The "Association Restriction": Should Child Sex Offenders Lose their Constitutional Rights as Parents?

Hannah K. Phillips

Follow this and additional works at: https://digitalcommons.liberty.edu/lu_law_review

Recommended Citation
Phillips, Hannah K. (2016) "The "Association Restriction": Should Child Sex Offenders Lose their Constitutional Rights as Parents?," Liberty University Law Review: Vol. 11 : Iss. 1 , Article 6. Available at: https://digitalcommons.liberty.edu/lu_law_review/vol11/iss1/6

This Article is brought to you for free and open access by the Liberty University School of Law at Scholars Crossing. It has been accepted for inclusion in Liberty University Law Review by an authorized editor of Scholars Crossing. For more information, please contact scholarlycommunications@liberty.edu.
NOTE

THE “ASSOCIATION RESTRICTION”: SHOULD CHILD SEX OFFENDERS LOSE THEIR CONSTITUTIONAL RIGHTS AS PARENTS?

Hannah K. Phillips†

ABSTRACT

All parents are responsible for protecting their children. Some parents, however, choose to be a source of danger to their children. Child sexual abuse in various forms—sexual assault, molestation, and child pornography—is currently a common occurrence in society. In opposition to basic morality, many child sexual abusers are the child’s own parents. Parents who are child sex offenders, like other parents, have the fundamental rights of parenthood and familial association guaranteed by the Constitution. Children, however, have the right to be protected from any person who presents a danger to their health, safety, and well-being. A glaring issue arises when these two opposing rights are applied to a real-world situation: should child sex offenders lose their constitutional rights as parents after posing a threat to children? Some circuit courts have decided this question in favor of the rights of parents. Other circuit courts have answered this question in favor of the protection of children. Thus, circuit courts have not yet uniformly resolved this question. This Note proposes a workable solution to resolve the circuit court split.

Over the past few decades, Congress has attempted to resolve this issue by enacting various statutes. The current system of supervised release imposes special conditions on a child sex offender when he is discharged from prison after completing his sentence. The special condition at issue is the “association restriction” that prohibits a child sex offender from associating with any minors, often including his own children, without the supervision of a probation officer or other designated official. The opposing rights of children and parents are triggered when this “association restriction” deprives child sex offenders of their liberty in raising their children. Child sex offenders, however, do not automatically create a potential threat to their children.

† Articles and Book Reviews Editor, Liberty University Law Review, Volume 11. J.D. Candidate, Liberty University School of Law (2017). I would like to dedicate this Note to my parents who have encouraged me to pursue God’s calling on my life by attending Liberty University School of Law. I would like to thank Dr. William R. Bowen, my professor of Political Science at Pensacola Christian College, who inspired me to attend law school in the first place.
Each child sex offender’s relationship with his children is different and cannot be evaluated generally. Although each case should be reviewed on an individualized basis, the increase of child sexual abuse demands a more consistent, child-focused approach to resolving the issue of these competing rights. This Note proposes one consistent standard favoring the protection of children by shifting the burden of proof onto the objecting child sex offender, adhering to the familiar standard of “the best interests of the child” and retaining individualized review of each offender’s situation.

I. INTRODUCTION

Every time a person sexually exploits a child, he makes a deliberate choice to relinquish some fundamental rights guaranteed to him in the United States Constitution. Child sex offenders are predators who use children for their own sexual gratification. Child sex offenders, however, are also often parents. In these situations, two competing interests arise: the child sex offender’s rights of parenthood and association with his children and the child’s right of protection. When these opposing rights are triggered in a situation, the courts have a decision to make: whose rights are superior over the other’s rights.

In an attempt to balance these rights, the courts routinely apply an “association restriction” as part of the offender’s term of supervised release after being released from prison. The “association restriction” prevents child sex offenders from associating with any children, including their own, without supervision. This special condition of supervised release inherently limits the offender’s fundamental rights of parenthood and association. Although child sex offenders retain their constitutional rights of parenthood and familial association upon release from prison, children have the right to be protected from any person who could cause harm to them. These two rights often conflict with each other, leading to the ultimate question: should child sex offenders lose their constitutional rights as parents?

Some circuit courts have decided this question in favor of the rights of parents. Other circuit courts have answered this question in favor of the protection of children. Thus, federal circuit courts of appeal have not yet uniformly resolved this question. This Note proposes one consistent standard in favor of the protection of children to resolve this circuit court split: shift the burden of proof for objections to the child sex offender, follow the standard of “the best interests of the child,” and preserve every offender’s individual treatment based on the particular facts and circumstances of each case.
II. BACKGROUND

In the United States today, children face the possibility of sexual abuse every day. Child sex offenders pose a present danger to children. During the past several years, Congress has enacted various statutes either mandating or authorizing the imposition of conditions of supervised release on child sex offenders. These conditions—particularly the “association restriction”—restrict child sex offenders, after being released from prison, from associating with children, including their own, without supervision. By imposing an “association restriction,” the courts have attempted to balance both the goal of protecting children and the goal of preserving the rights of parents. If a child sex offender objects to the imposition of this “association restriction,” the government bears the burden of proof to adequately justify why such a restriction is necessary. Although the courts have applied the “association restriction” inconsistently, the courts agree that an “association restriction” cannot be imposed on an offender unless there are specific reasons and sufficient evidence, even if unrelated to the offense, that justifies the imposition of the restriction.

A. The Present Danger of Child Sex Offenders

More than 150 million girls and 73 million boys have been sexually abused.\(^1\) Powerless and voiceless, children are vulnerable to manipulation and coercion in society. Despite state legislatures having enacted statutes that make child sexual abuse illegal, children across the United States face sexual abuse every day.\(^2\) Child sexual abuse is “any interaction between a child and an adult (or another child) in which the child is used for the sexual stimulation of the perpetrator or an observer.”\(^3\) This abuse “can include both touching and non-touching behaviors.”\(^4\) Although many cases of child sexual abuse are not reported, studies estimate that about one out of four girls and one out of six boys are sexually abused by the time they reach

---

4. Id.
age eighteen. Specifically, abusive incidents involving more than 6.6 million children in 3.6 million reports occur every year. These abused children will most likely experience health issues, cognitive developmental disorders, emotional problems, and risky behavior in adolescence and adulthood. Children may never recover from the long-lasting effects of sexual abuse, especially abuse inflicted by those they trust. Parents are in a unique position of trust to either protect or hurt their children. A common myth regarding child sexual abuse is that children are more likely to be abused by a stranger than someone the child knows. This is a myth, because the victim’s family members or those whom the child trusts perpetrate most incidents of child sexual abuse. Sadly, if children are being abused, their parents are most likely the abusers. Children should be protected from anyone who seeks to exploit them and take advantage of their innocence.

Child sex offenders regularly take advantage of children, including their own children, by committing a sexual assault on a child, molesting a child, or viewing child pornography. People who exhibit a sexual interest in a child may never act on their interest, but they do pose a risk to children. In this digital age, the prevalence of child pornography necessitates the protection of children at all costs. The United States Department of Justice describes child pornography as “a form of child sexual exploitation” in which “each image graphically memorializes the sexual abuse of that child . . . [who] is a victim of sexual abuse.” Child pornography websites generate three billion dollars annually. In 2008, law enforcement officials discovered more than 1,536 internet domains for child pornography.

5. Id.
9. Id.
10. Hafemeister, supra note 7, at 826.
13. Id.
These child pornography websites often depict “penetrative sexual activity involving children and adults and sadism or penetration by an animal.” Adults who possess or distribute child pornography pose a risk to children, even if they have never touched a child. For example, in United States v. Smith, Brian Smith pled guilty to distribution of child pornography. The court voiced its concern that “someone . . . struggling with [child pornography]” presents a high risk of engaging in sexual contact with a minor. Child pornography memorializes past and potential future sexual abuse. The increase in the quantity and easy accessibility of child pornography demands a solution to the harms committed against children.

B. Development of Conditions of Supervised Release for Child Sex Offenders

In response to the prevalence of child sexual abuse, Congress has enacted various statutes over the past few decades in an attempt to intervene on abused children’s behalf. Congress specifically established the system of conditions of supervised release with the Sentencing Reform Act of 1984. Congress later codified this Act in 18 U.S.C. § 3583, which introduced both mandatory and discretionary conditions of supervised release. Further promoting the protection of children, Congress enacted the PROTECT Act of 2003 to authorize stricter special conditions of supervised release on sex offenders.

1. Sentencing Reform Act of 1984

The Sentencing Reform Act of 1984 (SRA) introduced a system of conditions of supervised release, in addition to completed prison sentences, imposed on criminals, including child sex offenders. Unlike the prior system of parole that allowed convicted criminals to be released from prison before completing their sentence, the supervised release system “imposes conditions on a person’s behavior after he or she is released into the

14. Id.
15. United States v. Smith, 564 F. App’x 200, 201 (6th Cir. 2014).
16. Id. at 207 (alterations in original).
18. See U.S. DEPT OF JUSTICE, supra note 11. Former Attorney General Eric Holder lamented that the United States has “seen a historic rise in the distribution of child pornography, in the number of images being shared online, and in the level of violence associated with child exploitation and sexual abuse crimes.” Id.
community..."[10] A condition of supervised release could only be imposed on a person who had already been sentenced to prison.[20] Under the SRA, a term of supervised release initially lasted between one and three years.[21] The purpose of supervised release was not to punish offenders but to instead deter and rehabilitate them.[22] The Senate Report indicated that the goal of supervised release was:

\[
\text{to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a short period in prison for punishment or other purposes but still needs supervision and training programs after release.}\]

With this goal in mind, Congress first attempted, through the SRA, to rehabilitate criminal offenders by imposing conditions on them after they finished their sentences in prison.

2. 18 U.S.C. § 3583

The current version of the SRA is codified in 18 U.S.C. § 3583.[24] When a criminal defendant completes his sentence and is released from prison, he may be required to live by certain standards within the community.[25] An offender who does not abide by these conditions may face the court's revocation of his term of supervised release.[26] The court is either authorized or required to then command the offender to return to prison for the entire term of supervised release.[27] Under § 3583, both mandatory and discretionary conditions of supervised release may be imposed on criminal defendants.[28] Containing mandatory conditions, § 3583(d) demands that a defendant "1) is not to commit another offense while on supervision; 2) is to refrain from unlawful use of controlled substances and submit to drug

20. Id. at 998.
21. Id.
22. Id.
26. Id.
27. Id.
testing; 3) is to make restitution to the victim of the offense; and 4) is to submit to the collection of a DNA sample."

Judges have broad discretion in mandating additional conditions of supervised release. These discretionary conditions, however, must first be "reasonably related to the factors" in § 3553. To determine the condition’s reasonable relation to the § 3553 statutory factors, the court should consider

"(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed . . . (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . "

Second, these discretionary conditions must "involve[] no greater deprivation of liberty than is reasonably necessary for the purposes set forth in” § 3553. These purposes are to deter criminal conduct, protect the public, and provide the defendant with necessary training or treatment.

3. PROTECT Act of 2003

Congress enacted the PROTECT Act of 2003 "[t]o prevent child abduction and the sexual exploitation of children . . . ." Specifically targeting child sex offenders, the PROTECT Act modified 18 U.S.C. § 3583 in the areas related to multiple child sex offenses, including criminal offenses involving child pornography. Under § 3583(k), child sex offenders may now face "a minimum of five years’ imprisonment and up to a lifetime of supervised release." This harsh penalty inflicted on child sex

32. 18 U.S.C.A. § 3553(a)(1)-(2) (West 2010).
36. Gill, supra note 29, at 3.
37. Id.
offenders merely demonstrates the importance of regulating the actions of known child sex offenders to prevent them from causing more harm to children in the future.

C. The Burden of Proof for Conditions of Supervised Release

The burden of proof rests on the government to demonstrate which discretionary conditions of release are appropriate for child sex offenders. Although United States v. Weber is a United States Court of Appeals for the Ninth Circuit decision, it provides a persuasive model for the burden of proof concerning supervised release conditions. Prior to Weber in 2006, the Ninth Circuit never explicitly stated which party bears the burden of proof in this context. The court in Weber, however, believed the "answer to this question is fairly evident in light of the . . . statutory requirements and our case law discussing the burden of proof at sentencing generally." As noted in Weber, conditions of supervised release must be "reasonably related to the goals of deterrence, public protection, and rehabilitation" and involve "no greater deprivation of liberty than is reasonably necessary to meet those purposes."

Since the defendant’s constitutional rights are at issue, the government has the burden of proof to ensure that the defendant’s liberty is preserved according to 18 U.S.C. § 3553. Even if the government fulfills its burden initially, the defendant may object to the court’s imposition of a particular condition. The government again has the burden of proof to demonstrate that the condition is appropriate if the defendant raises an objection. Because the defendant’s liberty is at risk, the government bears the burden of proving that the condition meets statutory requirements both at the initial sentencing hearing and on remand. The government, not the defendant, must fulfill its burden of proving the condition is necessary.
D. The Courts’ Application of the “Association Restriction” to Child Sex Offenders

If the government fulfills its burden of proof for discretionary conditions, the courts may also apply “sex offender conditions” in various ways in different jurisdictions.47 Some of the typical “sex offender conditions” consist of “restrictions on internet use,”48 “residence and contract restrictions,”49 “employment/occupational restrictions,”50 “treatment conditions,”51 and “restrictions on possession of materials.”52 As part of a sentence for a conviction of child sexual abuse or child pornography, the district court may impose a condition of supervised release that requires a sex offender to not associate with children.53 Defense counsel for child sex offenders may object to these “association restrictions” by arguing that the condition either infringes upon the parent’s fundamental right of parenthood under the Fourteenth Amendment or right of association under the First Amendment.54 The courts are split concerning how restrictive this special condition is allowed to be.55 The courts are generally in agreement, however, regarding certain preliminary requirements of these conditions imposed on sex offenders restricting their contact with minors.56

1. United States v. Schaefer

Courts have generally held or acknowledged that a sentencing court must provide specific reasons for imposing a special condition of supervised

47. Gilg, supra note 29, at 4.
48. Id. at 4.
49. Id. at 4.
50. Id. at 4-5.
51. Id. at 5.
52. Id. at 5-6.
55. Williams, supra note 53, at 8; see, e.g., United States v. Widmer, 785 F.3d 200 (6th Cir. 2015); United States v. Wolf Child, 699 F.3d 1082 (9th Cir. 2012); United States v. Schaefer, 675 F.3d 1122 (8th Cir. 2012); United States v. Albertson, 645 F.3d 191 (3d Cir. 2011).
56. See, e.g., United States v. Schaefer, 675 F.3d 1122 (8th Cir. 2012); United States v. Miller, 325 F. App’x 362 (5th Cir. 2009); United States v. Voelker, 489 F.3d 139 (3d Cir. 2007).
release that prohibits the offender from associating with minors. In United States v. Schaefer, Theodore J. Schaefer was convicted for possession of child pornography and sentenced to ninety-seven months in prison with an additional ten years of supervised release. The district court imposed two conditions of supervised release that prohibited Schaefer from having contact with children under the age of eighteen or going to places where minor children under eighteen might be congregated without consent from a probation officer. The Court of Appeals upheld both conditions of supervised release. The court reasoned that the factors of 18 U.S.C. § 3553 should be individually considered without requiring that the special condition be reasonably related to all of the factors. The court further reasoned that district courts should “make an individualized inquiry into the facts and circumstances” to determine whether the condition meets the requirements of the statute. As demonstrated in Schaefer, although judges have wide discretion, there must be valid reasons for imposing special conditions of supervised release upon child sex offenders.

2. United States v. Voelker

In addition to requiring valid reasons for imposing special conditions, courts have generally held that a sentencing court cannot impose a special condition of supervised release without sufficient evidence to justify its necessity. In United States v. Voelker, Daniel Voelker was sentenced to a lifetime term of supervised release following seventy-one months of imprisonment for possession of child pornography. The district court imposed three conditions as part of the lifetime term of supervised release: a ban on internet use, a prohibition on possession of sexually explicit materials, and a prohibition from association with children under the age of

57. Williams, supra note 53, at 11; see, e.g., United States v. Worley, 685 F.3d 404 (4th Cir. 2012); United States v. Schaefer, 675 F.3d 1122 (8th Cir. 2012); United States v. Brogdon, 503 F.3d 555 (6th Cir. 2007).
58. Schaefer, 675 F.3d at 1124.
59. Id.
60. Id. at 1126.
61. Id. at 1124.
62. Id. (quoting United States v. Springsteen, 650 F.3d 1153, 1155-56 (8th Cir. 2011)).
63. Williams, supra note 53, at 12.
64. Id. at 13; see, e.g., United States v. Windless, 719 F.3d 415 (5th Cir. 2013); United States v. Voelker, 489 F.3d 139 (3d Cir. 2007); United States v. Prochner, 417 F.3d 54 (1st Cir. 2005).
65. Voelker, 489 F.3d at 142.
eighteen except in the presence of an approved adult. The court of appeals vacated the judgment and remanded all of the conditions. The court reasoned that special "[c]onditions of supervised release must be supported by some evidence that the condition imposed is tangibly related to the circumstances of the offense, the history of the defendant, the need for general deterrence, or similar concerns." The court further reasoned that a condition must have an evidentiary basis or it violates the statute’s requirement that special conditions do not deprive the defendant of more liberty than is reasonably necessary.

3. United States v. Miller

Courts have also routinely held that a sentencing court can impose conditions of supervised release that are unrelated to the defendant’s criminal conviction. In United States v. Miller, Fred Miller was convicted of wire fraud. The district court, however, imposed a special condition of supervised release that required him to be evaluated and possibly treated psychosexually, restricting his ability to associate with minors under the age of eighteen. Miller challenged the condition, arguing that it was not reasonably related to his conviction of wire fraud and thus deprived him of more liberty than was reasonably necessary. The court upheld the special condition of supervised release, because Miller had previously committed a sexual offense and was a repeat offender. The court reasoned that "[a] district court may impose sex-offender related special conditions when the underlying conviction was for a non-sexual offense under certain circumstances," particularly if the defendant had previously engaged in criminal conduct even if he was not convicted. The court was concerned about protecting society from future criminal offenses and deterring the defendant’s possible recidivism.

66. Id. at 143.
67. Id. at 156.
68. Id. at 144.
69. Id.
70. Williams, supra note 53, at 14; see, e.g., United States v. Miller, 325 F. App’x 362, 363 (5th Cir. 2009); United States v. Wise, 391 F.3d 1027, 1031 (9th Cir. 2004).
71. Miller, 325 F. App’x at 363.
72. Id.
73. Id.
74. Id. at 364.
75. Id. (quoting United States v. Dekon, 280 F. App’x 348, 351 (5th Cir. 2008)).
76. Id.
III. PROBLEM

If they are parents, child sex offenders have fundamental rights of parenthood and familial association guaranteed by the Constitution. When child sex offenders are released from prison, however, they pose a danger to children, including their own. A problem exists when these interests are in conflict: the child sex offender's rights of parenthood and association with his children and the child's right of protection. When the courts impose an "association restriction" which restricts the offender's fundamental rights of parenthood and association, the courts try to balance these opposing rights to achieve a satisfactory solution that both protects children and preserves parental rights. These conflicting rights, however, often present this issue: should child sex offenders lose their constitutional rights as parents? Some circuit courts treat the rights of children to be protected as paramount to the fundamental rights of parents. Other circuit courts consider the fundamental rights of parents to be more important than the protection rights of children. Thus, circuit courts have not yet uniformly resolved this question.

A. Potential Objections to the "Association Restriction" Imposed On Child Sex Offenders

Courts routinely apply the "association restriction" as part of a child sex offender's conditions of supervised release. In applying this restriction, courts try to protect children at all costs. An offender, however, may object to the imposition of the "association restriction" as it applies to his own children. Child sex offenders may object because the "association restriction" violates their fundamental right of parenthood under the Fourteenth Amendment. Child sex offenders may also object because the "association restriction" violates their right of association under the First Amendment.

1. The Fundamental Right of Parenthood Under the Fourteenth Amendment

A potential objection to the "association restriction" is that the special condition infringes upon a parent's fundamental right of parenthood.77 Do child sex offenders actually have a fundamental right to be parents after posing a threat to children? Since the founding of the United States of America, Americans have fought grueling battles to protect the rights guaranteed in the Constitution. The Fourteenth Amendment dictates that

77. See Gitlitz, supra note 29, at 12-13.
no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 78 Many United States Supreme Court cases have struggled with the limits to be placed on the Due Process Clause and the Equal Protection Clause. What constitutes a fundamental right? Jeffrey Shulman, professor of constitutional family law at Georgetown Law, recognizes that parents have a fundamental right to choose how to raise their children. 79 When balanced with the rights of children, however, parents who are child sex offenders cannot claim that their liberty interest outweighs the best interest of their child.

Case law established parameters for this fundamental right of parenthood assumed by many to be rooted in the Fourteenth Amendment. Washington v. Glucksberg defined a fundamental right protected by the Fourteenth Amendment as a right that is "deeply rooted in this Nation's history and tradition." 80 The Supreme Court in Glucksberg listed "child rearing" among those fundamental rights protected by the Due Process Clause. 81 In both Meyer v. Nebraska and Pierce v. Society of Sisters, the Supreme Court confirmed that parents have a fundamental right under the Fourteenth Amendment to raise their children. 82 When confronted with a custody battle initiated by the child's natural birth father, the Supreme Court in Stanley v. Illinois further recognized that a parent's liberty entails his "interest . . . in the companionship, care, custody, and management of his . . . children." 83 In Stanley, the Supreme Court also reiterated the "importance of the family" in that "[t]he rights to conceive and to raise one's children have been deemed 'essential.'" 84 These Supreme Court cases indicate that the federal government has preserved the significance of family in society by protecting a parent's fundamental right of parenthood.

While parents enjoy a right to privacy in the upbringing of their children, this right is better characterized as a responsibility for the health, safety, and welfare of one's own children. Shulman states, "What is deeply rooted in

78. U.S. Const. amend. XIV, § 1.
81. Id. at 726.
84. Id.
our legal traditions and social conscience is the idea that the state entrusts parents with custody of the child,” but “only as long as parents meet their legal duty to take proper care of the child.”

A parent who poses a threat to his child obviously cannot simultaneously protect his child. In 1816, Joseph Story believed that parents’ rights are “depend[ent] upon the mere municipal rules of the state, and may be enlarged, restrained, and limited as the wisdom or policy of the times may dictate.” The Lockean principle prescribes that “it is the child who has a fundamental right: the right to appropriate parental care . . .” While parents do have rights in the care of their children, these rights are dependent upon their fulfillment of their “legal duty to take proper care of the child.” Although the Supreme Court has specified parenthood as a fundamental right, it is possible for an individual to lose this fundamental right as a result of his choices.

2. The Right of Association Under the First Amendment

Another common objection to the “association restriction” is that the special condition infringes upon a parent’s right of association under the First Amendment. The First Amendment guarantees that Congress cannot make a law “abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Although the right of association is not explicitly mentioned in the First Amendment, it is implied from the other First Amendment rights. The Supreme Court, however, often treats the right of association as an individual right under the First Amendment. The right of association originated and grew out of several cases involving the National Association for the Advancement of Colored People (NAACP) in the 1950s and 1960s. In Bates v. City of Little Rock, the Supreme Court acknowledged the importance of the correlation between the right of association with each individual’s right to privacy.

85. Shulman, supra note 79.
86. Id.
87. Id. (emphasis added).
88. Id.
90. U.S. Const. amend. I.
92. Id.
93. Id.
B. The Circuit Split: The Protection of Children v. the Rights of the Parents

The government has an interest both in protecting children and in preserving the rights of parents. When a child sex offender is released from prison, it may seem obvious that he remains a threat to society. Since he poses a threat, the simple solution appears to be that he loses his rights to associate with his children. The assumption is that a person who would hurt someone else’s child would also hurt his own. The solution, however, is not that simple. Denying a child sex offender the right to associate with his children sparks other questions and issues that the United States Supreme Court has yet to face. Although the circuit courts apply the same statutory factors, the courts’ reasoning in the application of these factors differs, leading to unpredictable results. Uncertainty in this area of the law is especially dangerous to children’s lives and dignity.

1. Courts in Favor of the Protection of Children

Although many may raise objections to the “association restriction” often imposed on child sex offenders when they are released from prison, many courts believe that the purpose of protecting children far outweighs any objections.

a. United States v. Widmer

The Sixth Circuit presented the perfect model for the “association restriction” when, in May 2015, it took an extreme stance in favor of the protection of children over the rights of parents. In United States v. Widmer, Widmer challenged a condition of supervised release that “prohibit[ed] him from associating with minors [including his daughter] without first receiving written authorization from his probation officer.”\(^{95}\) In 2011, Widmer was convicted of receiving and downloading child pornography, including seven images and 134 videos.\(^{96}\) Widmer’s sentence consisted of ninety-seven months in prison and five years of supervised release.\(^{97}\) The special condition at issue, referred to by the court as the “association restriction,” imposed the following requirements on Widmer:

The defendant shall not associate and/or be alone with children under 18 years of age, nor shall he be at any residence where children under the age of 18 are residing, without the prior written approval of the probation officer. In addition, the

---

95. United States v. Widmer, 785 F.3d 200, 202 (6th Cir. 2015).
96. Id. at 202-03.
97. Id. at 203.
defendant shall not visit, frequent, or remain about any place that is primarily associated with children under the age of 18, or at which children under the age of 18 normally congregate without the prior written approval of the probation officer.98

This condition of supervised release undoubtedly placed a burden on Widmer’s fulfillment of his parental duties to his minor daughter.

In evaluating the reasonableness of the challenged condition of supervised release, the court applied 18 U.S.C. § 3553 to determine whether the condition of supervised release “(1) [was] reasonably related to specified sentencing factors . . . ; (2) involve[d] no greater deprivation of liberty than [was] reasonably necessary to achieve these goals; (3) and [was] consistent with any pertinent policy statements issued by the Sentencing Commission.”99 The court recognized that some special conditions of supervised release involving fundamental rights are scrutinized under careful review.100 The district court in *Widmer* believed that this condition of supervised release was necessary because the defendant posed a threat to children.101 In support of its conclusion, the district court repeated one expert’s opinion that the defendant might sexually abuse a child in the future since he exhibited a sexual interest in children by possessing child pornography.102 Widmer’s primary contention with the “association restriction” was that it violated his fundamental rights of parenthood and familial association.103 In response, the court first evaluated the condition as it related to Widmer’s association with other minors before it considered the application of the condition to Widmer’s relationship with his child.104

First, Widmer argued that the “association restriction” should not be imposed on him since the condition was not justified and did not “advance the goals of rehabilitation or protection of the public."105 The court rejected both contentions.106 Since Widmer had only possessed child pornography and had not touched a child, Widmer claimed that he did not constitute a high risk to children.107 In response to Widmer’s claim, the court

---

98. *Id.*
99. *Id.* at 204.
100. *Id.* at 204.
101. *Widmer*, 785 F.3d at 204-05.
102. *Id.* at 205.
103. *Id.*
104. *Id.*
105. *Id.* at 205.
106. *Id.*
107. *Widmer*, 785 F.3d. at 206.
emphasized the nature of the child pornography that Widmer possessed—
which included “sadistic images” and materials depicting sexual contact
between children and adults—in determining that Widmer did pose a
threat to children. In response to Widmer’s claim that the condition did
not advance proper goals since he had never abused or molested a child, the
court stated “[a] defendant convicted of possessing child pornography need
not have previously assaulted a minor to justify the imposition of a
restriction on the defendant’s association with minors.” The court
focused on the importance of preventing child abuse rather than waiting
until after it occurred to act.

Next, the court carefully dealt with the issue of Widmer’s fundamental
rights of parenthood and association with his children. For the denial of a
fundamental right to be valid, these special conditions of supervised release
must be “directly related to advancing the individual’s rehabilitation and
preventing recidivism.” Conditions that meet this standard are generally
upheld even when they impinge upon an individual’s fundamental rights. As
noted previously, the Supreme Court has recognized a fundamental right
of parenthood under the Fourteenth Amendment and the right of
association under the First Amendment. The Sixth Circuit in Widmer,
however, declared that these are not absolute rights, acknowledging that
the Supreme Court has not precisely articulated the limits on the
fundamental right of parenthood. Nevertheless, this “right to family
integrity” is countered by “an equal[ly] compelling governmental interest in
the protection of children, particularly where the children need to be
protected from their own parents.” Thus, even though the Supreme Court
has not yet determined how to balance these two competing interests, the
Sixth Circuit weighed the protection rights of children with the
fundamental rights of parents to achieve a satisfactory solution in this case.

Based on the nature of the child pornography he possessed and his
potential to act out his sexual interest toward children, the district court

108. Id. at 205-06.
109. Id. at 206.
110. Id. at 206.
111. Id. at 207.
112. Id.
113. See supra Part III.A.
114. Widmer, 785 F.3d at 207.
115. Id.
116. Id. (quoting Kottmyer v. Maas, 436 F.3d 684, 690 (6th Cir. 2006)) (alteration in
original).
determined that the “association restriction” would apply to Widmer’s
daughter for the “precise purpose of protecting [her].”117 The court of
appeals stressed the importance of protecting the children of child sex
offenders, who may need even more protection than other children based
on their circumstances.118 Widmer attempted to de-emphasize the severity
of his crime by rendering it “passive” in that he never molested or harmed a
child physically.119 Although Widmer claimed that he did not present a
danger to his own child, Widmer previously admitted that he had
masturbated to child pornography.120 As the court firmly declared, a man
who finds pleasure in the abuse of children, completely indifferent to their
health and safety, has not simply committed a “passive” crime.121 The court
of appeals deferred to the judgment of the district court, affirming the
special condition of supervised release that prevented Widmer from
associating with his daughter without supervision.122

b. United States v. Schaefer

In 2012, prior to the Sixth Circuit’s ruling in Widmer, the Eighth Circuit
rendered a decision with a similar result in United States v. Schaefer.123 The
district court convicted Theodore Schaefer of possession of child
pornography and sentenced him to prison for ninety-seven months.124 The
district court also imposed ten years of supervised release after his discharge
from prison, including a special “association restriction” that applied to his
own children.125 The district court had indicated that Schaefer had a sexual
interest in children based on his intention to distribute child
pornography.126 Although Schaefer’s children would no longer be minors
when he was released from prison, the court elevated the need for
protecting children over Schaefer’s rights as a parent.127 Considering all of

117. Id. at 208.
118. Id.
119. Id. at 209.
120. Widmer, 785 F.3d at 209.
121. Id.
122. Id. at 209-10.
123. United States v. Schaefer, 675 F.3d 1122, 1124 (8th Cir. 2012).
124. Id.
125. Id.
126. Id. at 1125.
127. Id. at 1125-26.
the circumstances, the Eighth Circuit affirmed the district court’s decision in restricting Schaefer’s association with his children.128

2. Courts in Favor of the Rights of Parents

As indicated by historical case law and interpretations of the Constitution, the rights of parents are vital to the maintenance of strong families. Parents with uncertain rights cannot raise their children in a consistent, personal way. Although Widmer and Schaefer elevated the protection of children as paramount to the rights of parents, other circuit courts have ruled in the opposite direction, creating a circuit split.

a. United States v. Wolf Child

The Ninth Circuit tends to follow an approach that rules in favor of the rights of parents concerning child sex offenders subjected to an “association restriction” with their own children. In United States v. Wolf Child, the Ninth Circuit ruled in accordance with this tendency.129 In Wolf Child, Wolf Child was charged in the district court with attempted sexual abuse in which he touched the private areas of a minor who was unconscious.130 The district court sentenced him to seven years in prison and ten years of supervised release.131 One particular special condition of supervised release prevented Wolf Child from associating with his own daughters without the supervision of a probation officer.132 The district judge reasoned, “This man cannot be trusted with minor children, in the view of this court. And he will not be.”133 On appeal, Wolf Child disputed the “association restriction” as it applied to his own children.134

The main special condition at issue in Wolf Child restricted his association with his daughters.135 Although the district court has wide discretion in imposing these conditions, the reviewing court will carefully scrutinize special conditions that involve a defendant’s constitutional right.136 The special condition in this case triggered this exception to the court of appeal’s traditional deference to the judgment of the district

128. Id. at 1126.
130. Id. at 1088.
131. Id.
132. Id. at 1087.
133. Id. at 1089.
134. Id. at 1087.
135. Wolf Child, 699 F.3d at 1087.
136. Id. at 1091.
court.\textsuperscript{137} The Ninth Circuit immediately declared, “There can be no doubt that the fundamental right to familial association is a particularly significant liberty interest . . . .”\textsuperscript{138} The court based this declaration on precedent that establishes the right of association within families.\textsuperscript{139} Setting up a persuasive argument in favor of the rights of parents, the court evaluated the special condition at issue in light of this well-established right to familial association.\textsuperscript{140}

The Ninth Circuit disagreed with the district court’s conclusion based on its lack of evidence that Wolf Child would sexually abuse his children.\textsuperscript{141} The court provided two major explanations for its opposition to the district court’s imposition of this particular special condition.\textsuperscript{142} First, the court explained that the district court’s weighty reliance on Wolf Child’s status as a convicted sex offender was not enough to brand him as a threat to his children.\textsuperscript{143} The court wisely declared that “[n]ot all sex offenders are the same . . . .”\textsuperscript{144} Second, the court explained that the district court’s conclusion that Wolf Child “cannot be trusted with minor children” does not support a conclusion that Wolf Child would harm his own children.\textsuperscript{145} The Ninth Circuit objected to the district court’s generalized assumptions; instead, it required a “detailed examination” of Wolf Child’s relationships with his children to determine whether Wolf Child posed a risk to his daughters in violation of their trust in his role as their father.\textsuperscript{146}

The court found there was no evidence that Wolf Child’s association with his children upon his release from prison would put his children’s safety and well-being in jeopardy.\textsuperscript{147} Since Wolf Child had only been charged with one sexual offense, the court refused to impose the special condition of supervised release that violated Wolf Child’s fundamental right of familial association without any evidentiary support that Wolf Child would harm his children.\textsuperscript{148} The court acknowledged the seriousness of

\textsuperscript{137} Id.
\textsuperscript{138} Id. at 1092.
\textsuperscript{139} Id. at 1091-92.
\textsuperscript{140} Id. at 1092.
\textsuperscript{141} Wolf Child, 699 F.3d at 1093.
\textsuperscript{142} Id. at 1094.
\textsuperscript{143} Id.
\textsuperscript{144} Wolf Child, 699 F.3d at 1094.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Wolf Child, 699 F.3d at 1096-97.
\textsuperscript{148} Id. at 1097.
Wolf Child’s crime, but it did not believe that the offense warranted the denial of Wolf Child’s fundamental right for such a substantial amount of time.\textsuperscript{149} The court also noted that Wolf Child’s “attempted sexual assault on a stranger” did not indicate that he had an interest in sexual assaulting his children.\textsuperscript{150} Attempting to balance out its extreme position in favor of the rights of parents, the Court in \textit{Wolf Child} briefly mentioned that it was not establishing a bright-line rule for all future cases in which a special condition of supervised release infringes upon an offender’s fundamental right.\textsuperscript{151} The Ninth Circuit, nonetheless, vacated and remanded the district court’s ruling, prohibiting the district court from reestablishing any conditions that would prevent Wolf Child from associating with his daughters.\textsuperscript{152}

b. \textit{United States v. Albertson}

Before the Ninth Circuit took its strong position in \textit{Wolf Child}, in 2011 the Third Circuit addressed the fairness of an application of an “association restriction” to a defendant’s own children.\textsuperscript{153} In \textit{United States v. Albertson}, the court found that Randy Albertson frequently viewed child pornography, both in physical images and online.\textsuperscript{154} After Albertson was reported for molesting his stepdaughter, the police found more than 700 depictions of child pornography on his computer.\textsuperscript{155} Albertson pled guilty to receiving child pornography, and the district court sentenced him to five years in prison with an additional twenty years of supervised release.\textsuperscript{156} One special condition at issue was the “restriction on his association with minors.”\textsuperscript{157} However, this “association restriction” in \textit{Albertson} did not include his own children.\textsuperscript{158} In addition to other arguments, Albertson appealed from the special condition that prohibited him from associating with minors, except for his own children, without supervision.\textsuperscript{159}

\begin{itemize}
  \item \textsuperscript{149} \textit{Id.} at 1098.
  \item \textsuperscript{150} \textit{Id.} at 1099.
  \item \textsuperscript{151} \textit{Id.}
  \item \textsuperscript{152} \textit{Id.} at 1096, 1103.
  \item \textsuperscript{153} See \textit{United States v. Albertson}, 645 F.3d 191, 193, 200 (3rd Cir. 2011).
  \item \textsuperscript{154} \textit{Id.} at 193.
  \item \textsuperscript{155} \textit{Id.}
  \item \textsuperscript{156} \textit{Id.} at 193-94.
  \item \textsuperscript{157} \textit{Id.} at 193.
  \item \textsuperscript{158} \textit{Id.} at 194.
  \item \textsuperscript{159} \textit{Albertson}, 645 F.3d at 194.
\end{itemize}
The court acknowledged that Albertson had sexually assaulted his teenage stepdaughter,160 but it did not grasp the risk that he posed to his own children. Leaning in favor of the rights of parents, the court believed there was adequate justification for the “association restriction” concerning other children, but not Albertson’s own children.161 Thus, the Court of Appeals affirmed this “association restriction,” which allowed Albertson to freely associate with his children.162 The court did not specifically address Albertson’s fundamental right of parenthood. The court’s decision, however, to exclude Albertson’s children from the “association restriction” implied that it could not recognize the danger in allowing Albertson to interact freely with his children.

IV. PROPOSAL

Child sex offenders are a present danger to children. Unfortunately, no child is immune to sexual exploitation by adults, even a child’s own parents in some cases.163 Despite this overwhelming problem of sexual offenses being committed against children, it is possible that some might object to any changes in the system. The history of the system of supervised release, however, has been ever-changing and improving since its establishment, especially regarding the treatment of child sex offenders.164 Since the authorities are restrained in their power by the preservation of individual rights, some may be wary of this Note’s proposal, thinking that it will strip criminal defendants of their liberties. This country was founded on the principle of liberty, and this proposal will not do anything to change that foundational principle. This Note’s proposal simply makes it more difficult for child sex offenders to associate with their children without supervision.

A. One Consistent Standard Favoring the Protection of Children

As discussed extensively in a previous section, the circuit courts are split regarding whether child sex offenders should be subjected to an “association restriction” upon supervised release that applies to their own children.165 Some courts tend to lean in favor of the child sex offender’s

160. Id. at 200.
161. Id.
162. Id. at 201.
163. See supra Part II.A.
164. See supra Part II.B.
165. See supra Part III.B.
rights; others tend to rule in favor of the child's rights.166 With such an important and even life-altering subject, however, inconsistent decisions across the states only hurt those who the courts desire to protect—children. Children need security and stability in their lives. The Supreme Court specifically recognized that children have an impressionable nature in School District of Abington Township v. Schempp.167 For the sake of children, all circuit courts should implement one consistent standard favoring their protection. This Note's proposal of one consistent standard involves shifting the burden of proof for objections to the child sex offender, following the standard of "the best interests of the child," and preserving every offender's individual treatment based on the particular facts and circumstances of each case.

1. Shifting the Burden of Proof

As noted previously, the burden of proof concerning objections to conditions of supervised release rests on the government.168 This proposal suggests no changes for the initial sentencing process in which the government must prove that the special condition meets the requirements of 18 U.S.C. § 3583.169 If the government meets its burden and the court imposes a discretionary "association restriction" that applies to the offender's own children, the offender can make an objection that the condition violates his fundamental rights of parenthood and association. This proposal only affects the burden of proof when a child sex offender makes an objection to an "association restriction" that applies to his own children. When a child sex offender makes this objection, this proposal shifts the burden of proof to the offender.

Under this proposal, each child sex offender must prove to the court that he does not pose a significant risk of harm to his own children. As Jennifer Gilg suggests in her article, these objecting offenders can bear their burden of proof by showing that their relationship with their children is healthy.170 If the court is satisfied with the offender's arguments and believes that he

166. See supra Part III.B; see, e.g., United States v. Wdmer, 785 F.3d 200, 202, 209 (6th Cir. 2015); United States v. Wolf Child, 699 F.3d 1082, 1087-88 (9th Cir. 2012); United States v. Schaefer, 675 F.3d 1122, 1125-26 (8th Cir. 2011); United States v. Albertson, 645 F.3d 191, 200-01 (3rd Cir. 2011).


168. See supra Part II.C.; United States v. Weber, 451 F.3d 552, 558 (9th Cir. 2006); Gilg, supra note 29, at 18.

169. See supra Part II.B.2; see also 18 U.S.C. § 3583(d)(1)-(2); United States v. Weber, 451 F.3d at 558.

170. Gilg, supra note 29, at 6-7.
has carried his burden of proof, the court has the discretion to modify or expunge the “association restriction” as it applies to the offender’s children. Shifting the burden to the child sex offender when he has an objection to the “association restriction” portrays the message to the public that the courts will not tolerate preying upon the innocence of children. While offenders are definitely people with certain rights, they are not victims of the criminal justice system. They chose to give up many of their basic rights when they exploited children for their own gain or sexual gratification. The law should not be nearly as lenient on those who have selfishly targeted the most vulnerable in society.


This proposal also incorporates the standard of “the best interests of the child” that is used in other areas of the law regarding the balance between the fundamental rights of both parents and children. In Custody of Smith, Justice Talmadge stressed in his dissenting opinion that “[t]he best interests of the child remain the court’s paramount concern.”

171 Although this standard is typically used in child custody battles, this “best interests of the child” standard controls how “all other rights are tested and concerns addressed in various contexts dealing with children.”

172 Thus, it should also be the standard in evaluating objections to “association restrictions” prohibiting child sex offenders on supervised release from interacting with their children. Justice Talmadge’s dissenting opinion in Custody of Smith provides guidance for how this standard should be applied to the “association restriction.”

173 Justice Talmadge recognized the precarious balance that must be maintained between the fundamental rights of parents and the protection rights of children.

174 Under this proposal, the court must necessarily continue to balance these competing rights. The burden shift, however, will require child sex offenders who object to “association restrictions” as applied to their own children to meet this standard of “the best interests of the child.”

According to this proposal, child sex offenders seeking to meet this burden of proof must establish that it is in “the best interests of the child[ren]” for the parents to have full control of them. The State has both a police power and a parens patriae power that allows it to interfere with the

172 Id.
173 See id.
174 Id. at 32 (Talmadge, J., dissenting).
family environment under certain circumstances. To exercise either power, the State must meet the "threshold requirement of parental unfitness, harm, or threatened harm." In this context of supervised release conditions for child sex offenders, however, this threshold requirement is already met. It has been proven that child sex offenders, including "no contact" offenders like those who possess or distribute child pornography, pose a great threat to children. Thus, the State can exercise either its police power or parens patriae power because child sex offenders have already exhibited some form of "parental unfitness, harm, or threatened harm." According to Custody of Smith, the government may use its police power to interfere in a parent-child relationship when the parent acts in a way that could hurt the child. The State may also intervene in the family by using its parens patriae power to preserve the child's interests. The government, however, may only exercise this parens patriae power "where a child has been harmed or where there is a threat of harm to a child." The State's powers authorize it take the place of unfit parents.

For this proposal, the objecting child sex offender will be judged by this same standard of whether his free association with his child is within "the best interests of the child." If not, the offender has not met his burden of proof, and the State will exercise one of its powers and intervene in the familial relationship. In these situations of supervised release, this intervention will simply be the courts' preservation of an "association restriction" applied to the offender's child. As discussed previously, both parents and children have fundamental rights in America. Even though the family is the bedrock of this society, parents' rights "are not absolute and must yield to fundamental rights of the child or important interests of the State." Incorporating the standard of "the best interests of the child" into the area of child sex offender conditions of supervised release, these competing rights can find the "proper balance . . . in protecting the best

175. Id. at 28.
176. Id.
177. See supra Part II.A.
178. Custody of Smith, 969 P.2d at 28.
179. Id.
180. Id.
181. Id.
182. Id.
183. See supra Part III.A.
interests of the child.” The circuit courts will be able to consistently preserve the rights of all involved.

3. Requirement for Individualized Review

This shifting of the burden of proof in this proposal will not affect the vital requirement for individualized review. In Schaefer, as stated previously, the court must conduct an “individualized inquiry into the facts and circumstances” of each case. For supervised release conditions, “a ‘one size fits all’ approach is prohibited.” Every case regarding a child sex offender is different. Every familial situation involving a child sex offender is different. Having one consistent standard that favors the protection of children does not dictate stripping all of the rights of child sex offenders merely because they committed an offense. This statement does not take away from the fact that child sex offenders have committed destructive acts that will not be tolerated. The courts, however, cannot blindly take away rights without peering into each individual situation carefully.

B. Potential Objections to the Proposal

Although this proposal only makes a few changes to create one consistent standard, some may object to this proposal. One may object by claiming that this proposal is inconsistent with the intended purposes of the supervised conditions of release, including the “association restriction.” Others may object by claiming that the inclusion of “non-contact” child sex offenders is far too restrictive and unnecessary. Both of these objections, however, are easily refuted.

1. Inconsistent with Purposes of Conditions

A possible objection to this proposal may be that it is inconsistent with the purposes of the conditions of supervised release. For example, Jennifer Gilg has protested to any shift of these special conditions to correspond with supervised release that punishes the defendant. She believes that this shift toward punishment is blatantly obvious in special conditions imposed on sex offenders. As discussed previously, the purposes of conditions of supervised release, however, are to deter criminal conduct, protect the

185. Id.
186. See supra Part II.D.1; United States v. Schaefer, 675 F.3d 1122, 1124 (8th Cir. 2012).
188. Id. at 2.
189. Id. at 3.
public, and provide the defendant with necessary training or treatment. In addition, the original goal of supervised release was not punishment, but, instead, deterrence and rehabilitation. This proposal, however, does not seek to inflict additional punishment on child sex offenders, potentially crippling them against any hope of rehabilitation. This proposal merely seeks to protect children. Protecting children falls under one of the purposes of conditions of supervised release—"protect[ing] the public." 

2. Inclusion of "Non-contact" Child Sex Offenders

Some may respond to this proposal by objecting to the inclusion of "non-contact" child sex offenders. Non-contact child sex offenders, however, pose a unique threat to society. Child sex offenders include both "contact" and "noncontact" offenders. This new age of digital technology allows people to have access to practically anything with a few keystrokes or clicks of the computer mouse. With mobile devices, people can access the same information or images with a few swipes across the screen. Since the viewing of pornography has become a "socially acceptable" practice, many may not believe that viewing pornography, even child pornography, is a problem. After all, the perpetrator never actually touched the child. The question to be determined is whether a person's viewing of child pornography increases their likelihood of committing a sexual assault on a child. According to Mary Anne Layden, PhD, of the Department of Psychiatry at the University of Pennsylvania in 1999, speaking before the U.S. Senate, all sexual abusers who were her clients were fueled by pornography in committing some act of sexual violence. The danger of the production, possession, and distribution of child pornography is real. These "noncontact" child sex offenders pose just as great of a risk as "contact" offenders. Thus, children must be protected from all child sex offenders.

V. CONCLUSION

Society cringes at the thought of a “child sex offender” because such individuals pose a present danger to children. To protect children, courts often impose an “association restriction” on child sex offenders released from prison to prevent them from associating with minors, including their own children. Under the United States Constitution, even child sex offenders have constitutional rights of parenthood and association that cannot be stripped away simply because many are disgusted by their behavior. In situations where a child sex offender’s rights conflict with a child’s rights, the circuit courts have either favored the protection of children or the rights of parents. Although a child sex offender’s constitutional rights should not completely dissipate, this Note’s proposal shifts the burden of proof onto the objecting offender, follows the familiar standard of “the best interests of the child,” and retains individualized review to create one consistent standard favoring the protection of children. The balancing of the competing rights of parents and children may always be necessary in a society characterized by liberty, but these few simple changes will ensure that children are afforded all of the protection they need. With child sexual abuse increasing with each passing year, it is time for the circuit courts to work together to protect children.

195. See supra Part II.A.
196. See supra Part II.D.
197. See supra Part III.A.
198. See supra Part III.B.
199. See supra Part IV.A.