PRIVATE WRITINGS AND THE FIRST AMENDMENT: THE CASE OF BRIAN DALTON

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The protections of the First Amendment do not extend to certain types of speech such as obscenity, child pornography, and incitement of illegal conduct. Recently, Ohio convicted Brian Dalton for creating and possessing a personal diary containing violent sexual fantasies involving children. He was found to have violated an Ohio statute prohibiting the creation or publication of obscene material involving minors even though there was no indication that he intended to publish the diary and no certainty that he would engage in the described acts.

This note examines the application of obscenity, child pornography, and incitement law to the regulation of private, written materials. The author argues that current obscenity, child pornography, and incitement jurisprudence should not be expanded to cover the contents of the personal writings of pedophiles. Instead, the author notes that states can use civil commitment to protect the public from many sexual predators whose writings evidence a strong propensity to commit violent sexual acts.

I. INTRODUCTION

Americans have recently faced a series of high-profile child abductions, molestations, and murders.[1] In February 2002, a seven-year-old girl in San Diego was abducted from her bedroom and later found dead.[2] A neighbor, who possessed child pornography on his home computer, was convicted of the killing.[3] In June 2002, a fourteen-year-old girl in Salt Lake City was also taken from her bedroom by an intruder; she was

1. Despite the heavy news coverage of such events, critics have pointed out that any perceived epidemic is merely an illusion. *See* Andrew Murr, *Sending out an S.O.S.*, NEWSWEEK, Aug. 12, 2002, at 28 (explaining that much like the perceived outbreak of shark attacks in the Summer of 2001, there has not been an increase in child abductions, just more news coverage of them).

2. Alex Roth, *Westerfield Lawyers Want Sentencing Delay; Evidence May Show Girl Wasn't Abducted*, SAN DIEGO UNION-TRIB., Nov. 15, 2002, at B3 (detailing how the nude body was found a month later along a rural road).

3. Jamie Reno, *Man Behind the Mask*, NEWSWEEK, Sept. 2, 2002, at 33.

found alive and well nine months later.[4] In July of the same year, in perhaps the most shocking case of them all, a five-year-old girl in Stanton, California was abducted as she played outside her home.[5] Her body was found the next day.[6] The man accused of kidnapping, molesting, and killing the girl was previously acquitted of two other molestations of girls from the same neighborhood.[7] Given the prevalence of these senseless killings, it is not surprising that states would seek to identify and act upon any warning signs from potential offenders before these tragic events unfold. The power to do so is not unconstrained, however, especially when speech is involved.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[8] Of course, this right is not absolute. Certain restrictions may be upheld if content falls into a predefined category of punishable speech.[9] The Supreme Court has defined several categories of speech that can be regulated or prohibited, including defamatory statements and fighting words.[10] Most importantly, the Court has recognized that obscenity, child pornography, and advocacy of illegal conduct are not protected by the First Amendment.[11]

Pursuant to these recognized free speech exceptions, Ohio enacted legislation making "pandering obscenity involving a minor" a crime.[12] In July of 2001, Brian Dalton, age 22, of Columbus, Ohio, was convicted under this statute and sentenced to seven years in prison.[13] His crime: writing fictional stories involving child molestation in his personal diary.[14] Many leading scholars, including Professor Laurence Tribe, have criticized his conviction, noting that it is "'clearly unconstitutional.' . . . 'It's as close as you can get to creating a thought crime.'"[15] The prosecution and conviction raises substantial questions regarding the government's

4. Stuart Pfeifer, *The Region O.C. Inquiry Is Linked to Utah Abduction*, L.A. TIMES, Nov. 3, 2002, at B8; Alex Tresniowski et al., *The Miracle Girl*, PEOPLE, Mar. 31, 2003, at 44 (describing the alleged kidnapping and sexual assault by religious fanatic Brian David Mitchell).

5. Andrew Murr, *When Kids Go Missing*, NEWSWEEK, July 29, 2002, at 38.

6. *Id.*

7. *Id.*

8. U.S. CONST. amend. I.

9. *See infra* notes 52–58 and accompanying text.

10. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that public officials can recover damages for false statements made with actual malice); Chaplinski v. New Hampshire, 315 U.S. 568 (1942) (holding that fighting words likely to cause a violent response against the speaker can be punished).

11. *E.g.*, New York v. Ferber, 458 U.S. 747 (1982); Miller v. California, 413 U.S. 15 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969).

12. OHIO REV. CODE ANN. § 2907.321(C) (Anderson 2001).

13. *See* Tunku Varadarajan, *If It Doesn't Harm Children, Is It Child Pornography?*, WALL ST. J., July 30, 2001, at A19.

14. *See id.*

15. Kevin Peraino, *A Seven-Year Sentence for a Diary*, NEWSWEEK, July 30, 2001, at 36 (quoting Laurence Tribe). Laurence Tribe is the Ralph S. Tyler, Jr. Professor of Constitutional Law at Harvard University and author of AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).

ability to regulate one's inner thoughts as transcribed in a personal journal.

Part II of this note will discuss the background of Ohio's pandering obscenity statute and Brian Dalton's subsequent conviction. Given that the Supreme Court of Canada recently addressed these same issues, their handling of such cases will be briefly examined.[16] Part III will then analyze how under current Supreme Court precedent on obscenity and child pornography, a conviction based on private written expression cannot be upheld. The potential applicability of the incitement doctrine will also be discussed. This will require an overview of the scientific research exploring the likelihood and prevalence of individuals actually acting out such fantasies involving child molestation.[17] Part IV will include a recommendation that obscenity, child pornography, and incitement jurisprudence not be extended to justify the regulation of written expression in private journals. Instead, if a state is concerned that such writings evidence a strong likelihood of committing violent sexual acts, civil commitment, along with its accompanying procedural safeguards, is available in truly egregious cases to ensure that sexually violent predators are not allowed to prey on society.

II. BACKGROUND

First enacted in 1977, the Ohio statute criminalizes "pandering obscenity involving a minor."[18] Ohio's statute makes it a crime to "[c]reate, reproduce, or publish any obscene material that has a minor as one of its participants or portrayed observers . . . ."[19] Thus, under the statute, the mere *creation* of *any* obscene material depicting a minor is punishable. There is no requirement the material be published or distributed, and there is no limitation that the material be confined to visual depictions of actual children.[20] The significance of these issues arose in 2001 with the arrest and conviction of Brian Dalton.

16. *See infra* notes 32–39 and accompanying text.

17. *See infra* notes 157–87 and accompanying text.

18. OHIO REV. CODE ANN. § 2907.321(C) (Anderson 2001).

19. *Id*. § 2907.321(A)(1). Similarly, the statute provides that one shall not "[b]uy, procure, possess, or control any obscene material, that has a minor as one of its participants . . . ." *Id*. § 2907.321(A)(5).

20. One prior court decision, also involving written expression, does attempt to confine the statute to materials that actually have a minor as one of its participants. *See* Ohio v. Lesinski, No. L-86-265, 1987 WL 13692, at *3 (Ohio Ct. App. 1987). Lesinski responded to an advertisement placed by an undercover postal inspector and sent a three-page letter describing how he had intercourse with an eight-year-old girl. Enclosed with the letter were three photographs of the girl taken by her mother, one at age five, fully clothed, and the others at age two, partially clothed, depicting navel surgery which had been performed. *Id.* At trial, Lesinski was convicted under the statute on the theory that the pictures and the letter, as a unit, were obscene. The appellate court agreed that the materials were obscene, but did not believe that the statute "intended to punish the private possession of an obscene, but possibly fictitious letter. . . . Otherwise, the legislature would in effect be punishing an individual for his/her thoughts." *Id.* at 3. Instead, the court read into the statute a requirement that the obscene material "actually have a minor as one of its participants." *Id.* However, it is clear that this decision

Brian Dalton was first convicted of "pandering obscenity" in 1998 after he was caught with pictures of children having sex, which he had downloaded from the Internet.[21] At the time, the police found a different journal, in which Dalton depicted the rape of a young girl.[22] Dalton would later reveal that the journal was not entirely fiction. The girl in his story was really his ten-year-old cousin whom he had touched inappropriately when he was fifteen years of age.[23] This time, however, charges were not brought in connection with the journal, but only for possession of the photographs.[24] Dalton served four months of his eighteen-month prison sentence and was released on parole.[25]

In early 2001, the journal in question was discovered.[26] It contained fourteen handwritten pages describing the sexual assaults and torture of children.[27] Primarily, Dalton had written about killing crack-addicted parents, kidnapping their two young children, and locking them in a cage in his basement.[28] Dalton's attorney would later testify that he had mentioned "how easy it would be to get a child from an addict parent."[29]

Based on this journal, Dalton was charged under the "pandering obscenity involving a minor" statute.[30] This was possible under the statute absent any distribution of the material, or existence of visual images, as the statute prohibits the mere creation of any obscene material with a minor as a participant.[31] Such broad coverage raises constitutional questions under current obscenity, child pornography, and incitement jurisprudence.

To put this dispute in context, the Supreme Court of Canada's recent handling of depictions of children in private diaries in *The Queen v. Sharpe*[32] sheds light on the inherent problems of punishing such expression. The Court was faced with a statute, which, *inter alia*, defined child pornography as "any written material or visual representation that advo-

was not known to anyone involved in the Dalton case, as Dalton was allowed to plead guilty to violating the statute for possessing similar material.

21. *See* Stephen Buckley, *Weighing Personal Rights Against Perversion in Ohio*, ST. PETERSBURG TIMES, Aug. 12, 2001, at 1A.

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. There are conflicting reports on the chain of events that led to the journal's discovery. One version has Dalton's parents discovering the journal in their son's apartment and turning it over to police so that he could get treatment. *See id.* Others have reported that the journal was discovered by the police during a routine search of his premises conducted under the terms of his probation. *See* Varadarajan, *supra* note 13, at A19.

27. *See* Buckley, *supra* note 21, at 1A.

28. *See id.*

29. *See* Tim Doulin, *Judge Won't Let Offender Change Plea*, COLUMBUS DISPATCH, Oct. 20, 2001, at 01C.

30. *See id.*

31. OHIO REV. CODE ANN. § 2907.321(A)(1) (Anderson 2001).

32. The Queen v. Sharpe, [2001] S.C.R. 45 (Can.); *see also* Robert Martin, Case Comment, R. v. Sharpe, 39 ALBERTA L. REV. 585 (2001).

cates or counsels sexual activity with a person under the age of eighteen years."[33] The Court was extremely concerned that such a definition would include "written works created by the author alone, solely for his or her own eyes,"[34] specifically addressing cases involving private journals and diaries.

After balancing the impairment of free expression against the benefits of such a prohibition, the Court ultimately concluded that such material must be exempted from the statutory prohibition.[35] The lost freedom of expression was significant. Diaries and private journals were seen as "intensely private" and expressive.[36] Furthermore, such expression deeply implicated the values of self-fulfillment, self-actualization, and the inherent dignity of the individual.[37] At the same time, the Court recognized that the link between such diaries and any risk of harm to children is extremely tenuous.[38] As a result, "[t]o ban the possession of our own private musings thus falls perilously close to criminalizing the mere articulation of thought."[39] Thus, the Supreme Court of Canada made clear that the tenuous link to child abuse could not justify regulating the contents of personal diaries.

Many have noted that Ohio could have avoided any constitutional issues by simply enforcing the terms of Dalton's probation.[40] A condition of Dalton's release from prison following his prior conviction was that he not possess any obscene material, even within the confines of his home.[41] However, since the obscenity statute has a provision for increased penalties for repeat offenders, prosecutors charged Dalton with pandering obscenity involving minors as a result of the entries in his personal diary.[42]

Despite the uproar Dalton's case has caused among civil libertarians, no court will likely rule on the merits of his constitutional claims. Seeking to avoid the negative publicity of a trial, and perhaps not truly believing that he would receive such a substantial sentence, Dalton pled guilty to the charges.[43] However, Dalton was sentenced to seven years in

33. *Sharpe*, [2001] S.C.R. at 63–65. Such a definition is clearly broader than the formulation of what constitutes child pornography in the United States, but could instead be regulated in the United States under *Brandenburg*'s standards for punishing advocacy of illegal conduct, i.e., sexual intercourse with minors. *See infra* notes 146–48 and accompanying text.

34. *Sharpe*, [2001] S.C.R. at 85.

35. *Id.* at 50.

36. *Id.* at 93.

37. *Id.* at 85. Granted, in recognizing such values, the Supreme Court of Canada was focusing primarily on diary entries authored by teens containing standard descriptions of adolescence, as opposed to the disturbed fantasies of a pedophile.

38. *Id.* at 93.

39. *Id.* at 108.

40. *See* Mark Davis, Editorial, *Porn Probationer Should Be Prosecuted*, FORT WORTH STAR TELEGRAM, Aug. 8, 2001, at 13.

41. *See id.*

42. The statute provides that "[i]f the offender previously has been convicted of or pleaded guilty to a violation of this section . . . pandering obscenity involving a minor . . . is a felony of the third degree." OHIO REV. CODE ANN. § 2907.321(C) (Anderson 2001).

43. *See* Buckley, *supra* note 21, at 1A.

prison.[44] He has since repeatedly attempted to withdraw his guilty plea, urging that his attorney did not fully explain the constitutional arguments he could have raised.[45] The judge in the case has refused to allow Dalton to change his guilty plea, however, noting that Dalton made the knowing decision not to contest the statute.[46] Still, the question remains, should Brian Dalton have to spend seven years of his life behind bars for the contents of a private journal?

III. ANALYSIS

Government abridgment of speech can take one of two forms.[47] First, the government may enact time, place, or manner restrictions that are aimed at the noncommunicative impact of speech.[48] Such regulations are less suspect in that they do not target the message of the speech. A simple example of such a regulation would be a prohibition against loudspeakers in residential areas, regardless of the message conveyed.[49] In such cases, courts balance First Amendment values against the government's regulatory interests on a case-by-case basis,[50] with the government likely to prevail so long as the regulations are not unduly restrictive.[51]

A second, more suspect government regulation is one aimed at the content, or the communicative impact of the speech itself.[52] Such regulation is "presumptively at odds with the First Amendment. For if the constitutional guarantee means anything, it means that, ordinarily at least, 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"[53] In these instances, case-by-case balancing of interests does not occur. Instead, the Supreme Court has mandated a system of "definitional balancing,"[54] where a law is deemed unconstitutional unless it regulates a category of speech that has been recognized as unprotected by the First Amendment.[55]

Cohen v. California[56] is frequently cited as representing this typical approach to free speech cases. In *Cohen*, the defendant was convicted for disturbing the peace after wearing a jacket bearing the words "fuck

44. *See id.*; *see also Punishing Thoughts?*, COLUMBUS DISPATCH, Sept. 10, 2001, at 10A.
45. *See* Liz Sidot, *Man Fights Guilty Plea Over Diary*, CHI. TRIB., Oct. 21, 2001, at 17.
46. *See* Doulin, *supra* note 29, at 01C.
47. *See* TRIBE, *supra* note 15, § 12-2. Professor Tribe has advocated treating these cases on one of two "tracks," where the track of analysis followed dictates the level of review to be applied. *See id.*
48. *See id.*
49. *See id.*
50. *See id.*; *see also* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 119 (1981) (arguing that the content distinction should be abandoned as unworkable).
51. *See* TRIBE, *supra* note 15, § 12-2.
52. *See id.*
53. *See id.* (quoting City of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972)).
54. *See* Redish, *supra* note 50, at 119.
55. *See* TRIBE, *supra* note 15, § 12-2.
56. 403 U.S. 15 (1971).

the draft" in a courthouse.[57] The Court held that the case "cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression" such as obscene speech or fighting words.[58] As a result, Cohen's expression could not be punished consistent with the First Amendment. Thus, to defend a law that restricts the content of speech, the government must prove that it fits within a category of speech the Supreme Court has recognized as punishable.

Ohio's law prohibiting the pandering of obscenity involving a minor clearly falls within the latter, more suspect type of regulation. Brian Dalton was not convicted merely because he kept a personal journal. On the contrary, he was prosecuted because of its content. As a result, Dalton's conviction is only justifiable if the personal journal fits within a recognized category of punishable expression, such as obscenity,[59] child pornography,[60] or speech that incites imminent violence.[61] An analysis of each reveals that Dalton's expression falls short of being punishable under current standards, and an extension of any category to such expression is unwise.

A. Regulating Obscenity Under Miller *and* Stanley

In *Roth v. United States*,[62] the Supreme Court first recognized that obscenity is not protected by the First Amendment. *Roth* involved a conviction for mailing obscene circulars and advertising to solicit sales.[63] The Court noted that any ideas having even the "slightest redeeming social importance" are generally protected by the First Amendment.[64] The Court, however, went on to explain that the history of the First Amendment rejects obscenity as "utterly without redeeming social importance."[65] Although *Roth* clearly established that obscenity is not protected by the First Amendment, it did not define obscenity in great detail. *Roth* merely used the test of "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[66]

57. *See id.* at 16–17.

58. *Id.* at 20–21; *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.").

59. *See infra* notes 62–88 and accompanying text.

60. *See infra* notes 89–126 and accompanying text.

61. *See infra* notes 127–87 and accompanying text.

62. 354 U.S. 476 (1957).

63. *Id.* at 480.

64. *Id.* at 484.

65. *Id.*

66. *Id*. at 489.

In *Miller v. California*, the Court readdressed the issue to better define obscenity and rectify what at least one Justice called "the intractable obscenity problem."[67] Like *Roth*, *Miller* also involved a mass-mailing campaign where explicit materials were "thrust by aggressive sales action upon unwilling recipients."[68] The Court rearticulated that obscenity is not protected by the First Amendment, noting that "to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom."[69]

In defining obscenity, the *Miller* Court announced the following three-part test:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[70]

This test was ultimately designed to "isolate 'hard core' pornography from expression protected by the First Amendment."[71] These three requirements—appealing to the prurient interest, depicting sexual conduct in a patently offensive manner, and lacking redeeming values—continue to measure what can be punished as obscene consistent with the First Amendment.

Although *Miller* made little attempt to define the scope of these requirements with regard to mediums of expression, the Court has made clear that words alone can be obscene. *Kaplan v. California*[72] involved a conviction for the sale of the book entitled "Suite 69" under the same obscenity statute as in *Miller*.[73] The book had a plain cover with no pictures, and contained repetitive descriptions of sexual conduct "to the point of being nauseous."[74]

In holding that words alone can be punished, the Court noted that *Miller* made "no distinction . . . as to the medium of the expression" and that obscenity can "manifest itself in conduct, in the pictorial representation of conduct, or in the written and oral description of conduct."[75] Even though the punishable material contained merely words, it was regarded as "capable of encouraging or causing antisocial behavior."[76]

67. 413 U.S. 15, 16 (1973) (quoting Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting)).
68. *See id*. at 18.
69. *Id.* at 34.
70. *Id.* at 24 (citations omitted).
71. *Id.* at 29.
72. 413 U.S. 115 (1973).
73. *See id.* at 116.
74. *Id.* at 117.
75. *Id.* at 119.
76. *Id.* at 120.

Thus, at least in the obscenity context, the Supreme Court has made clear that words are as potentially dangerous as pictures in their potential effect on readers or viewers. This certainly illustrates that Ohio had an understandable interest in attempting to regulate written material such as Dalton's diary.

Determining whether a given work is obscene under *Miller* is necessarily a case-by-case inquiry, but in this case, there is seemingly little doubt that the standard is satisfied. Courts have recognized that the age of those depicted is relevant towards determining whether a given work is obscene.[77] With this in mind, the diary, taken as a whole, clearly appeals to the prurient interest. It describes the sexual torture of young children, clearly offending contemporary community standards. Like "Suite 69" in *Kaplan*,[78] it describes sexual conduct in a patently offensive manner. When passages of the diary were read to the grand jury, the jurors were so sickened that they asked a detective to stop reading after two pages.[79] One juror even broke into tears.[80] Furthermore, few would argue that the diary as having any redeeming social value of any kind. It was intended for Dalton's personal use only, not to be distributed or enjoyed by others. However, herein lies the problem.

In *Stanley v. Georgia*, the Supreme Court ruled that the mere private possession of obscenity cannot be punished.[81] In *Stanley*, police discovered three reels of eight-millimeter film while executing a search warrant designed to uncover evidence of bookmaking.[82] The police concluded that the films were obscene, and the defendant was arrested and convicted of possessing obscene materials.[83] However, the Court recognized that although these materials were obscene, they must consider an individual's right "to be free . . . from unwanted governmental intrusions into [his] privacy."[84] The Court ultimately concluded that the State "has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[85]

Most relevant to the case of Brian Dalton, *Stanley* went on the note that the government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."[86] Dalton's case presents a prime example of this suspicious rationale. Unlike Stanley,

77. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 240 (2002) (stating that "we may assume that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards").

78. The book at issue in *Kaplan* contained "[a]lmost every conceivable variety of sexual contact, homosexual and heterosexual . . . [w]hether one samples every 5th, 10th, or 20th page, beginning at any point or page at random, the content [was] unvarying." *Kaplan*, 413 U.S. at 117.

79. *See* Peraino, *supra* note 15, at 36.

80. *Id.*

81. 394 U.S. 557, 559 (1969).

82. *Id.* at 558.

83. *Id.*

84. *Id.* at 564.

85. *Id.* at 565.

86. *Id.* at 566.

Dalton did not merely view or read obscenity created by someone else, he created it himself within the confines of his home.[87] He presumably had these thoughts and happened to write them down in his personal, private journal. As Professor Tribe has noted, this comes "as close as you can get to . . . creating a thought crime."[88] Thus, although Dalton's diary is likely obscene, it cannot be punished as such, as Dalton merely possessed the material within the confines of his home. Thus, if the Ohio statute is a mere obscenity statute, the diary cannot be punished consistent with First Amendment standards.

B. Child Pornography, Ferber*, and* Ashcroft

Given that Ohio already has a separate statute for the mere pandering of obscenity,[89] which requires some form of commercial exploitation or distribution,[90] the broader "pandering obscenity involving a minor" statute clearly has strong overtones of regulating child pornography, even though it is on its face still an obscenity statute.[91] Thus, it is essen-

87. *Stanley* should be taken with a grain of salt as the Court has subsequently defined it as an extremely narrow holding. For example, although an individual has a right to privately possess obscenity, the Court has repeatedly held that states can regulate the channels through which that material arrives in the home. *See generally* Claudia Tuchman, Note, *Does Privacy Have Four Walls? Salvaging* Stanley v. Georgia, 94 COLUM. L. REV. 2267, 2275 (1994). However, Dalton's case still falls within the narrow ruling of *Stanley* as it does involve pure private possession. The diary was created and intended to be kept within the confines of the home.

88. *See* Peraino, *supra* note 15, at 36; *see also* Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 655 n.36 (2002) (noting that Dalton's conviction is a "dramatic violation" of the doctrine rejecting the government's power to control citizens' minds).

89. OHIO REV. CODE ANN. § 2907.32 (Anderson 2001).

90. *See id.* § 2907.32(A)(1) (providing that "no person . . . shall . . . create, reproduce, or publish any obscene material, when the offender knows that the material is to be used for commercial exploitation or will be publicly disseminated or displayed").

91. The statute on its face simply increases penalties for obscenity that involves minors. It would not appear to address the issue of child pornography. Under the general pandering obscenity statute, pandering obscenity is a felony of the fifth degree. *See id.* § 2907.32(C). However, where that obscenity involves a minor, it can be a felony of the second degree. *See id.* § 2907.321(C). In either case, a showing of obscenity is still required, as Ohio courts have incorporated the *Miller* standard into the statutory definition of obscenity. *See* State v. Ward, 619 N.E.2d 1097, 1099 (Ohio Ct. App. 1993).

Explicitly missing from the statute, however, is any requirement of distribution or commercial exploitation, as would be required if material is only obscene under *Miller* and *Stanley*. *See generally* § 2907.321. Whereas the "pandering obscenity" statute requires that the material be used for "commercial exploitation" or be "publicly disseminated," the "pandering obscenity involving a minor" makes it illegal to merely "create" or "reproduce" the works. *See id.* This lack of a distribution requirement suggests some reliance on child pornography jurisprudence, which allows a prohibition on private possession.

The *Lesinski* case further demonstrates the statute's link to child pornography. Ohio v. Lesinski, No. L-86-265, 1987 WL 13692 (Ohio Ct. App. 1987); *supra* note 20 (discussing Lesinski's conviction based on written expression). Foreshadowing the Supreme Court's decision a decade later in *Ashcroft*, the Ohio Court of Appeals attempts to limit the statute to materials "which actually have a minor as one of its participants." *Id.* at *3. Placing such a limitation on the statute—although largely ignored—clearly indicates that it attempts to regulate not just obscenity, but child pornography as well.

Ohio does have a separate statute, in § 2907.323, which commands that no person shall "[p]hotograph any minor who is not the person's child or ward in a state of nudity, or create, direct,

tial to consider the constitutionality of the statute not only under the obscenity doctrine, but under child pornography standards as well. But since the regulation of child pornography is limited to *visual* depictions of *actual* children, punishing Dalton for diary writings is impermissible under this rationale.

Apart from obscenity, states can punish the possession or sale of child pornography. The Supreme Court first excluded child pornography from First Amendment protection in *New York v. Ferber*.[92] The *Ferber* ruling and subsequent cases on child pornography give the states "greater leeway in the regulation of pornographic depictions of children."[93] Proof of obscenity is not required, and most essential to the Brian Dalton case, private possession can be outlawed.

In *Ferber*, a bookstore owner was convicted after selling films that depicted young boys engaged in sexual conduct.[94] The defendant was charged under a New York law forbidding "the use of a child in a sexual performance," and defined performance as "any play, motion picture, photograph or dance . . . or any other visual representation exhibited before an audience."[95] The Court ultimately held that nonobscene adolescent sex could be singled out for punishment apart from obscenity as defined in *Miller*.[96] In altering the *Miller* formulation to regulate child pornography, "[a] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole."[97] Thus, essentially any work that depicts a minor engaging in sexual conduct can be punished.[98]

produce, or transfer any material or performance that shows the minor in a state of nudity." *See* § 2907.323. This fits as a traditional child pornography statute that does not require proof of obscenity but does require that the depictions are visual and not just "any" depiction.

92. 458 U.S. 747 (1982).

93. *Id.* at 756.

94. *Id.* at 752.

95. *Id.* at 750–51 (quoting N.Y. PENAL LAW §§ 263.00–.05 (McKinney 1980)).

96. *See id.* at 753.

97. *Id.* at 764.

98. The Supreme Court has never specifically defined child pornography, instead it has merely upheld statutory definitions it has confronted. *See* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921 (2001) [hereinafter Adler, *Inverting*]. Since *Ferber*, federal courts have "tolerated child pornography statues that define child pornography in increasingly broad and subjective terms." *See* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 238 (2001) [hereinafter Adler, *Perverse Law*]. The 1984 Child Protection Act, adopting language from *Ferber*, had prohibited "lewd" or "lascivious exhibition of the genitals." *Id.* (citing Child Protection Act of 1984, Pub. L. No. 98-292, § 5, 98 Stat. 204, 205 (codified as amended at 18 U.S.C. § 2253 (2000)).

In *Massachusetts v. Oakes*, several Justices approved of a law that prohibits all depictions of child nudity, with limited exceptions for a narrow range of proper purposes such as family photographs. *See* 491 U.S. 576, 588–90 (1989) (Scalia and Blackmun, J.J., concurring). Furthermore, the Third Circuit has held that a depiction can be "lascivious" even if the child is wearing clothes, such as where a video zooms in on the genital areas of clothed girls. *See* United States v. Knox, 32 F.3d 733, 747–48 (3d Cir. 1994). The Ninth Circuit has endorsed a broad multifactor test to define child pornography, including such factors as whether the visual depictions suggest sexual coyness or a willingness to engage in sex-

This holding was based on the rationale of preventing "the abuse of children who are made to engage in sexual conduct for commercial purposes."[99] The Court went on to note that the State's interest in "safeguarding the physical and psychological well-being of a minor is compelling."[100] The Court also focused on several other aspects of child pornography: the harm caused by a permanent record of a child's participation, the need to remove the economic motive for such practices, and the *de minimis* value of this expression.[101] As with obscenity, the lack of First Amendment value to this type of speech has been used to readily justify its prohibition.

This is the first layer of additional protection in regulating child pornography. Because of the greater societal interest in protecting children from abuse, material need not be obscene under the *Miller* requirements to justify regulation if minors are portrayed in sexual acts. A second layer of protection—especially relevant to this discussion—exists with regard to child pornography. Because the main focus is on the harm to children from the mere production of the material, as opposed to the effect on the viewer, private possession can be outlawed, unlike with general obscenity. The child subject is harmed by the specific acts depicted, regardless of whether the material remains in the home or is distributed to a wider audience.

In *Osborne v. Ohio*,[102] the Supreme Court rejected extending the *Stanley* rationale to child pornography, and held that private possession can be outlawed.[103] In *Osborne*, the police found photographs of nude adolescents in the defendant's home, very much like Dalton's first conviction for possessing similar photographs. The Court stated that "the interests underlying child pornography prohibition far exceed the interests justifying the [obscenity] law at issue in *Stanley*."[104] Here, the Court noted that the concern is not the effect on the mind of its viewers, but instead on the "physiological, emotional, and mental health of the child."[105]

Coinciding with this rationale, however, the scope of punishable child pornography is limited to visual images of actual children. In *Ferber*, the Court noted that "the nature of the harm to be combated requires that the . . . offense be limited to works that *visually* depict sexual conduct by children below a specified age."[106] Thus, *Ferber* limits regula-

ual activity and whether the depiction is designed to elicit a sexual response from the viewer. *See* United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987); United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom*. But each of these broad standards still requires some *visual* depiction of *actual* children, consistent with the Court's holdings in *Ferber* and *Ashcroft*.

99. *Ferber*, 458 U.S. at 753.
100. *Id.* at 756–57 (citations omitted).
101. *See id.* at 759–63.
102. 495 U.S. 103 (1990).
103. *Id.*
104. *Id.* at 108.
105. *Id.* at 109.
106. *Ferber*, 458 U.S. at 764.

tion to where a real child is depicted and needs protection from abuse.[107] Such a rule clearly forbids Dalton's punishment under child pornography rationale, as not only did he produce words and not pictures, but the subjects of the written depiction are presumably fictional children as well.

The Court's recent decision in *Ashcroft v. Free Speech Coalition* clarified that only depictions of *actual* children can constitute child pornography, further foreclosing the possibility of punishing fictional written expression, at least under the rubric of child pornography.[108] *Ashcroft* involved the constitutionality of the Child Pornography Prevention Act of 1996 (CPPA), which prohibited any visual depiction that "appears to be, of a minor engaging in sexually explicit conduct" or one that is advertised in such a manner to convey the impression it contains such a depiction.[109] Such a broad definition encompassed computer-generated images that appeared to depict minors and certain movies that used older actors to portray minors engaged in sexual conduct.[110]

Congress, in passing the CPPA, cited various ways in which such material could threaten children. First, there was concern that pedophiles would use such materials to encourage otherwise reluctant children to participate in sexual activity.[111] The rationale was that children, "by viewing depictions of other children 'having fun' participating in such activity," would be more likely to submit to a pedophile's advances.[112] Second, Congress was concerned that pedophiles might "whet their own sexual appetites" through such material, and as a result, the sexual abuse of actual children would increase.[113] The Court recognized that under these rationales "harm flows from the content of the images, not from the means of their production."[114] Thus, in passing the CPPA, Congress attempted to shift the focus of child pornography regulation from protecting children directly harmed by the production of such materials to protecting children at-large who may be indirectly harmed by pedophiles accessing these fictional depictions.[115]

The Supreme Court, however, resisted shifting the basis for regulating child pornography by recognizing that *Ferber* ultimately targeted the "production of the work, not its content."[116] Child pornography regulation is permissible only when targeted at the evils of the production

107. *See supra* notes 99–100 and accompanying text.
108. 535 U.S. 234 (2002) (internal quotation marks omitted).
109. *See* 18 U.S.C. § 2256(8)(B) (Supp. V 1999).
110. *See Ashcroft*, 535 U.S. at 241.
111. *See id*.
112. *Id.* (internal citations omitted).
113. *Id.*
114. *Id.* at 242.
115. The growing focus in child pornography law on the harm caused to society as a whole has been criticized by some as a severe departure from the original basis of *Ferber* of protecting the specific subjects of child pornography from sexual abuse. *See* Adler, *Perverse Law*, *supra* note 98, at 246–55 (arguing that expanded child pornography laws designed to meet the growing crisis of child sexual abuse have the opposite effect of actually encouraging abuse).
116. *See Ashcroft*, 535 U.S. at 249.

process itself, and not the effect of the material on its eventual viewers. The Court articulated two primary justifications for this limitation. First, such a limitation is necessary to avoid suppressing too much speech.[117] Second, the Court did not find sufficient proof that such material directly leads to the sexual abuse of children.[118]

The Court in *Ashcroft* was visibly concerned that an extension of child pornography beyond visual images of actual children would suppress speech with significant value. Under *Ferber*, child pornography need not be obscene or patently offensive to be punished, so long as minors are depicted engaging in sexual conduct.[119] Thus, if any material that appeared to depict child sexuality were outlawed, countless literary works and films would be in jeopardy. The Court cited many highly acclaimed films, such as *Traffic*[120] and *American Beauty*,[121] which used older actresses to depict minors engaged in sexual activity. But under the CPPA's broad standards, if "these films, or hundreds of others of lesser note that explore [teenage sexuality], contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value."[122]

But more relevant to a case like Brian Dalton's, the Court did not believe there was sufficient evidence that viewing such material would lead to the sexual abuse of children. In finding that virtual child pornography is not "intrinsically related" to sexual abuse, the Court believed "the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts."[123] Furthermore, and most significantly, the "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."[124] Thus, Dalton's diary cannot be banned merely because of a tendency to encourage child abuse. Instead, to justify prohibiting such material, the government would have to show "a significantly stronger, more direct connection" to the sexual abuse of children.[125]

Therefore, *Ferber* and *Ashcroft* make clear that only visual depictions of actual children can be prohibited to prevent child abuse in the production process. In the case of Brian Dalton, it is clear that no children were harmed in the production of his journal. Instead, Ohio sought

117. *See id.* at 251–53.
118. *Id.* at 250.
119. New York v. Ferber, 458 U.S. 747, 764 (1982).
120. *Traffic* was nominated for "Best Picture" at the Academy Awards in 2001. *See Ashcroft*, 535 U.S. at 248.
121. *American Beauty* was nominated for and won the Academy Award for "Best Picture" in 2000. *See id.* at 247.
122. *Id.* at 248.
123. *Id.* at 250.
124. *Id.* at 253.
125. *Id.* at 253–54.

to punish Dalton on the rationale that the diary's fictional contents posed a certain danger to children at-large. Under *Ashcroft*, such reasoning cannot justify regulating such material as child pornography. *Ashcroft* did raise the possibility that such material can be prohibited so long as there is a stronger, direct connection to child abuse.[126] However, a more in-depth examination of the requirements of the Supreme Court's incitement jurisprudence, and a review of the scientific evidence examining the effect of such a diary, fails to establish such a direct connection.

C. Incitement of Illegal Conduct

Prohibiting all written depictions of children engaged in sexual activity would clearly broaden the scope of "child pornography" beyond what is truly necessary to protect children from pedophiles. However, a more limited prohibition may be appropriate. Brian Dalton's case presents a unique issue. He is not merely reading these fictional depictions, he authored them, which may present a significant danger that he will act them out. An argument may be made that this situation is no different than had he given a speech advocating his fantasy in front of an elementary school or to a group of pedophiles in a treatment facility.[127] In *Roth*, the Court made clear that if material is obscene, a showing that it will "create a clear and present danger of antisocial conduct" is not required to justify punishment.[128] Conversely, this implies that if the obscenity standards cannot be met in a given case, a likely imminent danger of antisocial conduct from such expression could provide an independent basis for regulation.

In *Schenk v. United States*, the Supreme Court first recognized that words can be punished if they "create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[129] Clearly, Congress and the states have a right to prevent child abuse.[130] The Court's "clear and present danger" approach has since been supplanted by the standard announced in *Brandenburg v. Ohio*[131] for instances of incitement to illegal conduct. The issue that must be explored here is whether an individual can be punished for what may be described as, for lack of a better term, self-incitement, consistent with the Supreme Court's approach to regulating the incitement or advocacy of illegal conduct.

126. *Id.*

127. Such a situation is likely punishable under *Brandenburg*, as based on the speaker's surroundings, such expression is likely and intended to incite imminent lawless action. *See* Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969).

128. Roth v. United States, 354 U.S. 476, 486 (1957).

129. 249 U.S. 47, 52 (1919).

130. *See generally Ashcroft*, 535 U.S. at 244 (stating that "sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people"). New York v. Ferber, 458 U.S. 747 (1982) (recognizing that the prevention of child abuse is a compelling interest).

131. *Brandenburg*, 395 U.S. at 448–49.

1. Evolution of the Clear and Present Danger Test

In *Schenk*, the defendants were convicted under the Espionage Act for distributing leaflets urging that the draft was a form of involuntary servitude, allegedly calculated to cause "insubordination and obstruction."[132] Although there was little evidence that these leaflets would actually lead to violence, the Court reasoned that the leaflets would not have been distributed unless intended to have some effect.[133] Similarly, in *Abrams v. United States*,[134] the Court affirmed the convictions of a group of immigrants who circulated petitions objecting to having American troops in Eastern Europe.[135] The approach used to the clear and present danger standard in these cases has been referred to as the "bad tendency" era, where speech that could have the mere tendency to incite violence could be punished.[136]

Applying a heavily speech-restrictive standard such as this to Dalton's case could certainly justify punishment. Although there would be little proof that lawless action was soon to follow, it is certainly conceivable that engaging in such behavior could have the tendency to invoke the actual illegal activity of child abuse. Applying such an approach is clearly flawed, however, and has been generally rejected by the Court. Justice Holmes, dissenting in *Abrams* and in later cases, repeatedly stressed that there must truly be a clear and present danger of illegal action.[137] In other words, there must be reasonable ground to believe that the danger apprehended is actually imminent.[138]

132. *Schenk*, 249 U.S. at 49.

133. *See id.* at 51.

134. 250 U.S. 616 (1919).

135. *See id.* at 617–18, 624.

136. *See generally* Rodney A. Smolla, *Should the* Brandenburg v. Ohio *Incitement Test Apply in Media Violence Tort Cases?*, 27 N. KY. L. REV. 1, 25 (2000).

137. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 806–08 (1997). In *Abrams*, Holmes recognized the continued validity of the clear and present danger line of cases in noting that he

> does not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States . . . may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.

Abrams, 250 U.S. at 627. But in stressing the importance of allowing the value of opinions to be tested through market competition, speech should only be suppressed where it "so imminently threaten[s] immediate interference with the lawful and pressing purposes of the law." *Id.* at 630. For Holmes, this standard was not met in *Abrams*. *See id.* at 631.

138. *See id.* at 627. In *Gitlow v. New York*, the Court had again upheld a conviction for the distribution of literature allegedly advocating the overthrow of government by forcible means. 268 U.S. 652 (1925). Justice Holmes (and Brandeis) again dissented from the judgment, believing that there was "no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views." *Id.* at 673 (Holmes, J., dissenting). The literature's publication alone, without some showing of imminent danger, should have been insufficient to withstand First Amendment scrutiny. The importance of the imminence requirement would later be highlighted with the Court's holding in *Brandenburg*. *See infra* notes 146–48 and accompanying text.

In the 1950s a different approach to the clear and present danger problem emerged in *Dennis v. United States*.[139] The case involved the convictions of several alleged communists under the Smith Act for advocating the overthrow of the government.[140] In *Dennis*, the Court would adopt a formula by Judge Learned Hand.[141] This balancing approach required that in each case courts "must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[142]

Such an approach seemingly provides a sound basis to potentially punish behavior such as Dalton's. In applying the risk formula, the gravity of the evil, although not as grave as the potential overthrow of the government, is clearly substantial. As the Court made clear in *Ferber*, child abuse is a grave evil from which children need strong protection.[143] Whether a pedophile will always act out his writings is unclear.[144] In Dalton's case at least, he had authored a prior journal that did come true to some extent.[145] Thus, there may have been a strong possibility that his behavior would have escalated into actual abuse again.

However, *Brandenburg v. Ohio*[146] created the modern, stricter stan-

139. 341 U.S. 494 (1951).

140. *Id.*

141. *See* CHEMERINSKY, *supra* note 137, at 809.

142. *Dennis*, 341 U.S. at 510 (internal citations omitted).

143. *See supra* notes 99–101 and accompanying text.

144. *See infra* notes 157–87 and accompanying text.

145. *See supra* notes 21–23 and accompanying text.

146. 395 U.S. 444 (1969). Some have argued that the "clear and present danger" analysis was not entirely supplanted by the Court's ruling in *Brandenburg*. For example, Smolla has argued that "[t]here are innumerable other First Amendment contexts in which the *Brandenburg* standard just does not apply, contexts in which the Supreme Court has fashioned special standards suited for the balance of interests at hand." Smolla, *supra* note 136, at 12. Specifically, Smolla argues that *Brandenburg* was not meant to apply beyond the limited context of the specific cases under which it arose, where government seeks to forbid advocacy of the use of force or law violation. *See id.* at 14.

For example, in *Rice v. Paladin Enterprises, Inc.*, the Fourth Circuit liberally applied the *Brandenburg* analysis in holding a publisher liable for providing an instruction manual explaining how to earn a living as a hit man. 128 F.3d 233, 244 (4th Cir. 1997). In such a case, *Brandenburg*'s imminence standard would be difficult to meet because of the delay between when the words were written and when they were read. *See also* John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425 (2002). In *Rice*, the court allowed a departure from the imminence requirement where the defendant provided detailed instructions on how to commit the crime, essentially as an aider and abettor. 128 F.3d at 246–49.

One court, since *Brandenburg*, has actually applied the clear and present danger rational to justify punishment of inappropriate written expression regarding children. In *United States v. Hartwig*, a conviction for "conduct unbecoming an officer" was upheld after an army captain sent a fourteen-year-old girl a letter suggesting they pursue a relationship and exchange their "most intimate feelings" in subsequent "fantasy" letters. 39 M.J. 125, 127 (C.M.A. 1994). The court held that the letter posed a clear and present danger of compromising the defendant's standing as an officer. *See id.* at 128. In rejecting the defendant's claim that proof of actual harm was required, the court noted that "[f]orbidden speech is measured by its tendency, not its actual effect." *Id.* at 130 (internal citations omitted). In stressing the importance of the speech's tendency, the court reverts to a standard close to the "bad tendency" era of *Schenk* and *Abrams*.

Although these lower courts have been willing to stray somewhat from the strict requirements of *Brandenburg*, the Supreme Court has never approved of such an approach. In fact, the Supreme Court in *Ashcroft* reaffirmed that a mere tendency to cause illegal action is insufficient grounds to

dard for cases involving incitement or advocacy of illegal activity. In *Brandenburg*, the Court overturned a conviction of a Ku Klux Klan leader for advocating violence at a rally. The new standard announced by the Court held that a state cannot punish advocacy of illegal conduct except where "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[147] This standard is far more speech-protective in that it requires *intent* on the part of the speaker and likely *imminent* lawless action.[148] This test is presently the predominant test in analyzing incitement to violence cases.

2. Potential to Trigger Actual Abuse

It was under this *Brandenburg* standard that the Court in *Ashcroft* declined to recognize a sufficient link between fictional child pornography and child abuse. There was insufficient evidence that imminent abuse was intended or likely to occur as a result of such speech. There was "no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."[149] Likewise, in *American Booksellers Ass'n, Inc. v. Hudnut,*[150] the Seventh Circuit noted that there was no "direct link" between obscenity and violence against women, and that any ill "effects depend on mental intermediation."[151] These would appear to foreclose any argument that an individual such as Brian Dalton can be subject to punishment based on the potential effect of his diary. However, it is worth exploring whether Brian Dalton's speech posed a unique likelihood of imminent illegal conduct that decisions such as *Ashcroft* and *Hudnut* may not have addressed.

In Brian Dalton's case, a known pedophile, his authorship and possession of these writings may have posed some danger that he would have engaged in child abuse in the near future. His first diary, discovered in the course of his prior conviction for pandering obscenity involving a minor, did come true to some degree.[152] The diary contents mirrored, to an exaggerated extent, inappropriate contact between himself and his younger cousin.[153]

suppress speech. *See supra* notes 123–25 and accompanying text. Thus, absent an extension of *Brandenburg*, there is little ground to argue that a diary such as Brian Dalton's creates a clear and present danger of child abuse, absent the explicit requirements under *Brandenburg.*

147. *Brandenburg*, 395 U.S. at 447.

148. The Court would later emphasize the importance of the imminence requirement in overturning a disorderly conduct conviction of demonstrators who made the statement overheard by police, "'[w]e'll take the fucking street later.'" Hess v. Indiana, 414 U.S. 105, 107 (1973). At most, this statement constituted the advocacy of action at some point in the future, and lacked the imminence required under the *Brandenburg* test. *See id.* at 108–09.

149. Ashcroft v. The Free Speech Coalition, 535 U.S. 234, 253 (2002).

150. 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

151. *Id.* at 329 & n.2.

152. *See supra* notes 21–23 and accompanying text.

153. *See id.*

Here, he was caught with a far more sadistic diary containing fantasies of kidnapping and molestation. Dalton made remarks that he believed it would be "easy" to carry out such a plan.[154] Thus, all indications were that Dalton was close to turning this fantasy into a reality, in the same manner that has justified punishment of high school students caught with "fantasies" of committing severe acts of violence in the classroom, or perceived threats to the life of the President.[155] But just how likely was Dalton's speech in his journal to lead to actual abuse? Resolving this question is critical under any application of incitement analysis to these facts. As Justice Holmes originally advocated and subsequent Court decisions have emphasized, some showing that imminent danger is likely required under this rationale.[156]

Some have urged that writing and rereading these accounts strengthen the desire to engage in the depicted activity and could trigger actual abuse and molestation of children.[157] Along these lines, in the case of pedophiles, journal writing may not be harmless if it interferes with the development of self-control and avoiding activities and triggers antisocial action.[158] On the other hand, some have suggested that allowing a pedophile to put these repulsive thoughts in writing does have certain benefits.[159] Primarily, the theory states that by venting these thoughts on paper, one is less likely to actually act on them.[160]

Initial research in the social sciences found no link between sexually explicit materials and antisocial conduct. In 1967, Congress established an advisory commission to study the causal relationship between sexually explicit materials and antisocial behavior.[161] In 1970, the Report of the Commission on Obscenity and Pornography was issued.[162] The report

154. *See supra* note 29 and accompanying text.

155. Commentators have argued that had Dalton's diary contained threats to the President of the United States or a plan to duplicate the school shooting at Columbine High School, there would be little hesitation to intervene and punish the author. *See* Janet M. LaRue, *A Private Journal and the First Amendment*, SUN-SENTINEL, Aug. 17, 2001, at 31A. Indeed, in *Watts v. United States*, the Supreme Court recognized the overwhelming interest of protecting the President. 394 U.S. 705 (1969). "The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." *Id.* at 707. Thus, so long as a statement contained a "true threat" to the President, and not merely hyperbole voicing political opposition, the speaker can be punished. *See id.* at 707–08. This presumably remains the case whether the threat is voiced on the mall in Washington, D.C., or in one's personal journal that happens to be discovered by the police.

156. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

157. *See* Cynthia S. Osborne, *Even in Writing, Child Pornography Can Trigger Abuse*, BALTIMORE SUN, Aug. 12, 2001, at 3C.

158. *See id.* Osborne argues that from a psychological standpoint, to avoid the target behavior (i.e., child molestation), exposure to trigger behavior (i.e., any form of child pornography) must be eliminated. *See id.*

159. *See* Joe Loya, *How Can Writing in Your Journal Be a Crime?*, L.A. TIMES, Aug. 5, 2001, at M3.

160. *See id.*

161. REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 1 (Bantam Books 1970).

162. *See id.*

concluded that "empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults."[163]

The report relied on studies from Denmark, which after removing all restrictions on pornographic materials, supposedly experienced a decrease in sex offenses.[164] As pornography became more readily available in Denmark, the annual average of sexual offenses per 100,000 inhabitants dropped from eighty-five to fifty.[165] More specifically, these studies also found a decrease of eighty percent in child molestations as sexually explicit materials became more readily available.[166] Such studies propagated the belief that sexually explicit materials could function as a safety valve[167] and have a cathartic effect.[168] In other words, these studies suggested that individuals might use these materials as an alternative to acting out and committing sex crimes. These early studies, however, have been heavily criticized and largely discredited. More detailed analysis of data from Denmark revealed that the decrease in sex crimes was limited to lesser crimes such as exhibitionism and peeping, whereas the number of rapes remained steady or increased.[169] More recent studies have lent support to a social learning model, or in other words, "the more you see, the more you do."[170] Similarly, others have charged that "[p]ornography is the theory, and rape the practice."[171] A review of recent evidence does reveal a strong correlation between certain types of sexually explicit materials, specifically, violent pornography, and resulting real-life violence. But these same studies have generally failed to establish the direct causation which might be required under incitement analysis.

In 1986, the Meese Commission, headed by the Attorney General, issued a final report on pornography, following up on the report issued in 1970.[172] In studying the effects of sexually explicit materials, the report

163. *Id.* at 32.

164. *See id.* at 272–74.

165. Berl Kutchinsky, *The Effect of Easy Availability of Pornography on the Incidence of Sex Crimes: The Danish Experience*, 29 J. SOC. ISSUES 163 (1973) [hereinafter Kutchinsky, *Easy Availability*].

166. Berl Kutchinsky, *Pornography and Its Effects in Denmark and the United States: A Rejoinder and Beyond*, 8 COMP. SOC. RES. 301, 315–19 (1985); *see also* Michael S. Kimmel & Annulla Linders, *Does Censorship Make a Difference? An Aggregate Empirical Analysis of Pornography and Rape*, 8 J. PSYCH. & HUMAN SEXUALITY 1, 6 (1996) (describing Kutchinsky's findings).

167. Kutchinsky, *Easy Availability*, *supra* note 165, at 163.

168. Raqual Kennedy Bergen & Kathleen A. Bogle, *Exploring the Connection Between Pornography and Sexual Violence*, 15 VIOLENCE & VICTIMS 227, 228 (2000) (recounting early evidence such as the Kutchinsky study).

169. *Id.* (discussing studies).

170. Elizabeth Cramer et al., *Violent Pornography and Abuse of Women: Theory to Practice*, 13 VIOLENCE & VICTIMS 319, 322 (1998).

171. ROBIN MORGAN, GOING TOO FAR: THE PERSONAL CHRONICLE OF A FEMINIST 169 (1977).

172. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY (Rutledge Hill Press 1986) [hereinafter MEESE COMMISSION REPORT]. The report of the Meese Commission has been heavily criticized by groups opposing censorship of sexually explicit or other materials. *See, e.g.*,

broke them down into several categories: sexually violent material, nonviolent materials depicting degradation, nonviolent and nondegrading materials, and regular nudity.[173] The Meese Commission concluded that

> [w]hen clinical and experimental research has focused particularly on sexually violent material, the conclusions have been virtually unanimous. In both clinical and experimental settings, exposure to sexually violent materials has indicated an increase in the likelihood of aggression. More specifically, the research . . . shows a causal relationship between exposure to material of this type and aggressive behavior. . . ."[174]

The Commission went on to find that sexually violent materials led to many types of harms: acceptance of rape myths, degradation of the status of women, and modeling effects.[175] However, the conclusion that studies had found a causal relationship likely overstated the effect of such materials. Studies since 1986, while reaffirming a strong correlation between sexually violent materials and antisocial conduct, have consistently emphasized that a causal relationship has not been established.[176]

Although the Meese Commission's report addressed the problem of child pornography in great detail, it focused on the abuse to children in the production process, as opposed to the potential that child pornography could trigger actual abuse.[177] In fact, there have not been many studies examining the specific effects of child pornography on its audience. However, there are still concerns that such materials may have unique effects. This is in part due to the belief that reading or viewing such material can reinforce a pedophile's attraction to children and validate their beliefs.[178] There is at least some evidence to support linking sexually explicit materials involving children to actual child abuse. In 1976, the Los Angeles Police Department's Sexually Exploited Children Unit interviewed 150 victims and suspected offenders, and found that child pornography was involved in *every* case.[179] Furthermore, one discovery of a child pornographer's mailing list revealed that thirty to forty percent of

NATIONAL COALITION AGAINST CENSORSHIP, THE MEESE COMMISSION EXPOSED (1986); PHILIP NOBILE & ERIC NADLER, UNITED STATES OF AMERICA VS. SEX: HOW THE MEESE COMMISSION LIED ABOUT PORNOGRAPHY (1986).

173. MEESE COMMISSION REPORT, *supra* note 172, at 39–47.

174. *Id.* at 39.

175. *Id.* at 290.

176. *See, e.g.*, Bergen & Bogle, *supra* note 168, at 232 (concluding that "correlational data does not prove causality. While we cannot say that pornography causes violence against women, this research does provide more evidence about how pornography plays a role in sexual violence."); Kimmel & Linders, *supra* note 166, at 3 (noting that "such correlations assume a causation that cannot be demonstrated from the evidence").

177. MEESE COMMISSION REPORT, *supra* note 172, at 130–81.

178. *See* TIM TATE, CHILD PORNOGRAPHY: AN INVESTIGATION 109–10 (1990).

179. *See id.* at 109.

the customers were registered sex offenders.[180] Certainly, news accounts of individual instances of sexual abuse certainly foster these beliefs.

Despite these instances, there is not an abundance of scientific data establishing a causal effect between the viewing of child pornography or the reading of obscene text and actual child abuse. British researcher Dennis Howitt, after surveying the scientific research on the issue, concluded that case studies do not support a "direct causal effect" of child pornography on offending behavior.[181] Furthermore, Howitt noted that there is very often an "imperfect match between fantasy and action."[182]

Howitt's case study also revealed that most of the pedophiles interviewed reported little interest in actual child pornography.[183] Instead, many offenders used nonpornographic depictions of children to stimulate their fantasies, such as images in clothing catalogues, television, newspapers, and magazines.[184] This finding has troubling implications for a case like Brian Dalton's. Howitt would ultimately conclude that these "legal alternatives to child pornography as sources of fantasy seem to dominate in the lives of most of the offenders."[185] Dalton exhibited these same characteristics in using an alternative to traditional child pornography to stimulate his sexual fantasies. Although not suggesting a causal effect, Howitt's study reveals that this is a common characteristic among many pedophiles. This certainly creates a significant dilemma for child pornography law. The most dangerous and often-used materials are the most mainstream.

Although a review of the evidence reveals some basis for the conclusion that child pornography and fantasy may cause actual abuse, such a conclusion is somewhat speculative. In retrospect, one can easily review the history of nearly any pedophile offender and find some evidence that such behavior should have been predictable. This evidence might range from the use of actual child pornography, to "legal alternatives" such as mass media depictions of children, to diary entries such as Brian Dalton's. However, without strong evidence that viewing or authoring such material is *likely* to trigger *imminent* abuse, as required under an incitement analysis,[186] punishing expression on these grounds is clearly questionable as well. Based on language in *Ashcroft* and *Hud-*

180. *See id.* This statistic is even more troubling when one considers that relatively few abusers are ever caught. *Id.* at 109–10.

181. Dennis Howitt, *Pornography and the Paedophile: Is It Criminogenic?*, 68 BRIT. J. MED. PSYCHOL. 15, 24 (1995).

182. *See id.* at 15.

183. *See id.* at 22–24.

184. *See id.* at 24. Others have also noted that pedophiles often resort to such otherwise innocent pictures that are not traditionally seen as child pornography. *See* Adler, *Inverting*, *supra* note 98, at 943–44 (citing 1 ATTORNEY GEN. COMM'N ON PORNOGRAPHY, FINAL REP. 407 n.71 (1986)).

185. *See* Howitt, *supra* note 181, at 24. Because of this fact, Howitt explained, "it is difficult to conceive of legislation which could limit many of the things which paedophiles process into paedophiliac fantasy." *Id.*

186. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

nut,[187] without a direct causal link, correlational data is insufficient to meet the requirements of *Brandenburg*. Furthermore, unless the diary is viewed as a blueprint for future abuse, it is questionable whether Dalton actually intended any abuse to occur as a result of his writings.

IV. RECOMMENDATION

As the aforementioned issues illustrate, both obscenity and child pornography law leave little room to regulate expression such as Dalton's diary. Ohio's "pandering obscenity involving a minor" statute can best be seen as an attempted morphing of obscenity and child pornography guidelines. It takes bits and pieces from each, creating an impermissible regulation in the process. Ohio would like to adopt the feature of obscenity law that allows for written words to be regulated, while ignoring the limitation that private possession cannot.[188] Conversely, the statute seeks to make up for this shortcoming by relying on the child pornography overtones to justify the regulation of private possession, while ignoring the limitation that it applies only to visual images.[189] But in combining the favorable aspects of each doctrine while ignoring the limitations, the statute clearly fails constitutional scrutiny under both obscenity and child pornography jurisprudence.

However, a serious problem remains and must be addressed. A pedophile who keeps and rereads such a diary may pose a substantial risk to the community. The incitement standard could allow the courts to fashion a remedy to protect society, if there was sufficient evidence that authoring such fantasies could trigger actual abuse. Such a broad expansion of the incitement standard to cases of self-incitement is, however, inappropriate given this lack of strong evidence that abuse was inevitable in Dalton's case.

Furthermore, the logic justifying the suppression of speech that poses a danger of inciting illegal conduct does not hold when the entire process occurs within a defendant's mind. Whenever an individual contemplates the commission of a crime, the initial thoughts are not punishable. "One of the basic premises of the criminal law is that bad thoughts alone cannot constitute a crime."[190] Drawing the line between harmless thoughts and acts which can be punished is typically relegated to the states in defining *inchoate* crimes.[191] The incitement rationale should not

187. *See supra* notes 123–26, 150–51 and accompanying text; *see also* CONGRESSIONAL RESEARCH SERVICE, LEGAL ANALYSIS OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY'S FINAL REPORT, REPORT NO. 86-148A, at CRS-25 (1986) (noting that even if correlations are accepted, "the types of harm encompassed and their relationship to the material sought to be suppressed do not appear to meet the *Brandenburg* standard[s]").

188. *See supra* notes 62–88 and accompanying text.

189. *See supra* notes 89–126 and accompanying text.

190. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 503, § 6.2(d) (2d ed. 1986).

191. Various jurisdictions have taken differing approaches in evaluating when the line is crossed between mere preparation and punishable conduct. The strictest approach looks to proximity,

be used as an end run around these guidelines to punish behavior before the actual crime is committed. Had Dalton merely imagined these fantasies this point would be clear. The fact that he happened to write them down makes little practical difference.[192]

However, rejecting an extension of the obscenity, child pornography, and incitement approaches does not leave the State powerless. Instead, a more limited remedy already exists to control pedophiles that do pose a true threat to the community: civil commitment. In *Kansas v. Hendricks*, the Supreme Court upheld, against due process challenges, a state law providing for the civil commitment of "sexually violent predators" who pose a danger to themselves or others.[193] The defendant in *Hendricks* had a "chilling history" of repeated child molestation over several decades, and even acknowledged that although he hoped to cease such behavior, "the only sure way he could keep from sexually abusing children in the future was 'to die.'"[194] With evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future,[195] an offender can be detained beyond the duration of their original prison sentence.

Many states have laws similar to the one upheld in *Hendricks*. Washington was the first to enact such legislation in 1990.[196] Several others soon followed, including Kansas, Arizona, California, Minnesota, and

whether the act was sufficiently proximate to the intended crime. *Id.* at 504. The probable desistance approach requires that the attempt, in the ordinary course of events, would result in the commission of the actual crime except for the intervention of some extraneous factor. *Id.* at 506. The equivocality, or res ipsa approach, is met where an act speaks for itself, and can have no other purpose than the commission of that specific crime. *Id.* at 507. A final approach, adopted by the Model Penal Code, requires a "substantial step . . . strongly corroborative of the actor's criminal purpose." *Id.* at 508.

Since Dalton was charged under the obscenity statute, and not for any sort of attempted child abuse, these issues were not directly raised by the case. However, under any of these four standards, Dalton's conduct clearly falls short of being punishable as an attempt to commit some form of abuse. Under the proximity and probable desistance approaches, there is no evidence that Dalton was at all close to committing these crimes. Writing words in his home certainly would not qualify. Likewise, under the equivocality and substantial step that is corroborative of criminal intent approaches, Dalton's conduct cannot be seen as speaking for itself that these crimes would have been committed. Dalton could easily argue that these were merely fantasies, never intended to be acted upon. Establishing criminal intent to commit these crimes in light of such an argument would be extremely difficult.

192. Unless, of course, there was strong evidence to support Osborne's statements that writing such fantasies can trigger potential abuse.

193. 521 U.S. 346 (1997); *see also* RONALD D. ROTUNDA & JOHN E. NOWAK, 3 TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE AND PROCEDURE 39 n.18 (3d ed. 1999). Although the correctness of the *Hendricks* decision is beyond the scope of this Note, it should be noted that many scholars have sharply criticized the decision as incorrect. *See, e.g.*, Grant H. Morris, *The Evil that Men Do: Perverting Justice to Punish Perverts*, 2000 U. ILL. L. REV. 1199; Stephen J. Morse, *Fear of Danger, Flight From Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250 (1998); Michael L. Perlin, *"There's No Success Like Failure/and Failure's No Success at All": Exposing the Pretextuality of* Kansas v. Hendricks, 92 NW. U. L. REV. 1247 (1998). But regardless of the correctness of *Hendricks*, the case makes clear that civil commitment of sexually violent predators is permissible, and as one scholar noted, this is not likely to change in the near future. *See* Morris, *supra*, at 1210.

194. *See Hendricks*, 521 U.S. at 354–55. In this respect, Hendricks' long history of sexually molesting children is admittedly far beyond anything that Brian Dalton has acted upon to date.

195. *See id.* at 357.

196. *See* Morris, *supra* note 193, at 1200 (citing WASH. REV. CODE ANN. § 71.09 (West 2002)).

Wisconsin.[197] Ohio has yet to follow suit with legislation specifically addressing the civil commitment of sexually violent predators. However, Ohio does have a general statute regarding involuntary civil commitment of the mentally ill.[198] In the wake of *Hendricks*, which recognized pedophilia as a mental illness,[199] such a statute could be applicable in an appropriate case.[200]

Nonetheless, such a statute would likely be inapplicable to an individual such as Brian Dalton. Although he has a prior conviction for possession of child pornography and has admitted to some inappropriate contact with minors, he has yet to be convicted of any crime of sexual violence. This again suggests that Brian Dalton has yet to engage in any conduct that should warrant additional confinement.

The exact applicability of these laws to Brian Dalton, however, is not especially important to the larger picture. In cases where a person can be shown to truly present a danger to the community, civil commitment exists as a possibility to protect others. In truly egregious cases, as in *Hendricks*, a remedy is available to ensure that sexual predators are not released back to the streets to commit further crimes. By relying on civil commitment, instead of expanding categories of unprotected speech, an appropriate balance is struck between free speech rights and the need to protect society. Expression remains protected unless there is a showing of past sexual violence and likelihood of future violations. In these cases, diaries such as Brian Dalton's could certainly be used as evidence of dangerousness, but using such an approach avoids punishment for the content of the diary itself.

V. CONCLUSION

Brian Dalton's case presents a complicated interplay between obscenity and child pornography law. Under current precedent, Dalton's writings cannot be punished as obscenity because he has a right to possess them within his home, and made no attempt to otherwise distribute the material. Nor can they be punished as child pornography since the diary only contained words. Although a general extension of child pornography regulations to all written material would be inappropriate, the actions of known pedophiles must be scrutinized more closely to prevent future child abuse.

197. *See id.* at 1201 n.14.

198. *See* OHIO REV. CODE ANN. § 5122.05 (Anderson 2002).

199. *See Hendricks*, 521 U.S. at 360 (recognizing that diagnosis as a pedophile qualifies as a mental abnormality, and coupled with proof of future violence, suffices for due process purposes).

200. However, it should be noted that the impetus for the enactment of specific sexual predator legislation was that these general civil commitment statutes were inadequate to control the problem. *See, e.g.*, KAN. STAT. ANN. § 59-29a01 (1994) (stating that "existing involuntary commitment procedure" for the treatment of the mentally ill is "inadequate to address the risk these sexually violent predators pose to society). Thus, Ohio may wish to enact a statute similar to these other states to best regulate sexually violent predators.

Recognizing that such speech could incite child abuse provides a potential basis for regulation. However, given the lack of evidence establishing a clear link between writing such fantasies and subsequent illegal action, such an approach is inappropriate. Such a broad interpretation of the incitement of illegal conduct doctrine is also unnecessary in light of the State's power to civilly commit dangerous sex offenders. Civil commitment provides a narrower remedy to control those posing the most substantial danger to society. Thus, if Ohio is truly concerned about Brian Dalton, it should move for civil commitment, and not punish him solely for the content of his personal diary.