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Civil Rights Update

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***John Doe v. City of Lafayette*:**

The Seventh Circuit Weighs-in on a Municipality's Right to Protect Children from Pedophiles

The United States Court of Appeals for the Seventh Circuit decided the case of *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004) in late July 2004. Taken as a whole, this case discussed the First and Fourteenth Amendments, weighed the rights of the individual against constitutionally limited powers of local government, and emphatically noted the compelling interest governmental entities have in protecting minors from child predators. In addition to the lively civil rights and civil liberties debate between the majority and the minority, this case also serves as a guide for how cities and municipalities may deal with pedophiles.

Factual Background

John Doe admitted that he had a history of criminal behavior regarding children dating back to 1978. He conceded that he was a sex addict with a proclivity toward children. He had numerous arrests and convictions ranging from child molestation to various misdemeanors including: voyeurism, exhibitionism, and window peeping. He was last convicted in 1991 for attempted child molestation. This conviction resulted in four years of house arrest and four years of probation. Since this 1991 arrest, Doe had received various types of out-patient treatment for sex addiction.

In January 2000, Doe admitted having inappropriate sexual thoughts about children. Doe acted on these thoughts when he drove to a park where he saw five youths in their early teens and watched them for about thirty minutes from a distance. At this time, Doe had fantasies about exposing himself to or having sexual contact with the children. By Doe's own admission, he went to the park to "cruise" for children. However, after watching the children for a time, he realized that there were too many potential witnesses, so he went home.

After he left the park, Doe became upset about the incident, called his therapist, and eventually shared the experience with his sex-offenders group. Sometime later, Doe's former probation officer received an anonymous call that Doe had been in a park watching children. The probation officer forwarded this information to the Lafayette police department, who, in turn, contacted Vicki Mayes, Superintendent of the Lafayette Parks and Recreation Department, and Dr. Ed Eiler, Superintendent of the Lafayette School Corporation. On February 2, 2000, Superintendents Mayes and Eiler each sent Doe letters informing him that he was prohibited from entering any of the City's parks for any reason and prohibited him from going on school grounds; neither ban included a termination date.

Doe challenged only the ban on public parks, alleging that the park ban violated his First Amendment right to free speech and his Fourteenth Amendment substantive due process rights.

First Amendment

Perhaps the most surprising legal discussion in this case is the stark contrast between the majority and the dissent in their analyses of the First Amendment challenge. The majority discarded Doe's First Amendment challenge quickly and decisively. The majority noted that for a First Amendment violation to occur, there must be some form of expressive speech or conduct that was intended to convey a message. The court held that Doe had not articulated *any* form of expressive conduct which was impinged by the City's ban. Doe had not claimed that the ban was overly broad because it prohibited too much speech or expression. Indeed, there was no evidence that Doe had ever used the City's parks for expression in the past and had no clear intention of doing so in the future.

The Seventh Circuit carefully noted the monumental importance of the First Amendment, but added that the United States Supreme Court had "never" extended its protections to non-expressive conduct. Writing for the majority, Judge Ripple declared: "[w]e have nothing approaching 'expression'; instead, we have predation." *Doe*, 377 F.3d at 19. The majority barely even addressed Doe's contention that the park ban punished him for his thoughts – noting simply that the City was not bound to wait until this plaintiff committed yet another crime of child molestation to act. *Doe*, 377 F.3d at 24, FN 8.

However, the minority, written by Judge Williams and joined by Judges Rovner and Wood, discussed the First Amendment issues at great length. The minority focused its discussion on the importance of protecting the freedom of thought. Their stance was that Doe should not have been punished for merely thinking about a crime, especially when no children were actually harmed in the process. Their view was that Doe's trip to the park did not rise to the level of "action" of sufficient gravity to justify being banned from the City's parks. The minority argued that the resulting park ban was akin to punishment for mere – though admittedly inappropriate – thoughts.

The majority accepted that Doe acted on his thoughts by physically driving to a park, seeking out, and watching children. The minority disagreed, contending that Doe had done no wrong apart from having sexual thoughts about children, which must be a protected right, even if it is repugnant to society. The majority based its decision, in part, on Doe's own admittance that what physically stopped him from exposing himself to or molesting a child that day was the rather fortunate fact that there were simply too many children at the park to be able to get away with it.

Fourteenth Amendment: Procedural Due Process

Various City officials held *ex parte* discussions and conferences resulting in the ban. Doe was never informed about or made party to this process. Doe was never given the opportunity to plead his case, tell his side of the story at trial, in an informal hearing, or appeal directly to a local court or tribunal. Here emerged a fairly compelling violation of procedural due process. Inexplicably, Doe did not bring such a claim, he instead exclusively pursued a substantive due process claim.

While the majority noted this bizarre absence in passing, the minority spent some time discussing issues that most accurately describe procedural due process violations, despite the fact Doe had set forth no such claim. The minority began this discussion by noting that while the majority characterized the park ban as a "civil exclusion," it was clearly punitive in nature and it was too broad in both scope and duration. The park ban expressly prohibited Doe from entering any property deemed a part of the Lafayette Park system – which, in reality, included much more than just parks (such as public baseball diamonds, swimming pools, zoos, and golf courses). The park ban also contained no termination date and could potentially be indefinite. The minority pointed to a total lack of procedural safeguards (such as periodic review of the necessity of the ban and any established procedure to test

the accuracy of the relied upon information leading to the ban). Had Doe brought a procedural due process claim, he would have been able to make the many compelling arguments the minority discussed, none of which had to be addressed by the majority.

Fourteenth Amendment: Substantive Due Process

Substantive due process is supposed to protect individuals from "the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Doe*, 377 F.3d at 28. There is a basic two-step process in determining whether there has been a substantive due process violation. First, a court must provide a careful description of the liberty interest the plaintiff seeks to have protected. Second, a court must decide whether the interest was fundamental. If there was a fundamental interest, a court must apply strict scrutiny; if there was no fundamental right, a court then looks to the rationality test.

In this case, the Seventh Circuit had a hard time determining exactly what type of liberty interest Doe wanted protected. The court ultimately determined that Doe was asserting a right to enter parks to loiter or for other innocent purposes. The court then found that such a right was not of the same import as the established fundamental rights (these include: the right to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion). The majority entertained the argument that Doe sought protection of his general right to intrastate travel, but refused to hold that Doe had a fundamental right to loiter in all places deemed public. *Doe*, 377 F.3d at 42-43.

If no fundamental right is found, then courts apply the rationality test, which simply asks whether the ban is rationally related to a legitimate governmental interest. On this point, even Doe conceded that the City's interest in protecting children from predators was not merely legitimate, it was compelling. In dictum, the court went on to illustrate that even if Doe had had a fundamental right to loiter in parks, the ban would still have survived an application of strict scrutiny – which tests whether there is a compelling governmental interest and whether the restraint has been narrowly tailored to serve that interest. Here, the majority made its point clear: the City had a greater interest in protecting its children than any interest Doe may have had in going to its parks. The City would have prevailed regardless of the level of scrutiny applied. The minority did not challenge this view.

Local Governments Take Heed

The minority's constitutional discussion provides some insight into what the holding of a borderline case might look like, especially if there were disputed facts, less restrained city officials, the imposition of a greater punishment, or a plaintiff with no prior convictions.

On the matter of First Amendment rights, the majority was quite comfortable concluding that Doe's record, admissions, and actions were sufficient to justify the City's reaction. The minority, however, drew greater attention to the distinction between thoughts and actions – foreshadowing that a case with disputed facts or with a plaintiff who had no criminal convictions might warrant a more serious discussion on this matter. Another First Amendment variable could come into play if there was evidence of any truly expressive speech or conduct. In this case, Doe did not claim that the park ban deprived him of his right to expression. With a different plaintiff, one who frequently used the parks to express himself (through poetry, dance, speech, etc.), there could be a more serious First Amendment claim.

Regarding procedural due process, this case serves as an example of attorney oversight. Doe's strongest claim would have been that he was punished by the City, yet had not been charged with any crime and had not been present at any of the discussions resulting in the ban. Despite Doe's silence on this matter, all the Seventh Circuit Judges concurred: this should have been part of Doe's case against the City. Though waived by Doe, the minority took the liberty of briefly discussing procedural due

process concerns. The minority viewed the park ban as abusive for being too geographically and temporally broad. *Doe*, 377 F.3d at 50. Further, the minority noted that Doe had not been made a party to the discussions that resulted in the ban. Local governments will want to take into consideration the minority's concerns when dealing with similarly situated plaintiffs.

The substantive due process deprivation could become a more serious matter in future cases where local governments impose bans or other forms of restrictions that are more broad or restrictive than necessary. It could be possible for a government to be too zealous and impose a ban that a court would find insufficiently tailored to the government's interest. Despite the majority's insistence that the ban in this case would have survived even strict scrutiny, it would be prudent for local governments to consider the breadth and depth of any bans they consider imposing.

Collectively, the minority's concerns can be viewed as a series of suggestions for municipalities to follow, if they want to avoid liability when dealing with future individuals of Doe's ilk.

Conclusion

As with other civil rights cases, *Doe* considered the competing interests of the individual and society. The Seventh Circuit clearly asserted its support for governmental efforts to protect "the most vulnerable members of society" – children. *Doe*, 377 F.3d at 43. The majority opinion was fairly cut and dry – thus avoiding the necessity of providing an extensive legal analysis of the First and Fourteenth Amendment issues. This was an especially facile stance for the majority to take, partly because this case was completely void of disputed facts, the plaintiff freely admitted all his past and then present thoughts and actions, the public officials acted with reasonable restraint, and Doe conceded that he had not even visited a park for any reason since 1990, excluding the 2000 visit at issue here.

Where the majority clearly articulated its willingness to side with local governments in this case, the minority used this opportunity to voice its fear that constitutional rights may be easily neglected or diminished in inherently provocative, sensitive, and emotional cases involving the sexual abuse of children.

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