WE DON'T NEED NO THOUGHT CONTROL: *DOE V. CITY OF LAFAYETTE*[*]

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I. INTRODUCTION

John Doe was a convicted sex offender living in Lafayette, Indiana.[1] Doe's past was littered with a variety of sexual offenses and convictions, dating back to 1978.[2] These offenses included performing oral sex on underage, unwilling boys in 1978 and 1979; peeping into apartments in 1985 and 1988; masturbating in front of three neighbor children in 1986; and approaching three boys for oral sex in 1990.[3] The 1990 oral sex incident led to Doe's last conviction in 1991 and his placement on house arrest from January 1992 to January 1996.[4] Doe was on probation until early January 2000.[5]

In January 2000, Doe visited a series of parks in the city of Lafayette, eventually stopping at Murdock Park.[6] Doe described what occurred at Murdock Park in his deposition:

> Well, I parked my car at Parkside Pharmacy across from Murdock Park. I saw three males and two females on the ball diamond there at Murdock Park.
> Q: Kids?
> A: Possibly early to mid teens, so yeah, they were underage. I walked over to the ball diamond. . . .They were down in that area, and I stood there and watched them for a while, probably 15 minutes, maybe a half-hour, I said to myself: I've got to get out of here before I do something, I

* Author's Note: This title was inspired by the Pink Floyd song, Another Brick in the Wall, long considered a rock classic. The line is included in the chorus, which states: "We don't need no education/We don't need no thought control/No dark sarcasm in the classroom/Teacher, leave those kids alone." These lyrics are only overshadowed in the song by the later line of "If you don't eat your meat, you can't have any pudding! How can you have any pudding if you don't eat your meat?!" PINK FLOYD, *Another Brick in the Wall (Part II)*, *on* THE WALL (Columbia Records 1979).

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1. Doe v. City of Lafayette (*Doe III*), 377 F.3d 757, 758 (7th Cir. 2004) (en banc).
2. *Id*.
3. *Id*. at 758-59.
4. *Id*. at 759.
5. *Id*.
6. *Id*.

left.[7]

Doe had no contact with the children.[8] Asked later what he was thinking about when he walked into the park and watched the children, Doe stated:

> 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.[9]

An anonymous caller contacted the Lafayette Police Department and reported the incident.[10] The police chief, aware of Doe's criminal history, contacted the superintendents of the Lafayette Parks and Recreation Department and of the Lafayette School Corporation.[11] The police chief advised the officials to ban Doe from entering any of the city's public parks and schools, feeling it was necessary to "protect the citizens, and specifically the children of this community, from the imminent danger posed by John Doe."[12] Doe was banned from all of the city's parks and schools, with no durational or geographical limits.[13]

At the time of the incident, Doe was not on probation for his previous offenses, and he had not been restricted from entering the park during his previous period of house arrest a decade earlier.[14] Doe had been receiving therapy under the supervision of Dr. Patricia C. Moisan-Thomas since 1990.[15] Doe also had been attending a self-help group for sexual addicts, and after January 2000, he "voluntarily began taking medications to control his sexual urges."[16] While admitting that Doe would "'always have inappropriate thoughts,'" Dr. Moisan-Thomas believed that Doe eventually "learned how to resist these inappropriate urges."[17] Dr. Moisan-Thomas further believed that the January 2000

7. *Id*.
8. *Id*. at 760.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*. at 775 (Williams, J., dissenting). See particularly footnote 4 in the dissent, describing the previous house arrest order as not involving a restriction from the park. *Id*. at 775 n.4 (Williams, J., dissenting).
15. *Id*. (Williams, J., dissenting).
16. *Id*. (Williams, J., dissenting).
17. *Id*. at 761.

incident, when Doe recognized his inappropriate urges and took no action, may have been a "good thing" because it "'gave him the opportunity to use his relapse prevention program and to learn about his limits.'"[18]

Doe filed suit challenging his ban from the Lafayette public parks, but not his ban from the city's schools.[19] In *Doe v. City of Lafayette* (Doe I), the United States District Court for the Northern District of Indiana framed the issue succinctly: "whether a convicted sexual offender who is no longer serving a sentence or probation can be permanently banned from a city park after entering the park, watching young persons in the park and having inappropriate sexual thoughts about those young persons."[20] Doe argued that the ban violated his First Amendment rights "by punishing him for mere inappropriate thoughts," and also violated his substantive due process rights.[21] In upholding the ban, the district court held that

> the city of Lafayette is not attempting to control the mind or thought of Doe at the City parks. . . . Nor is the city of Lafayette's ban order an attempt to control the thoughts of Doe in the privacy of his home. Rather, the ban order is an attempt to protect the health and welfare of its younger citizens from potential molestation, exhibitionism or other sexual acts from a convicted sex offender with an admitted continued sexual addiction.[22]

The court found that any effect on Doe's thoughts represented an "incidental impact," which would not preclude the city from exercising its police power.[23] The court similarly rejected Doe's substantive due process arguments regarding the liberty of his person and his freedom to travel, and concluded that the ban should be upheld.[24]

Doe appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit in *Doe v. City of Lafayette* (*Doe II*).[25] The panel in *Doe II* stated that the "freedom of individuals to control their own thoughts has been repeatedly acknowledged by the Supreme

18. *Id*.

19. *Id*. at 760. Among other things, Doe wished to use the park to play softball, attend company outings, take walks with friends, and watch the Colt World Series, which "[a]ccording to the record, . . . is a baseball 'league of young fifteen, sixteen, [and] seventeen-year-old males.'" *Id*. at 760 n.2.

20. Doe v. City of Lafayette (*Doe I*), 160 F. Supp. 2d 996, 999 (N.D. Ind. 2001).

21. *Id*.

22. *Id*. at 1001.

23. *Id*.

24. *Id*. at 1003-04.

25. Doe v. City of Lafayette (*Doe II*), 334 F.3d 606 (7th Cir. 2003), *reh'g granted, vacated*, 377 F.3d 757 (7th Cir. 2004) (en banc).

Court."[26] The panel noted that First Amendment protection for pure thoughts did not extend to non-expressive actions.[27] However, the court of appeals panel rejected the contention that Doe's actions in the park justified punishment.[28] Instead, the court found that Doe's ban resulted from the city's concern over his fantasies about children.[29] According to the court, the ban infringed upon Doe's freedom of thought.[30]

In reversing the district court's decision, the panel stated that "[d]espite our repudiation of the content of his thoughts, the City of Lafayette may not punish Doe for this thinking alone, for without protection from government intrusion into our thoughts, the Freedoms guaranteed by the First Amendment would be meaningless."[31] It is against this backdrop that the Seventh Circuit reheard the case en banc, resulting in the decision of *Doe III*.[32]

This Casenote argues that the opinions in *Doe III*, while substantially flawed, provide the complementary framework necessary to reach a decision that protects an individual's freedom of thought while also allowing for appropriate legislation regarding factual situations similar to Doe's. Part II of this Casenote examines the progression of freedom of thought jurisprudence at the United States Supreme Court level, paying particular attention to issues concerning obscenity and child pornography. This assessment provides a framework for analyzing the arguments advanced by the court in *Doe III*. Part III examines the majority and dissenting opinions in *Doe III*, breaking down key arguments related to freedom of thought and other relevant issues. Part IV analyzes the *Doe III* opinions and provides the basis for a workable framework to deal with the case. Finally, Part V presents issues that may potentially arise in light of the decision in *Doe III*.

II. RELATED CASES: THE PROGRESSION OF FIRST AMENDMENT PROTECTION OF FREEDOM OF THOUGHT

First Amendment protections for freedom of thought date back to the United States Supreme Court's 1943 decision in *West Virginia State Board of Education v. Barnette*,[33] and the principles supporting that

26. *Id*. at 608.
27. *Id*. at 610.
28. *Id*. at 611.
29. *Id*.
30. *Id*. at 613.
31. *Id*.
32. 377 F.3d 757 (7th Cir. 2004) (en banc) (upholding Doe's ban).
33. 319 U.S. 624 (1943).

freedom reach back even further. As the Seventh Circuit panel noted in *Doe II*, "[t]he maxim that *cogitationis poenam nemo patitur* (no one is punishable solely for his thoughts) is a cornerstone of the American common law system of criminal justice that has shaped many of the constitutional boundaries of criminal law."[34] With this proviso in mind, the Court's decision in *Barnette* represents a logical starting point in freedom of thought jurisprudence.[35] In *Barnette*, the plaintiffs were Jehovah's Witnesses who challenged a state law requiring students to salute the American flag.[36] Students who did not comply with the commands risked expulsion from school and charges of delinquency.[37] Parents faced prosecutions for causing their children's delinquencies.[38]

In examining the validity of the law, the Court noted that the case presented a conflict between state authority and individual rights.[39] The children were compelled to declare a belief, even though there was no allegation that failure to declare that belief presented any danger.[40] Given the gravity of compelling belief, the Court examined the exercise of authority without regard to the possible benefits of the ceremony.[41] In essence, the procedure at issue in *Barnette* was a form of government-mandated adherence to a particular belief—requiring school children to submit to and affirm a certain mode of thought, regardless of their beliefs.[42]

The Court affirmed the judgment enjoining enforcement of the compelled salute and elaborated on the importance of the individual's right to freedom of thought.[43] The Court stated, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[44] The Court elevated the sanctity of the mind, protecting the "sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[45]

Another landmark case in the Court's freedom of thought

34. *Doe II*, 334 F.3d at 611.
35. *Barnette*, 319 U.S. at 624.
36. *Id*. at 629.
37. *Id*. at 630.
38. *Id*.
39. *Id*.
40. *Id*. at 633-34.
41. *Id*. at 634.
42. *Id*.
43. *Id*. at 642.
44. *Id*.
45. *Id*.

jurisprudence is *Wooley v. Maynard.*[46] In *Wooley*, a New Hampshire statute made it a misdemeanor for an individual to obscure the letters or numerals on a license plate.[47] New Hampshire license plates were printed with the state motto, "Live Free or Die," and the New Hampshire Supreme Court had held that the statute extended to any obscuring of this motto.[48] The appellees were Jehovah's Witnesses who contended that the motto interfered with their religious beliefs.[49] George Maynard was cited three times for violating the New Hampshire anti-obscurement statute, and he refused to pay the fines for each offense.[50]

The United States Supreme Court framed the issue as whether a state could compel a private citizen to publicly display an ideological message.[51] The Court began with the proposition that the freedom of thought protected by the First Amendment included the right to speak and to refrain from speaking.[52] The Court held that the statute required the Maynards to communicate the state's "ideological message," which necessarily implicated their First Amendment rights.[53] The Court rejected the state's justifications for the regulation as not compelling enough to abridge First Amendment rights, holding the statute unconstitutional.[54]

The 1969 case of *Stanley v. Georgia*[55] implicated the freedom of thought in the realm of offensive sexual activity. In *Stanley*, the defendant was convicted of violating a statute forbidding the knowing possession of obscene material.[56] The State of Georgia argued that

46. 430 U.S. 705 (1977).

47. *Id*. at 707.

48. *Id*.

49. *Id*. at 707.

50. *Id*. at 707-08. Maynard also received a fifteen-day jail sentence after his second citation, when he informed the court that he would not pay the $25 fine from his first offense, or the $50 fine from his second offense. *Id*. at 708. The court noted that the obscurement resulted when Maynard clipped the words "or Die" from his license plates, and covered up the rest of the motto (and the hole in the license plate) with tape. *Id*. at 708 n.4.

51. *Id*. at 713.

52. *Id*. at 714.

53. *Id*. at 715-16.

54. *Id*. at 716-18. In particular, the Court rejected the state's contention that the required display of the motto, which was limited to passenger vehicles, allowed police officers to more easily identify whether the vehicle carried the proper plates, as the combination of letters and numbers also served this purpose. *Id*. at 716. Additionally, the state's second claimed interest, promoting the state's history and an appreciation of individualism and state pride, also did not serve as justification, *id*. at 716; indeed, "where the state's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id*. at 717.

55. 394 U.S. 557 (1969).

56. *Id*. at 558-59.

previous cases upholding bans on the distribution of obscene materials also provided a basis for criminalizing the possession of obscene materials within an individual's home, even when the possessor lacked intent to distribute the materials.[57]

According to the Court, Georgia's rationale of extending the sanctions to mere possession was flawed.[58] The right to receive ideas was well established.[59] Moreover, the factual scenario in *Stanley* was more distressing, as it entailed governmental intrusion into the individual's privacy.[60] The Court made sweeping statements regarding the individual's freedom of thought: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[61] Indeed, this consideration may have effects beyond the privacy of the individual's home, to the extent it affects legislative intent.[62] While a state has the power to legislate against ideas it considers immoral, it cannot premise the use of that power "on the desirability of controlling a person's private thoughts."[63]

Many of these issues resurfaced in *Ashcroft v. Free Speech Coalition*.[64] In *Free Speech Coalition*, adult filmmakers, among others, challenged the Child Pornography Prevention Act (CPPA) of 1996.[65] The act prohibited the creation of "sexually explicit images that appear to depict minors but were produced without using any children."[66] The Court held that this statute went "beyond" *New York v. Ferber*,[67] which

57. *Id*. at 559-60. After noting that obscene material is not constitutionally protected, the Court rhetorically framed Georgia's position: "If the State can protect the body of a citizen, may it not, argues Georgia, protect his mind?" *Id*. at 560.

58. *Id*. at 564.

59. *Id*.

60. *Id*. (citing Martin v. City of Strothers, 319 U.S. 143, 143 (1943); Griswold v. Connecticut, 381 U.S. 479, 482 (1966); Lamont v. Postmaster General, 381 U.S. 310, 307-08 (1965) (Brennan, J., concurring)).

61. *Id*. at 565. The Court dissected Georgia's claim that it has the "right to protect the individual's mind from the effects of obscenity," stating that "[w]e are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment." *Id*. at 565-66.

62. *Id*. at 566.

63. *Id*. While the Court's statement seemed straightforward and common-sensical, it was in some respects a most disingenuous analysis of the goals behind legislative action. *See* analysis *infra* Part IV.

64. 535 U.S. 234 (2002).

65. *Id*. at 239.

66. *Id*.

67. 458 U.S. 747 (1982).

had "distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process."[68] At issue in *Free Speech Coalition* were technological advances, such as computer imaging, that facilitated the creation of images appearing to include children.[69]

Although the broad range of images seemingly proscribed by the statute's language troubled the Court,[70] Congress's motives in enacting the statute were more damning for the constitutionality of the CPPA.[71] No children could be physically harmed in the creation of the images, as none were involved in the production process.[72] Nonetheless, Congress felt children were threatened in other indirect ways, such as pedophiles using the materials to encourage children to participate in sexual acts.[73] Further, according to Congress, the materials might cause pedophiles to "whet their own sexual appetites" from the images, "thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children."[74]

The Court stated that "Congress may pass valid laws to protect children from abuse, and it has."[75] However, the CPPA did not merit a finding of constitutionality under either a *Miller v. California*[76] analysis or a *Ferber*[77] analysis.[78] The Court then examined other justifications for the CPPA.[79] The Court held that the restriction was not "narrowly drawn," because it restricted speech that should be available to law-abiding adults.[80] The justification of preventing minors from seeing the

68. *Free Speech Coalition*, 535 U.S. at 240. The Court noted that under *Ferber*, materials that were not "obscene" under the so-called *Miller* test (from *Miller v. California*, 413 U.S. 15 (1973)) could still be banned for their effects on the children used in making them.

69. *Id*.

70. *Id*. at 241.

71. *Id*.

72. *Id*.

73. *Id*.

74. *Id*. (quoting the Congressional Finding (3) following 18 U.S.C. § 2251).

75. *Id*. at 245.

76. 413 U.S. 15 (1973).

77. 458 U.S. 747 (1982).

78. *Free Speech Coalition*, 535 U.S. at 246-51. The Court noted, among other things, that underage sexuality has informed artistic works ranging from Shakespeare to the movie *American Beauty* (Dreamworks 1999); and that, given the *Ferber* decision's emphasis on harm to the children involved in the production, the CPPA could not stand on those grounds. Indeed, the majority noted that the *Ferber* Court "did not hold that child pornography is by definition without value," but had instead relied on virtual images "as an alterative and permissible means of expression" for images of child pornography that had value. *Id*. at 251.

79. *Id*. at 251-52.

80. *Id*. at 252-53.

material was not enough.[81]

The justification that virtual pornography would lead to greater abuse of children by whetting the appetites of pedophiles also could not sustain the statute's constitutionality.[82] As the court wrote: "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. . . . First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end."[83] The importance of the individual's ability to think is paramount, according to the court: "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[84] The importance of speech and thought means that limits should more properly be imposed on conduct than speech.[85]

The Supreme Court's First Amendment jurisprudence demonstrates a strong respect for the importance of speech and an admonition that restrictions on speech be severely limited.[86] The cases clearly indicate a strong connection between speech and thought, so that an individual's freedom of thought may be no less revered than his speech.[87] As the Court demonstrated in *Stanley* and *Free Speech Coalition*, the reasons for restrictive legislation must be legitimate, and must not be for the impermissible ends of controlling an individual's thoughts.[88]

III. THE DECISION: *DOE V. CITY OF LAFAYETTE (DOE III)*

A. The Majority Opinion

In reversing *Doe II*, the Seventh Circuit, sitting en banc, reinstated the district court's order affirming the ban of John Doe from all of the city parks in Lafayette, Indiana.[89] The Seventh Circuit first approached Doe's First Amendment claim, and sought to "ascertain whether any of the values protected by this provision are implicated in the situation

81. *Id*.

82. *Id*. at 253.

83. *Id*.

84. *Id*.

85. *Id*.

86. *Id*.

87. *Id*.

88. *See* Stanley v. Georgia, 394 U.S. 557, 565-66 (1969); *Free Speech Coalition*, 535 U.S. at 253.

89. Doe v. City of Lafayette (*Doe III*), 377 F.3d 757, 774 (7th Cir. 2004) (en banc).

before us."[90] At the outset, the court noted that "at the core of the First Amendment is the protection of the right to self-expression."[91] The court examined whether Doe was engaging in self-expression, and held that he was not:

> He did not go to the park to advocate the legalization of sexual relations between adults and minors. He did not go into the park to display a sculpture, read a poem or perform a play celebrating sexual relations between adults and minors. He did not go into the park for some higher purpose of self-realization through expression. In fact, he did not go into the park to engage in expression at all. Rather, he went "cruising" in the parks "looking for children" to satisfy his sexual urges.[92]

According to the court, this conduct did not lead to any self expression, and it placed him in a position where he was more likely to act on his impulses.[93] This distinction between expressive conduct and non-expressive conduct is important, the court noted, because the First Amendment's protection of conduct is limited to conduct "with a significant expressive element that drew the legal remedy in the first place."[94] Because of this restriction, "Doe's prohibition from the park only triggers First Amendment scrutiny if he can demonstrate that his conduct in going to the park in search of children to satisfy deviant desires somehow was infused with an expressive element."[95] Doe could not overcome this threshold requirement. Citing the similar "illegal sexual activity" at issue in *Arcara v. Cloud Books, Inc.*, the court held that the conduct was not expressive and did not merit protection under the First Amendment.[96]

The Seventh Circuit next addressed Doe's allegation that the City of Lafayette punished him for his thoughts.[97] The court conceded that the First Amendment prohibits the government from punishing an individual for pure thought.[98] The Seventh Circuit quickly limited the scope of this prohibition, however, stating that the "Supreme Court . . . has made it clear that only governmental regulations aimed at *mere* thought, and not thought plus conduct, trigger this principle."[99] The

90. *Id*. at 763.
91. *Id*.
92. *Id*.
93. *Id*.
94. *Id*. (quoting Arcara v. Cloud Books, Inc., 478 U.S. 697, 706 (1986)).
95. *Id*. at 764.
96. *Id*.
97. *Id*. at 765.
98. *Id*.
99. *Id*. (emphasis in original).

connection between thought and conduct becomes the key arbiter in such a situation, according to the Seventh Circuit.[100] The court expressed this limiting principle when it wrote that the "First Amendment's freedom of mind principle does not subject every conduct-focused regulation to First Amendment scrutiny; rather, it only prohibits those regulations aimed at *pure thought and thus mind control*."[101]

The Seventh Circuit did not define regulations "aimed at pure thought and thus mind control," but rather cited the Supreme Court's rejection of pornography laws established by precedent including *Stanley v. Georgia* as defining the limits of freedom of thought jurisprudence.[102] Curiously, the court stated that it could "accept in the abstract Mr. Doe's argument that a government may not punish pure thought."[103] This indicates that perhaps the reason the court has not defined situations in which pure thought is impermissibly punished is the court's own inability to conceive of a practical example of punishment for pure thought. In any event, the court found that Doe was not punished for pure thought:

> The City has not banned him from having sexual fantasies about children. It did not ban him from the public parks because he admitted to having sexual fantasies about children in his home or even in a coffee shop. The inescapable reality is that Mr. Doe did not simply entertain thoughts; he brought himself to the brink of committing child molestation. He had sexual urges directed toward children, and he took dangerous steps toward gratifying his urges by going to a place where he was likely to find children in a vulnerable situation.[104]

The Seventh Circuit noted that Doe's banishment from the city parks of Lafayette was not a form of punishment, but a civil remedy aimed at protecting the city's children.[105] The court found the city's measures to protect its younger residents in line with historical precedent, which illustrated that certain individuals were unable to control their tendencies and restrain themselves from conduct that injures others.[106] Because of the conduct element of Doe's actions and his criminal history and mental deficiencies, the court viewed the city's actions pragmatically.[107] "We cannot ignore, nor can we say the law somehow commands the

100. *Id*.
101. *Id*. (emphasis added).
102. *Id*. at 766.
103. *Id*.
104. *Id*. at 766-67.
105. *Id*. at 767 n.8.
106. *Id*. at 767.
107. *Id*.

City to ignore, Mr. Doe's pedophilia and the history of his battle with that affliction."[108] While there are limits on the actions that government can take on the basis of an individual's particular inclinations, a government has leeway in restricting the individual in order to protect society.[109] As the court stated,

> we must recognize the actual situation confronting the City as well as the parents and children who look to that City for protection. The children and their parents are not concerned about Mr. Doe's thoughts. They are concerned about his coming to the park to achieve sexual gratification. They do not need to wait until a child is molested to take steps to protect their children.[110]

After discussing First Amendment issues, the majority rejected Doe's due process claims attempting to invalidate the city's ban.[111] The court noted that Doe had not raised any procedural due process claims in the court below and was, therefore, precluded from raising them on appeal.[112] The only remaining due process issues were thus substantive, requiring a "careful description" of the liberty interest and a determination of whether that interest was "fundamental."[113] Rather than implicating "a generalized right to movement," Doe instead asserted "a right to enter the parks to loiter or for other innocent purposes."[114] The court based its analysis of whether this claimed right was fundamental by analogizing to other similar rights, including the right to marry, to use contraception, to direct children's education, and to refuse medical treatment.[115] While some circuits have held the right to intrastate travel to be fundamental,[116] the *Doe III* court concluded that Doe's right to enter the public parks to loiter was not.[117]

108. *Id*.

109. *Id*.

110. *Id*.

111. *Id*. at 768.

112. *Id*. The dissent was curious about this decision on Doe's part, as the procedure by which Doe was banned from the Lafayette parks consisted of a closed-door decision by administrators, which Doe then learned of through the mail. *Id*. at 775 n.5.

113. *Id*. at 768 (quoting Washington v. Glucksberg, 521 US 702, 721 (1997)).

114. *Id*. at 769.

115. *Id*. at 770.

116. *Id.* (citing Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002)).

117. *Id*. at 771 ("That this right is not 'fundamental' to Mr. Doe's personhood is readily apparent not only from a comparison to other 'fundamental' rights, but also from the fact that Mr. Doe has not even entered the City's parks since at least 1990."). For a more detailed discussion of the geographical ban at issue in the *Doe v. Lafayette* trilogy and its relation to rights based on the freedom of movement, see Kelly A. 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, 301 (arguing that "the [district] court's dismissal of Doe's case was improper because the right to free movement should be considered a fundamental right

Based on this conclusion, the Seventh Circuit was bound to apply the lenient "rational basis" test in determining whether the ban should be upheld.[118] Doe conceded that the city's interest was not only legitimate but also "compelling." Doe's admitted sexual addiction and history of pedophilia, coupled with his actions in the park, led the court to state that "it is hard to see how the City's ban is anything but rational."[119] The court further stated that "even if we were required to judge the ban under the strict scrutiny standard, we would uphold its validity."[120] The large geographic and temporal scope of the ban was acceptable because it was reasonable, as the city could not know in which park children might be present at any given time, and as Doe had admitted that his desire to molest children would always remain with him.[121] In sum, the Seventh Circuit found that no First Amendment freedom of thought issues were implicated, and that Doe's Fourteenth Amendment substantive due process claim failed because it was not based on a "fundamental" right.[122]

B. The Dissenting Opinion

The dissent forcefully refuted much of the rationale underlying the majority opinion in *Doe III*.[123] Based on the Supreme Court's admittedly limited freedom-of-thought jurisprudence, the dissent concluded that Doe's ban from all of the city parks of Lafayette violated his First Amendment rights and should be overturned.[124] Judge Williams began her analysis by noting that "[c]onvicted sex offenders, particularly child molesters, are a reviled group."[125] Nonetheless, all citizens remain protected by the First Amendment, and Judge Williams viewed the case as presenting several atypical questions for the court:

> May a city constitutionally ban one of its citizens from public property based on its discovery of that individual's immoral thoughts? Is being

under the Due Process Clause.").

118. *Doe III*, 377 F.3d at 773. As the court stated, "we must ask whether the ban is 'rationally related to a legitimate government interest, or alternatively phrased,' whether the ban is 'arbitrary' or 'irrational.'" *Id*. (quoting Lee v. City of Chicago, 330 F.3d 456, 467 (7th Cir. 2003)).

119. *Id*. at 773.

120. *Id*.

121. *Id*. at 773-74.

122. *Id*. at 771-74.

123. *Id*. at 774-85. (Williams, J., dissenting).

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

125. *Id*. at 774 (Williams, J., dissenting). Judge Williams also classified child molestation as "one of the most heinous and deplorable crimes," as it affects "our most precious resource, our children." *Id*. In light of this reality, Judge Williams conceded that pedophiles are "understandably vilified." *Id*.

> banned from public property a "punishment"? Does the First Amendment protect a citizen's right to think about committing a crime, even if he has committed that crime in the past? . . . [I]t is a rare case where thoughts, as distinct from deeds, become publicly known. Most thinking, unless purposefully revealed to others, remains one's own.[126]

Judge Williams traced the history of freedom-of-thought jurisprudence, beginning with *West Virginia State Board of Education v. Barnette*, and continuing through *Stanley v. Georgia*, and *Ashcroft v. Free Speech Coalition*.[127] Judge Williams then examined the city's goals in implementing the ban against Doe.[128] Framing the city's position, Judge Williams noted that the city "defends the ban as a measure to protect its youth from a person with a history of sex offenses whom it fears may harm its children in the future."[129] Judge Williams contended that this rationale was based on a belief that Doe's propensities to molest, coupled with a proximity to children, would lead to a recurrence of his previous conduct.[130] According to Judge Williams, this viewpoint was unacceptable on two levels: first, it ignored precedential case law holding that a pedophile may be able to control his urges;[131] second, it ignored precedent regarding the limits of prevention, because "this fear—that an individual's thoughts may encourage action—is not enough to curb protected thinking."[132]

Having thus analogized the actions in *Doe III* with the regulatory goal in *Free Speech Coalition*, Judge Williams next examined whether there was any expressive element to Doe's conduct.[133] Analyzing child

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

127. *Id*. at 776-77 (Williams, J., dissenting). In conducting this examination, Judge Williams noted that while "the freedom of individuals to control their own thoughts has been repeatedly acknowledged by the Supreme Court," this "guarantee of freedom of the intellect has not been limited to beliefs concerning politics or religion." *Id*. at 776 (Williams, J., dissenting).

128. *Id*. at 777 (Williams, J., dissenting).

129. *Id*.

130. *Id*.

131. *Id*. (citing Kansas v. Crane, 534 U.S. 407, 414 (2002)).

132. *Id*. This statement is bolstered by Judge Williams' discussion of *Stanley v. Georgia*, 394 U.S. 557 (1969), and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In particular, Judge Williams noted the impermissibility of basing legislation on desires to control individual thoughts. *Id*. at 778. Interestingly, the language chosen by Judge Williams, that "this fear—that an individual's thoughts may encourage action—is not enough to curb protected thinking," appears to leave open two possibilities: 1) that perhaps a more compelling reason than fear of a future crime may allow for the curbing of freedom of thought; and 2) that there may exist some thought that is not "protected" (the natural negative to the phrase "protected thinking.") More likely, this language represents a straightforward view that all thought is protected, and the possibility of curbing thought is very remote—for, if prevention of a serious crime is not a sufficient justification for this restriction, it is difficult to posit a situation that may in fact justify these limits. *Id*. at 778.

133. *Id*. at 778 (Williams, J., dissenting). Judge Williams began her discussion by stating that

pornography jurisprudence, Judge Williams noted the importance of harm as a key ingredient in determining whether conduct can be prohibited. She reasoned that *New York v. Ferber*[134] and *Osborne v. Ohio*,[135] which respectively outlawed distribution and possession of child pornography, were upheld because the actions resulted either in actual harm (in *Ferber*) or in the facilitation of criminal conduct which in turn relied on the actual harm suffered by participants (in *Osborne*).[136] Judge Williams then concluded that no one was affected by Doe's presence in the park—any number of city residents may think offensive thoughts in the park on any given day—and, as such, the only reason Doe was banned from the parks was his revelation of his own thoughts and his history as a pedophile.[137]

Judge Williams determined that the ban was indeed a form of punishment.[138] Applying the factors contained in Justice Breyer's dissent in *Kansas v. Hendricks*,[139] Judge Williams concluded that the ban was a punishment because it restricted Doe's liberty of movement and his personal actions.[140] Judge Williams distinguished this ban from sexual offender registration laws, which are constitutional because they do not limit the activities in which sex offenders may engage.[141] In addition to these limits, Judge Williams believed the ban served the traditional criminal punishment goal of deterrence, preventing Doe and others similarly situated from repeating their conduct, at least if their thoughts eventually become known to the public.[142]

Finally, Judge Williams concluded that Doe was being punished by the city of Lafayette for his status, not for his conduct.[143] Noting the "axiomatic principle" that an individual, under the Eighth Amendment,

"[t]he majority aptly points out that while pure thoughts are protected by the First Amendment, non-expressive actions are not." *Id*.

134. 458 U.S. 747 (1982).

135. 495 U.S. 103 (1982).

136. *Id*. at 778-79 (Williams, J., dissenting).

137. *Id*. at 779 (Williams, J., dissenting).

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

139. 521 U.S. 346 (1997). According to Judge Williams, these factors included "whether 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." *Doe III*, 377 F.3d at 780 (quoting *Hendricks*, 521 U.S. at 394 (Breyer J., dissenting)).

140. *Doe III* , 377 F.3d at 780 (Williams, J., dissenting).

141. *Id*. The majority used sexual offender registration laws in determining that the ban was civil and non-punitive. *Id*.

142. *Id*. at 781 (Williams, J., dissenting).

143. *Id*. at 782-83 (Williams, J., dissenting).

may not be punished for his status,[144] Judge Williams contended that "Doe's going to the park does not rise to the level of an 'action' of sufficient gravity to justify punishment."[145] Judge Williams compared Doe's punishment for visiting the park with other criminal situations, writing that "courts would not sanction criminal punishment of an individual with a criminal history of bank robbery . . . simply because she or he stood in the parking lot of a bank and thought about robbing it."[146] Judge Williams also concluded that Doe's conduct did not qualify as a "substantial step" under the analysis of attempt law, nor did it represent an action akin to stalking.[147] Judge Williams lamented the chilling effects that a ban such as that in the *Doe* cases might have on other pedophiles.[148] More importantly, according to the dissent, "the City of Lafayette may not punish Doe for his thinking alone, for without protection from government intrusion into our thoughts, the freedoms guaranteed by the First Amendment are virtually meaningless."[149]

IV. ANALYSIS

A. Doe III*: Right for the Wrong Reasons, or Wrong for the Right Reasons?*

Freedom-of-thought jurisprudence, limited though it may be, presents a tangle of issues to those who attempt to interpret it. The greater tension apparent in any form of organized government—the freedom of the individual at odds with the public good—is also evident in *Doe III*. Indeed, this tension makes a reasoned analysis of the *Doe* cases especially difficult, as the interests at stake on each side are especially compelling. On one hand, there is the freedom of thought, which even the staunchest advocate of legislation for the public good would concede is a vital and compelling interest. In the balance hangs a government action with a noble intention: protecting the children of a community from possible sexual abuse, perhaps the most reviled of crimes in the eyes of society.

144. *Id*. at 782 (Williams, J., dissenting).

145. *Id*. at 783 (Williams, J., dissenting).

146. *Id*. Judge Williams discussed another hypothetical that she considered analogous to the behavior at issue in *Doe III*, that of a drug addict standing outside a drug dealer's house "craving a hit but successfully resist[ing] the urge to enter and purchase drugs." *Id*.

147. *Id*.

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

149. *Id*. at 785.

As is often the case, the solution lies somewhere in the middle. The majority and dissent both viewed "freedom of thought" as an absolute that cannot be curtailed. For practical reasons, this is probably necessary.[150] As the dissent in *Doe III* stated, such factual situations are extremely rare; it is very uncommon that we are privy to the inner thoughts of an individual. Moreover, the primacy of freedom of thought is clear in the Supreme Court's jurisprudence; thought is so inextricably linked to speech that it is a bedrock principle as part of First Amendment rights. The majority and dissent in *Doe III* are complementary and provide the necessary framework for making the proper decision under these difficult circumstances. While both opinions are flawed, an examination of the underlying principles of each reveals a proper framework for considering "freedom of thought" cases similar to *Doe III*.

This Casenote contends that, in effect, the dissent's attempt to overturn the ban reached the correct decision for the wrong reasons.[151] The dissent attempted to justify overturning the ban on the basis that Doe was being punished for pure thoughts. While Doe's ban from the city parks of Lafayette was probably a punishment,[152] this punishment was not administered purely for his thoughts. Webster's Dictionary defines "thought" as "the product of mental activity; that which one thinks."[153] Common sense and a plain language interpretation of the word "thought" mandate that a thought be a mental object. When one discusses freedom of thought, one is discussing the ability of an individual to think what they wish, and process one's own information and ideas, as he or she chooses. Based on Supreme Court jurisprudence, a thought is, in some respects, distinguishable from, yet connected to, speech. If speech and thought were congruent, no need would exist to differentiate between the freedom of thought and the freedom of speech.

The key to determining the case lies in distinguishing between speech and thought. Once a thought is verbalized, it has been transformed from mere thought to speech. It is this distinction that forms the basis for a

150. In fact, the opinion in *Doe II* discussed the inherent difficulties with "knowing" the thoughts of citizens, alluding to the recent movie, *Minority Report* (20th Century Fox and Dreamworks 2002), in which a future police force engages in the prosecution and prevention of "future crimes." Doe v. City of Lafayette (*Doe II*), 334 F.3d 606, 608 n.8 (7th Cir. 2004).

151. Inversely, the majority opinion reached the incorrect decision, while attempting to apply the correct rationale.

152. While the dissent presented forceful arguments that Doe's ban was indeed a punishment and not a civil regulation similar to sex offender registration laws upheld by the Supreme Court, this represents a separate topic, which is beyond the scope of this Casenote.

153. WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1477 (Random House 1989).

proper decision in *Doe III*. While Judge Williams contended that Doe had been punished for pure thought, she overlooked this key distinction. Once Doe verbalized his salacious desires to his therapist and his support group, his expressions were no longer thoughts—they became speech. The right to freedom of speech, while broad and well protected, is not without limits.

The majority opinion in *Doe III* proceeded on a similar basis. The majority's reliance on *Arcara v. Cloud Books, Inc.*,[154] is a step in the right direction. According to the majority, the controlling decision in *Arcara*—that illegal sexual conduct is not protected expressive conduct under the First Amendment—justified the maintenance of the ban.[155] More importantly, the majority correctly rejected the notion that Doe is being punished exclusively for his thoughts. As the majority points out, the "Supreme Court . . . has made it clear that only governmental regulations aimed at *mere* thought, and not thought plus conduct, trigger this principle."[156]

The argument against punishing thought is mandated from a common-sense perspective. Because regulating an individual's thought is practically impossible, regulation is beyond the true power of government. However, it is disingenuous—on the part of the Supreme Court and the dissent in *Doe III*—to suggest that regulation of thought is not, at some level, the goal of all criminal legislation. Criminal legislation purports to affect the conduct of the individual. As the jurisprudence makes clear, thought plays a critical role in the genesis of speech and conduct. Thus, any legislation designed to curtail criminal conduct necessarily affects the individual's thought process. Given this logical approach, sweeping pronouncements about the sanctity of thought and the impermissibility of government motives designed to affect thought become just that—broad statements that do not align with the reality of the legislative apparatus. Naturally, pure thought remains beyond the reach of government interference for practical reasons. Because thought is impossible to regulate, courts are permitted to make broad statements about the primacy of freedom of thought, knowing that they will never have to deal with government regulation of thought on a practical level.[157]

154. 478 U.S. 697 (1986).

155. Doe v. City of Lafayette (*Doe III*), 377 F.3d 757, 764 (7th Cir. 2004) (en banc).

156. *Id*. at 765 (emphasis in original).

157. Criminal sanctions arguably control conduct and do not affect pure thought. For example, an individual may posit that he is allowed to fantasize murder as much as he likes, as long as no conduct follows from it. Naturally, this position proves that legislation ostensibly aimed at conduct also affects thought: the individual has conformed his thoughts to the goals of the state by limiting those thoughts to

Unfortunately, the majority in *Doe III*, while using the correct approach, overemphasized Doe's conduct in the park, ignoring several valid considerations articulated by the dissent. The majority characterized Doe's actions as a sort of pedophiliac brinkmanship: "The inescapable reality is that Mr. Doe did not simply entertain thoughts; he brought himself to the brink of committing child molestation."[158] This is a near-alarmist view of the events that transpired. The "brink" of molestation at which Doe found himself is presumably no greater than the level of temptation he must face each day as a pedophile with urges that will always persist. Doe did not approach the children in the park, nor did he take any steps toward making contact with them. While Doe was cruising for children to fantasize about, his trip to the park did not reach the level of danger that the majority suggested, nor one that would justify such an extensive ban.

The majority overlooked mitigating factors that must be considered in similar situations. As the dissent correctly pointed out, Doe not only resisted his urges at the park, but he immediately sought treatment to help quell future urges. Doe's display of self-control belies the majority's insistence that Doe was playing games of sexual brinkmanship. Moreover, it reveals the reality that banning Doe from all city parks was an unwarranted punishment: he resisted his urges in the earlier situation, and the likelihood of future resistance increased when he began taking medication to suppress his urges.

B. Doe *Situations: A Working Framework*

The dissent, in fiercely defending the freedom of thought, failed to consider the legitimate concerns of parents and communities who must coexist with pedophiles. The majority, reacting to Doe's conduct and the overreaching punishment, proved too much with far too little. While factual situations such as those presented in the *Doe* trilogy will be rare, the fact that strong and praiseworthy interests lie on each side of the argument necessitates a nuanced approach to resolving controversies that implicate freedom of thought. Applying common sense to the issues, and combining the positive aspects of the majority and the dissenting opinions in *Doe III,* can achieve a three-part framework (the *Doe* Framework) that protects individual rights along with societal interests.

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fantasies only.

158. *Id*. at 767.

Part 1: A Rebuttable Presumption against Classification as "Thought"

Perhaps the most serious issue at stake in the *Doe* cases is whether the individual is indeed being punished purely for his thoughts. A threshold question must be whether the defendant engaged in mere "thought." In most cases, this question will be clearly answered. The best method is to apply a straightforward definition of "thought," roughly defined as the internal feelings, beliefs, or machinations of the individual.[159] In most instances, any inner feelings or beliefs of an individual that are communicated, verbally or otherwise, to others will cease to be thought in the strict sense of the word. At this point, these beliefs and feelings are no longer thought, but speech or another form of communication. As such, they would be subject to the same strictures under First Amendment jurisprudence as other communications.

Based on these practical realities, the first mechanism in the *Doe* Framework should be a rebuttable presumption that the feelings and beliefs of the individual, once communicated, are no longer thoughts. While the circumstances in which communicated thoughts are still merely thoughts remain speculative, this approach allows for that possibility and prevents whatever harshness might arise in such circumstances.[160] Two factors that would be critical in rebutting the presumption that communicated thoughts are no longer protected as pure thought are: 1) intent, and 2) the party to whom the thought is communicated. Generally, if the communication was not intended to be received by others, and was not subsequently received by others, the thoughts communicated could still be considered pure thought and beyond government regulation.[161] This approach also protects the integrity of an individual's purely internal thoughts, dealing with the

159. While a more precise or clinical definition is possible and indeed desirable, this Casenote takes a far more pragmatic approach than much concise legal scholarship. It is the author's contention that pragmatism, as best personified in the works of William James, represents the quintessential American philosophy and, as such, deserves a place in our legal jurisprudence.

160. A hypothetical scenario in which thoughts may be communicated in some form and yet remain "thoughts" for purposes of First Amendment jurisprudence might include the recording of one's thoughts in a journal or a diary. At that point, the writing represents an action for remembering, cataloging, or reflecting on one's thoughts, rather than an attempt to communicate them to others. Other similar situations, largely depending on concerns of confidentiality, may be contemplated.

161. This pair of factors would protect instances such as the diary hypothetical discussed in note 159, *supra*, as well as actions as simple as muttering on the street to oneself. While determining whether Doe's comments to his therapist and support group should be classified as speech presents a more textured issue, the fact that Doe intended to tell others, and did in fact tell others, would lead to the conclusion that this was speech and no longer thought. Objections may be raised that such restrictions would prevent individuals from receiving the medical help that is necessary. This argument, however, raises confidentiality issues beyond the scope of this Casenote, and which are in no way clear on their own merits, considering the conflict between the duty to warn and the goal of helping sick individuals.

legitimate concern that freedom of thought is essential to democracy.[162]

Part 2: Assessment of the Societal Interest at Stake

The second and third elements of the *Doe* Framework would only be necessary in unique situations such as that in Doe's case.[163] After determining that the communication at issue is not pure thought subject to protection under the First Amendment, a practical assessment of the competing interest at stake is the next step. In *Doe III*, for instance, the competing consideration was extremely powerful: the safety of the children in the Lafayette community from sexual abuse. The majority opinion rightly considered this interest a major factor militating in favor of upholding Doe's ban from the Lafayette parks. In this respect, the opinion was correct, providing the second prong of the framework. A court should consider several factors when assessing the purported interests, chief among them the practical nature of the interests. Thus, the City of Lafayette's competing interest is much more compelling than the more abstract interest behind laws against virtual child pornography, as in *Ashcroft v. Free Speech Coalition*. This element of the framework would, in effect, incorporate the Supreme Court's mandate in *Free Speech Coalition* that the harms justifying the legislation not be remote.[164]

Part 3: Balancing the Interests with Mitigating Factors

The practical approach of the *Doe* Framework would reach its apex in the third element, wherein the interests of the community would be weighed against the content and form of the communication, as well as any mitigating circumstances. It is on this point that the majority

162. The distinction between thought and expression in this Casenote is intended to turn on a common sense view of the difference between pure thought and expression. It is this Casenote's contention that the communication of a thought (either verbalized or written) transforms that idea from thought to speech. As such, individuals will retain the ultimate ability to determine if and when they face strictures for expression. Clearly, people make countless decisions each day whether to communicate their pure thoughts. Communication of those thoughts signifies a decision by the individual, and in many ways is a voluntary placement of ideas in the realm of regulation (if they are ideas that society has decided should be regulated).

163. This rebuttable presumption test could be applied in other circumstances. In most cases, such a decision will lead to a conclusion that the concept at issue is expression. In those circumstances, the Supreme Court's First Amendment jurisprudence will supply the proper avenue for evaluating the regulation of that communication, whether it is unprotected speech or protected speech. This framework attempts only to provide a basis for reaching a judgment in the specific situation presented by the *Doe* trilogy.

164. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 252-53 (2002).

faltered in its analysis of Doe's ban from the Lafayette city parks. While Doe's thoughts became communication, and thus should be open to possible regulation, the form of his communication was a factor demanding an overturn of the ban. Doe's thoughts became known as he sought professional medical help. His rationale in communicating his thoughts was not to frighten, incite, or persuade, but rather to deal with his pedophilic tendencies and prevent future harm. Similarly, his actions relating to the incident—he did not approach the children in the park, sought immediate help, and began taking medication soon afterward to prevent future urges—represented substantial, mitigating factors that should have been properly considered. A reasoned balancing of these factors with the public's interest in protecting children should have informed the decision in the *Doe* cases. In light of the mitigating factors, the ban went too far in punishing Doe for his later-communicated thoughts. The steps that Doe had taken to prevent harm were significant, and may have in fact provided more protection for the children of Lafayette than his ban from the city's parks. With these factors in mind, and the added interest of encouraging those similarly situated to Doe to communicate their thoughts in hopes of treatment and prevention of future harm to society, Doe's ban should have been overturned.

V. CONCLUSION

John Doe's situation presents troubling and emotional issues of justice. The conflict between two competing goods—individual rights and the protection of children—is only exacerbated by the understandable unpopularity of pedophiles. While, on the surface, it appears that Doe was punished for his "mere thoughts," the dissent's conclusion was erroneous. Similarly, the majority's opinion, while correctly concluding that Doe was not punished for his thoughts, overstated the risk to the community inherent in Doe's action. This risk was then used to justify Doe's ban, disregarding the positive steps taken by Doe to prevent future occurrences or harm to children.

The disconnect between the opinions in *Doe III* is unsurprising, given the Supreme Court's limited guidance involving pornography, particularly child pornography. The Supreme Court has mandated that the justification for the regulation—typically, the desire to protect children—must not be "remote" in the sense that the action regulated must have a practical and evident effect in protecting that interest. Combined with the Supreme Court's broad pronouncements on the importance of freedom of thought, it becomes apparent how situations

such as Doe's ban can lead to disparate conclusions.

The *Doe* Framework seeks to incorporate the dissent's concerns about the freedom of thought with the legitimate societal concerns expressed by the majority. In determining these issues, practical considerations and applications should be paramount. Luckily, the day has not yet arrived when others can monitor our internal thoughts. Regardless, when thoughts are communicated, they are subject to societal regulation. When society chooses to regulate communication such as that in the *Doe* trilogy, it must consider mitigating factors that further the very interests that the regulation was intended to protect. Failing to consider mitigating factors is irresponsible and counterproductive, and should not be accepted by the judiciary in the interests of expediency.