clude the seriousness and characteristics of the offense, criminal history, and specific listed adjustments. The Supreme Court is hearing cases currently regarding enhanced sentencing departures under the sentencing guidelines—specifically, whether the sentencing judge's finding of a fact that was not found by a jury can allow such a sentencing departure.

The ruling in *Derbes* was quite logical. If the court had ruled otherwise and did allow a downward sentence departure in Mr. Derbes' hardly extraordinary case, then any wealthy white-collar convicted criminal could expect a similar departure. It brings to mind Tony Soprano's crimes and the fact that he sees a psychiatrist (*The Sopranos*, HBO). If the court had allowed a sentence departure in this case, then theoretically when Tony Soprano would have charges under the Racketeer Influenced and Corrupt Organizations (RICO) Act brought against him, he could plead guilty. Then he could claim that his relationship with Dr. Melfi and treatment for depression and anxiety should allow him to stay out of prison, so that he could get his combination medication treatment and maintain his relationship with Dr. Melfi.

Susan Hatters Friedman, MD
Fellow in Forensic Psychiatry
Case Western Reserve University
Cleveland, OH

Phillip J. Resnick, MD
Professor of Psychiatry
Director, Division of Forensic Psychiatry
Case Western Reserve University
University Hospitals of Cleveland
Cleveland, OH

Sex Offender Laws

A Sex Offender May Be Banned From Parks Because of His Thoughts

In *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004), the United States Court of Appeals for the Seventh Circuit reheard *en banc* a case that had been decided previously by a three-judge panel (*Doe v. City of Lafayette, Indiana*, 334 F.3d 606 (7th Cir. 2003). The City of Lafayette, Indiana, banned a known sex offender from entering city parks after learning that he had gone to a park and thought about having sexual contact with children. The court held that the ban did not violate the First or the Fourteenth Amendments.

Facts of the Case

John Doe was a convicted sex offender whose past offenses included child molestation, attempted child molestation, voyeurism, exhibitionism, and peeping. He was most recently convicted in 1991, after he invited three adolescent boys into an alley, unzipped his pants, and offered to perform oral sex. For that offense, Mr. Doe was sentenced to four years of house arrest, followed by four years of probation. His probation ended in January 2000, just before the incident at issue in this case. Mr. Doe had been in treatment for his disorder since 1986, and he attended Sexual Addicts Anonymous, a 12-step group.

In January 2000, Mr. Doe entered a city park and watched five teenagers for 15 to 30 minutes. He then said to himself, "I've got to get out of here before I do something," and left the park. When asked about his thoughts as he entered the park and watched the children, Mr. Doe stated:

> [M]y thoughts were thoughts I had before when I see children, possibly expose myself to them, I thought about the possibility of. . .having some kind of sexual contact with the kids, but I know with four kids there, that's pretty difficult to do. . . . Those thoughts were there, but they. . .weren't realistic at the time. They were just thoughts.

After leaving the park, Mr. Doe emergently contacted his psychologist, discussed the incident in his 12-step group on his psychologist's advice, and voluntarily began receiving weekly Depo-Provera injections to suppress his sexual urges. Mr. Doe acknowledged that he had ongoing sexual thoughts about children, and his psychologist testified that, "like any other addict, [he] does not have control over his thoughts. . . . [He] will always have inappropriate thoughts."

An anonymous source reported the park incident to Mr. Doe's former probation officer. After the police department, the superintendent of parks and recreation, and the city attorney became involved, the city issued a ban that permanently prohibited Mr. Doe from entering any city park property, at any time, for any reason, under penalty of prosecution for trespass. In addition to traditional parks, affected park property included a golf course, a sports complex, a baseball stadium, and a zoo. Mr. Doe chal-

lenged the ban as unconstitutional in federal court. He argued that in punishing him for inappropriate thoughts, the ban violated his First Amendment right to freedom of thought. He also claimed that the ban violated his fundamental right to enjoy city parks.

The district court granted summary judgment to the city, reasoning that there could be no First Amendment violation in the absence of expressive speech and that the city's legitimate interest in protecting its children justified the incidental impact on Mr. Doe's thoughts. As for the Fourteenth Amendment, the district court held that there was no fundamental right to enter city parks and that the ban was rationally related to the city's legitimate interest.

The case was appealed and a three-judge panel of the Seventh Circuit reversed, holding that the ban violated Mr. Doe's First Amendment right to freedom of thought. On the city's petition, the Seventh Circuit reheard the case *en banc*.

Ruling and Reasoning

In an eight-to-three vote, the *en banc* Seventh Circuit affirmed the district court's decision. The court rejected Mr. Doe's First Amendment claim for several reasons. First, noting that the "core" of the First Amendment is protection of the right of self-expression, the court found that the right was not implicated in Mr. Doe's case, because Mr. Doe did not go to the park to engage in expression. Recognizing that the First Amendment also protects conduct that has a significant expressive element, the court reasoned that "going to the park in search of children to satisfy deviant desires" contained no expressive element.

The court acknowledged that the First Amendment would be implicated if the state were to punish an individual for "mere thought, unaccompanied by conduct," but explained that "regulations aimed at conduct which have only an incidental effect on thought" do not violate the First Amendment. The court further reasoned that thought accompanied by conduct is not necessarily protected, because all regulation of conduct has some indirect impact on thought. In this case, the court reasoned that Mr. Doe had engaged in "thought plus conduct." He "did not simply entertain thoughts; he brought himself to the brink of committing child molestation" by going to a park where he was likely to find vulnerable children. In light of his status as a known pedophile who had difficulty controlling his urges, prohibiting Mr. Doe from entering parks, for the protection of the city's children, did not violate the First Amendment.

The court also rejected Mr. Doe's Fourteenth Amendment claim. Noting that the characterization of the right at issue is crucial in a substantive due process analysis, the court framed the right that Mr. Doe asserted as "a right to enter the parks to loiter or for other innocent purposes." That right, the court reasoned, was not like others that the Supreme Court has considered "fundamental," such as the right to marry and have children, the right to bodily integrity, and the right to abortion. Fundamental rights are those that are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [they] were sacrificed" (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Loitering in parks does not rise to that level.

Having determined that a fundamental right was not implicated, the court applied a rational-basis review, under which the ban would be acceptable so long as it was "rationally related to a legitimate government interest" (citing *Lee v. City of Chicago*, 330 F.3d 456, 467 (7th Cir. 2003)). The court concluded that the city's banning of Mr. Doe, "a sexual addict who always will have inappropriate urges toward children," from public parks, a place where children are particularly vulnerable to abuse, was rationally related to its legitimate, even compelling, interest in safeguarding the well-being of minors.

The court added that it would have upheld the ban even under a strict-scrutiny standard, under which a regulation must be narrowly tailored to serve a compelling government interest. The ban was the least burdensome means of protecting children in parks. It could not have been limited to certain park areas or to a finite period of time, as Mr. Doe had argued, because the city cannot predict where children will be and because Mr. Doe's urges will not pass with time. The indefinite ban of his use of the entire park system was 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" (emphasis in original).

Dissent

The dissent argued that the ban violated the First Amendment by punishing Mr. Doe on the basis of his immoral thoughts. The dissent cited a line of cases in which the Supreme Court has established the

right to "freedom of the mind," and noted that even immoral thoughts are protected. Potential harm or the possibility that thought may lead to action does not justify infringement on the right. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002), the Supreme Court held that virtual child pornography could not be prohibited on the ground that it might encourage illegal acts, because "the prospect of crime. . .by itself does not justify laws suppressing protected speech." The dissent disagreed with the majority's view that Mr. Doe's action involved thought plus action, because Mr. Doe's presence in the park would not have been objectionable in the absence of his thoughts.

Citing *Robinson v. California*, 370 U.S. 660, 666 (1962), for the proposition that one cannot be punished because of their status alone, the dissent argued that the ban in Mr. Doe's case was akin to punishing a former bank robber for standing near a bank and thinking about robbing it or punishing a drug addict for standing outside a dealer's house and thinking about buying drugs.

Discussion

The majority's constitutional analysis was heavily influenced by its abhorrence of Mr. Doe's past crimes and current thoughts. The crux of the court's First Amendment reasoning lay in its characterization of the incident as not just thought, but "thought plus conduct." The act that in the court's view justified the First Amendment infringement was "[bringing] himself to the brink of committing child molestation" by going to a park where he was likely to find vulnerable children. This contrasts with the dissent's characterization of Mr. Doe's conduct as merely being present in a park, which would be unobjectionable in the absence of his thoughts. As the dissent implies, it is unlikely that "bringing oneself to the brink" of bank robbery by standing near a bank and thinking about robbing it would have received the same analysis. As the dissent also noted, although intended to serve public safety, the decision to punish a sex offender for thoughts revealed in the context of his self-help group could actually be detrimental because it discourages sex offenders from speaking openly in therapeutic groups and thereby inhibits their treatment.

Karen S. Wiviott, MD, JD
Fellow in Forensic Psychiatry
Case Western Reserve University
Cleveland, OH