon feel it necessary to give local governments statutory authority to ban certain citizens from public areas.

VI. CONCLUSION

Crime is a serious social problem in the United States, with sex crimes considered among the most heinous and deserving of severe penalties.[304] The highly emotional response to sex offenses, coupled with a general fear of crime, media sensationalism, and dissatisfaction with the criminal justice system, have influenced legislators and government officials to impose ever-increasing restrictions on sex offenders released back into society.[305] At the same time, however, the constitutional rights of the individual, including the right to think and express ideas freely, must not be violated,

299. Browning, *supra* note 291, at 1.

300. *Id.*

301. Brown filed suit against Michigan City, challenging the ban as a civil rights violation. Brown v. Michigan City, No. 3:02cv572 (N.D. Ind. filed August 13, 2002). Cross motions for summary judgment have been filed and the case is awaiting decision. *See* current legal docket of the Indiana Civil Liberties Union at http://www.iclu.org/legal/current.asp#miscellaneous (last visisted Oct. 3, 2005).

302. *Molesters, a Ban, and Our Parks: A False Security*, J. & COURIER (Lafayette, Ind.), July 27, 2004, at 5A.

303. Shaw, *supra* note 207, at 16A. No bills of that kind have been introduced in the Indiana legislature so far this session. *Id.*

304. Lieb, *supra* note 5, at 44–46.

305. *Id.*

otherwise "the freedoms guaranteed by the First Amendment are virtually meaningless."[306] John Doe stood at the center of this conflict, representing the struggle between the efforts to protect citizens from sex offenders and the civil rights of an individual who has paid his debt to society.[307] The decision in *Doe v. Lafayette* demonstrates that, at least for now, the civil liberties of the individual will be sacrificed for the perceived greater good.

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306. *Doe III*, 377 F.3d at 785 (Williams, J., dissenting).

307. Gerrety, *supra* note 13, at 18A.

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