# Protecting Our Children from Internet Predators

*by Robert C. Phillips*

Our nation's youth are amongst our most precious assets—to be guided, nurtured, and protected at all costs. As such, a child's inherent vulnerability to outside influences, good and bad, is a fact of life that cannot be ignored, must always be monitored, and, when necessary for the child's well-being, at least controlled if not neutralized. The advent of the Internet has only exacerbated the problem of ensuring that our children are not exposed to adverse influences, at least until they are mentally and emotionally developed enough to properly process them.

Understandably, Internet predators are a frightening reality for parents and caregivers, particularly in this era of high-profile sex offenders and traffickers. A common enforcement tool used to seek out predators—helping to shield children from attempts instigated by Internet predators to lure a child into illicit relationships—is a sting operation.

As part of such a sting, a law enforcement officer (or other adult volunteer) uses the anonymity of the Internet to advertise him or herself as an underage child, typically responding to a would-be predator's Internet-based attempts to locate and communicate with inquisitive children.

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## PROPOSITION 83

### The Sexual Predator Punishment and Control Act

On November 7, 2006, California's electorate passed Proposition 83, enacting The Sexual Predator Punishment and Control Act, also known as "Jessica's Law." Prop. 83 was written, advertised as, and enacted as a means of protecting our children (among others) from sexual predators who, often through the phenomenon of a rapidly expanding Internet, have easy access to underage and vulnerable minors.[1] "[T]he common purpose of the provisions of Proposition 83 is to protect Californians from the threat posed by sex offenders."[2]

It is worth noting that the findings and declarations considered by voters along with Prop. 83 emphasize that California "places a high priority on maintaining public safety through highly skilled and trained law enforcement personnel as well as laws that deter and punish criminal behavior."[3] These same findings and declarations recognize that it is the Internet that has given sexual predators ready access to our children, luring them "away from their homes and into dangerous situations."[4] "The argument provided to voters in favor of Prop. 83 stated its provisions, among other things, 'Protect children from INTERNET PREDATORS by cracking down on people who use the Internet to sexually victimize children.'"[5]

Even prior to the passage of Prop. 83, it was already a felony to commit a lewd or lascivious act on a child,[6] to send or exhibit harmful matter[7] to a minor,[8] or to arrange a meeting with a minor for the purpose of engaging in certain lewd and lascivious behavior.[9] The addition of Penal Code section 288.3 pursuant to Prop. 83 helped to fill in some of the holes left by the prior legislation in the state's efforts to protect the young from sexual predators.

1. *In re E.J.* (2010) 47 Cal.4th 1258, 1263.
2. *People v. Keister* (2011) 198 Cal.App.4th 442, 451 [cert. for part. pub.].
3. SB 588, § 2(a) <*http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200520060SB588*> (accessed Feb. 28, 2020).
4. *Id*. at § 2(d).
5. *People v. Korwin* (2019) 36 Cal.App.5th 682, 690; citing Voter Information Pamp., Gen. Elec. (Nov. 7, 2006) argument in favor of Prop. 83, p. 46.
6. Pen. Code § 288.
7. Pen. Code § 313(a).
8. Pen. Code § 288.2.
9. Pen. Code § 288.4.

Inevitably during such a sting, after a months-long back and forth exchange of increasingly sexually suggestive Internet messages, the predator will give into his or her sexual urges, arranging to meet the target, still believing that the person on the other end of the conversation to be an underage child. Typically, the predator will show up at the pre-designated location with all the tools and toys needed to satisfy his or her sexual urges, only to get busted by waiting police. Those same sexual implements the predator expected to use for his or her selfish pleasures suddenly become the evidence necessary to prove intent, substantiating the charge of attempting to molest a child.[1]

This type of undercover operation has become relatively routine, most often resulting in a felony prosecution alleging the predator's attempt to engage a child in one or more of the sexually based acts prohibited by the Penal Code. The crime charged must be limited to no more than an attempt for the simple reason that no actual child is ever involved.

The effective use of such a sting operation is graphically illustrated in the 2019 case of *People v. Korwin*.[2]

## The Facts of *Korwin*

Based upon what eventually occurs, it appears that defendant Anthony Robert Korwin had those urges typical of the common sexual predator. As a means of satisfying those urges, Korwin followed the usual pattern by employing the ease and convenience of the Internet to locate and communicate with someone he believed to be a minor. After all, at least in his mind, that is what the Internet was invented for, was it not?

Accessing an online classified website and clicking on the "casual encounters" section, Korwin posted an advertisement announcing that he was seeking a relationship with a younger female between the ages of 18 and 28, possibly someone with what he referred to as a "daddy complex." The advertisement specified that responding individuals should use the title line "young and willing" and state an age.

Suspecting Korwin's intentions to be less than honorable, a law enforcement agent working in a child exploitation unit on an Internet task force responded to the ad with an e-mail entitled "Young and Willing 13." Giving Korwin an obvious out, which would have ended this investigation before it even began, the agent

wrote in the attached message that she knew she was "[p]robably too young, but you sound sweet. Thought I'd say hi anyways."[3]

Failing to just walk away, Korwin took the bait and responded to the agent's message, agreeing that although she was in fact too young, they could chat anyway. This seemingly innocent introduction was followed up by four-and-a-half to five months of back-and-forth e-mails that quickly degraded into sexually explicit messages.

The agent began by asking what was a "daddy complex?" Korwin responded by telling her, "some girls like to imagine they are having sex with their daddy, and some dad's [sic] fantasize the same. It can extend to getting bare butt spankings and other things."[4]

Korwin went on to explain that his goal in posting the advertisement was to find a "legal-aged virgin." His express wish was to be a woman's first lover, noting that such a goal was becoming difficult to achieve. He also noted that he was a high school teacher and had occasional "crushes" on some of his students over the years, but claimed to never have acted upon them.

Switching the conversation from himself, Korwin inquired about the girl's sexual encounters with boys her age, noting that if she was 18, they could have "some legitimate fun." The conversation, as he guided it, began to slip further and further into an inappropriate inquisitiveness about the girl's body including whether she had pubic hair, the size of her breasts, and her menstrual cycles. He finally expressed the desire to "mentor" her, giving her specific instructions on how to masturbate and give oral sex. At some point, Korwin sent the agent a picture of himself and asked for a picture of her in return. The agent responded with an age-regressed photo of another female agent.

Eventually, Korwin suggested that they meet at a specific fast food restaurant near where she lived. To add to the enticement, he suggested he could take some headshots of her to send to a modeling agency. But he also said he wanted to take naked—or at least suggestive—photos of her at a park somewhere. Throwing his previously expressed caution to the wind, Korwin told the girl to pick out polish so they could paint each other's toenails. He also said he would wear loose shorts when they met so she could touch his genitals with her feet.

Foolishly showing up at the agreed upon location, Korwin was immediately arrested. As promised, he was wearing loose gym

shorts. Several cell phones—one containing the age-regressed photo previously sent to him—and two cameras were located during a search of his vehicle, along with male enhancement pills, condoms, and a camera bag containing women's underwear.

### Findings and Appeal

Charged in state court, a jury convicted Korwin on three counts:

- **Count 1**: Penal Code section 288(c)(1)—attempting to commit a lewd act upon a child.
- **Count 2**: Penal Code section 288.3(a)—contacting a minor who he knew, or reasonably should have known was a minor, with the intent to commit a sexual offense.
- **Count 3**: Penal Code section 288.4(b)—going to an arranged meeting place for the purpose of engaging in lewd or lascivious behavior with a minor or a person he believed to be a minor.

Sentenced to three years in prison, Korwin appealed. The Fourth District Court of Appeal (DCA) (Div. 1) affirmed. On appeal, Korwin did not contest that he had attempted to commit a lewd act on a child, as alleged in Count 1, or that he arranged to meet with a person he believed to be minor for lewd purposes, as alleged in Count 3. The only issue on appeal was whether there was sufficient evidence to support his conviction under section 288.3(a), as charged in Count 2, where the agent with whom Korwin had communicated was not actually a minor.

Specifically, Korwin argued that his erroneous belief that he was communicating with a minor is not a substitute for the statutory requirement that the other person actually be a minor. Engaging in the commonly accepted rules of statutory interpretation, the court had no difficulty finding sufficient evidence to support Korwin's conviction for a violation of section 288.3(a), which reads as follows:

> Every person who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in Section 207, 209, 261, 264.1, 273a, 286, 287, 288, 288.2, 289, 311.1, 311.2, 311.4 or 311.11, or former Section 288a, involving the minor shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense.

Dissecting this offense down into its basic elements, as noted by the court, a violation of section 288.3 is proven when it is shown that a defendant

> (1) directly or indirectly communicated with or attempted to communicate with a person, (2) with the intent to commit an enumerated offense involving the person, and (3) knew or reasonably should have known the person was under the age of 18.[5]

Pointing out that section 288.3(a) specifically refers to the victim as being a minor, Korwin argued that because the agent with whom he communicated with was an adult, the elements of this offense were not proven. The court disagreed.

Under section 288.3(a), merely attempting to communicate with a minor is a completed crime. Korwin communicated with a person he believed to be a minor. Even though the person with whom Korwin was communicating was an adult, his belief to the contrary constitutes an attempt.[6] Also, the necessary "knowledge element makes the crime punishable if [Korwin in] making the contact or attempting to make the contact, either knows or reasonably should know that the person is a minor."[7] Per the court:

> [T]he knowledge requirement of the statute focuses on the knowledge and intent of the offender by ensuring the offense does not impose strict liability upon someone who does not know or has no reason to know the person with whom he or she is communicating or attempting to communicate is a minor. It does not actually require a minor victim.[8]

The key to the court's reasoning here is that a violation of section 288.3(a) only requires an "attempt to contact or communicate with a minor," with the requisite mental state of having reason to know, or reason to believe, the individual is a minor. The fact that the alleged minor turns out to be an adult does not negate a defendant's intent nor his or her culpability. "[T]he lack of an actual minor is not a defense to an attempt to commit a sex offense against a minor."[9]

The court further rejected Korwin's argument that he was guilty at most of an attempt to violate section 288.3(a), noting that the section already provides culpability for an attempt to commit the offense. As noted by the court,

> requiring a separate attempt charge where the statutory language of section 288.3, subdivision (a) makes an attempt to communicate with a minor with the requisite intent a completed crime would lead to "a logical merry-go-round."[10]

Lastly, the court also found its interpretation of section 288.3(a) to be consistent with the purposes of the statute, as explained to voters when they adopted this new Penal Code provision in November 2006 as part of the Sexual Predator Punishment and Control Act. "Our interpretation advances the statutory purpose of supporting law enforcement officers who use undercover measures to identify, deter, and punish Internet predators who attempt to sexually victimize children before they reach minor victims."[11]

In this vein, the statutory purpose, i.e., the so-called "rule of lenity" was also mentioned. Under the rule of lenity, a court must resolve doubts as to the meaning of a statute in a criminal defendant's favor any time there are two plausible interpretations of the statutory language.[12] Noting that this court's "interpretation advances the statutory purpose of supporting law enforcement officers who use undercover measures to identify, deter, and punish Internet predators who attempt to sexually victimize children," and that the rule of lenity "has no application where, 'as here, a court can fairly discern a contrary legislative intent,'"[13] the appellate court commented—almost in passing—that they would not allow use of the rule of lenity to water down its ruling.

Based upon these findings, Korwin's conviction for a violation of section 288.3(a) was upheld.

### The Entrapment Defense

In a sting operation such as this, "entrapment" is not an issue where the suspect is already predisposed to committing such a crime, and law enforcement merely provides him or her with the opportunity to do so.

Witkin's *Criminal Law* summarizes the rule best by noting: "The defense of entrapment is available where the crime was not contemplated by the defendant, but was actually planned and instigated by police officers, and the defendant was by persuasion or fraud lured into its commission."[14] In other words, merely providing an opportunity for an already predisposed criminal to commit a specific crime is not entrapment.

The unavailability of an entrapment defense in the situation where Korwin found himself is supported by case law. For instance, the Fourth DCA (Div. 2) in *People v. Reed* rejected a defendant's attempt to excuse his criminal acts by claiming to have been entrapped during a sting operation, noting that the defendant's entrapment defense failed because he initiated the contact and continued the lengthy correspondence with the detective who the defendant believed was a minor.[15]

In *Korwin*, the lack of a viable entrapment defense is so obvious that it was not even discussed. Under the facts, the police merely provided Anthony Korwin with the opportunity to commit a crime he himself fully intended to commit despite his initial cautionary statements reflecting a reluctance to get involved with a minor. It was Korwin, not the police agent, who led the conversation into the downhill slide involving inappropriate sexual topics. Such is not entrapment.

### The Constitutionality of Penal Code Section 288.3: *People v. Keister*

Anthony Korwin did not challenge the constitutionality of section 288.3, probably because that unsuccessful effort had been attempted before.

Before the ink was even dry on Prop. 83's 2006 enactment, Randal Scott Keister started molesting the 12-year-old, sixth grade daughter—identified only as "K." in the eventual published decision—of his live-in girlfriend. The molestations continued through summer 2009 when K.'s mother discovered a suggestive letter Keister had left in K.'s bedroom, along with a vibrator and a sexually explicit book. When eventually interviewed by the police (K.'s mother delayed law enforcement's involvement because she was reluctant to employ outside assistance), Keister fully admitted to his inappropriate sexual contacts with K.[16]

Charged and tried in state court, a jury convicted Keister of a number of child molest-based offenses, including eight counts of contacting or communicating with a minor with the intent to commit an enumerated sex offense, per the newly enacted section 288.3. Having no facts in his favor that might support an appeal, Keister instead challenged the constitutionality of section 288.3, employing a shotgun approach by arguing five different and distinct constitutionally based grounds.

*Freedom to Travel*

Keister first made the unique argument that section 288.3 is unconstitutional because "it improperly restricts the freedom of movement of any person the state identifies as having a sexual attraction towards children." In making this argument, Keister creatively surmised that "this improper restriction comes from the statute's failure to 'require the intent to commit an immediate sex act.'"[17] Not surprisingly, California's Third DCA rejected this argument.

Noting that section 288.3 restricts a person's movement only to the extent that the movement challenged is done for the purpose of contacting or communicating with a minor, or an attempt to do so, and when done with the specific intent to commit one or more of the enumerated sex offenses, the court found this restriction to be reasonable from a constitutional perspective. Noting that the U.S. Supreme Court has previously rejected arguments to the effect that the threatened harm must be imminent in order for the threat to be constitutionally punishable, the appellate court here found no unconstitutional restrictions on Keister's freedom to travel.[18]

*Vagueness*

Keister argued that section 288.3 is "void for vagueness because it 'allows for the personal predilections of law enforcement officials to establish standards for what constitutes contact with a child and how the required intent is shown.'" Illustrating this argument, Keister argued that "a glance, wink, or smile could suffice, as could '[w]alking by a child, riding on the same bus with a child, or standing next to a child in a line at the store.'"[19]

This argument was also rejected by the appellate court. In doing so, the court noted that Keister's examples did not address the issue of vagueness. The fact that one might be able to envision close cases (as is the problem with "virtually any statute") does not render a statute vague. Such an issue is resolved by requiring juries to find proof beyond a reasonable doubt in order to convict.

In determining a vagueness issue, as noted by the appellate court, the Supreme Court has ruled: "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."[20]

The appellate court found no such "indeterminacy" in section 288.3. To the contrary, the only issues to be resolved by the jury were questions of fact. "Whether a defendant made the contact or communication and had the requisite intent are yes-or-no determinations, not subjective judgments."[21] As such, section 288.3 is not void for vagueness.

*Freedom of Speech*

Keister argued that section 288.3 improperly restricts his constitutionally protected freedom of speech by "effectively prohibit[ing] child molesters from communicating with children." Per Keister's argument: "If a person is sexually attracted towards children, he violates the statute anytime he communicates with a child because he has the intent to molest children if given the opportunity."[22]

This argument was also rejected, with the court noting that the only communications that are prohibited are those that are motivated by a specific intent to commit one or more of the statute's enumerated sex crimes.

The court conceded that to some extent, constitutionally protected communications are in fact restricted. However, section 288.3 is not violated unless the defendant knows, or reasonably should have known, that the other person is a minor, and then with such knowledge, he or she initiates a communication with the minor with the specific intent to commit one or more of the statute's enumerated sex offenses. Under these circumstances, upon proof that the defendant harbors the necessary specific intent, the court found such a restriction on his otherwise freedom of speech to be reasonable.[23]

The court found support for this argument in the case law where it was held that section 288.2, prohibiting the distribution or exhibition of "harmful matter" to a minor, including via the Internet, was held not to be an unconstitutional restriction on one's freedom of speech. Per the court, "there was no constitutional problem with the statute because those limits were 'on the conduct of those who would use otherwise protected speech to seduce minors.'"[24]

*Equal Protection*

Keister further submitted that he was being singled out as a "potential" child molester, seeking to punish him for what he argued was basically a "thought crime," while failing to criminalize

"potential thieves or muggers who 'intend to commit a future theft or future assault.'"[25] This, Keister argued, was a violation of his constitutional equal protection rights.

Rejecting this argument, the Court of Appeal pointed out that section 288.3 is not violated merely by thinking about molesting children, it also requires that he act upon those thoughts. A violation of section 288.3 "requires the act of contacting or communicating with a minor or an attempt to do so coupled with the specific intent to commit an enumerated sex crime."[26]

The court also noted that those who violate section 288.3 are not "similarly situated" with those who are thinking about stealing something or assaulting someone.

> "The constitutional guaranty of equal protection of the laws means simply that persons similarly situated with respect to the purpose of the law must be similarly treated under the law. [Citations.] If persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold."[27]

One who is contemplating the molestation of a child and then acts upon that intent is not similarly situated to someone who might be thinking about committing a theft or an assault.

### *California's Single Subject Rule*

Moving from federal to state constitutional principles, Keister lastly argued that Prop. 83, which contains section 288.3, violates the California Constitution's single-subject rule. Pursuant to this rule: "[A]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect."[28]

The Court of Appeal disagreed with Keister's assertion that Prop. 83 violates the single-subject rule.

> [T]he common purpose of the provisions of Proposition 83 is to protect Californians from the threat posed by sex offenders. The proposition accomplishes this by increasing penalties for certain sex offenders, prohibiting registered sex offenders from living close to schools or parks, tracking their whereabouts, and expanding the reach of the sexually violent predator law.[29]

Prop. 83's provisions are "reasonably related to a common theme or purpose."[30] As such, the "single-subject" rule was not violated by its passage.

## Conclusion

The court in *Korwin*—supplementing *People v. Keister*'s more limited description of the purposes behind placing Prop. 83 on the ballot—expends considerable ink discussing Prop. 83, which added section 288.3. At one point, the *Korwin* court notes:

> The findings and declarations passed by voters along with Proposition 83 emphasize that California "places a high priority on maintaining public safety through a highly skilled and trained law enforcement as well as laws that deter and punish criminal behavior." (Prop. 83, § 2, subd. (a).) The findings and declarations observe the "universal use of the Internet has also ushered in an era of increased risk to our children by predators using this technology as a tool to lure children away from their homes and into dangerous situations. Therefore, to reflect society's disapproval of this type of activity, adequate penalties must be enacted to ensure predators cannot escape prosecution." (*Id*., § 2, subd. (d).)[31]

Such strong language dictates that statutes like section 288.3(a) be given as broad an interpretation as logically and legally possible in order to effectuate the intent of the electorate in passing Prop. 83. Given such a broad interpretation, section 288.3(a) provides police with an effective tool in the never-ending effort to intercept Internet predators before they reach our children, removing them from society, and punishing them appropriately. ■

### ENDNOTES

1. E.g., see *People v. Singh* (2011) 198 Cal.App.4th 364.
2. *People v. Korwin* (2019) 36 Cal.App.5th 682, 690.
3. *Id*. at 685.
4. *Id*.
5. *Id*. at 687–688, quoting *San Nicolas v. Harris* (2016) 7 Cal.App.5th 41, 46.
6. See also *Hatch v. Superior Court of San Diego County* (2000) 80 Cal.App.4th 170, 185–186.
7. *Korwin*, *supra*, at 688 [emphasis in original].
8. *Id*.
9. *Id*. at 689.

10. *Id*., citing *People v. Gallegos* (1974) 39 Cal.App.3d 512, 516.
11. *Korwin*, *supra*, at 690.
12. *People ex rel. Lungren v. Superior Court for the City and County of San Francisco* (1996) 14 Cal.4th 294, 312.
13. *Korwin*, *supra*, at 690, quoting *People v. Cornett* (2012) 53 Cal.4th 1261, 1271.
14. B.E. Witkin and Norman Epstein, *California Criminal Law* (2014) 4th ed., vol. 1, Defenses, § 100.
15. *People v. Reed* (1996) 53 Cal.App.4th 389, 400–401.
16. *People v. Keister* (2011) 198 Cal.App.4th 442, 445–447.
17. *Id*. at 447.
18. *Id*. at 448; citing *In re M.S.* (1995) 10 Cal.4th 698, 706, 711.
19. *Keister*, *supra*, at 448.
20. *Id*. at 449, quoting *United States v. Williams* (2008) 553 U.S. 285, 306.
21. *Keister*, *supra*, at 449.
22. *Id*.
23. *Id*. at 449–450.
24. *Id*. at 450, quoting *People v. Hsu* (2000) 82 Cal.App.4th 976, 989.
25. *Keister*, *supra*, at 450.
26. *Id*., quoting Pen. Code § 288.3(a).
27. *Keister*, *supra*, at 450, quoting *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155 [cert. for part. pub.].
28. *Keister*, *supra*, at 451, quoting Cal. Const., art. II, § 8(d).
29. *Keister*, *supra*, at 451–452.
30. *Id*. at 451, quoting *Manduley v. Superior Court of San Diego County* (2002) 27 Cal.4th 537, 575.
31. *Korwin*, *supra*, at 690.