"SEXUAL ADDICT" BANNED FROM PARKS AFTER "CRUISING" FOR KIDS

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In the case of *Doe v. City of Lafayette*, No. 01-3624, 2004 U.S. App. LEXIS 15762 (Cir. 7th 2004), the City issued a letter to a convicted sex offender banning him from all public parks under the City's jurisdiction. Plaintiff John Doe alleged the lifetime ban violated his rights under the U.S. Constitution. (In situations where an individual may not wish have his real name used on the record, the court may grant a party's request, as it did here, to identify him as a "John Doe" plaintiff.)

FACTS OF THE CASE

Doe had a long history of arrests and convictions for sexually related crimes dating back to 1978. Most of these convictions were for crimes against children, including child molestation, attempted child molestation, voyeurism, exhibitionism, and peeping. Doe admitted such deviant behavior had "occurred on a number of previous occasions in then-recent history." Although Doe said he was "still seeing a therapist," he acknowledged that such behavior "just happens." Following his most recent convictions in 1991 for peeping and attempted child molestation, Doe was placed under house arrest for four years; after which he was placed on probation until January 2000.

In January of 2000, Mr. Doe's probation officer, Joe Hooker, received a call from a "confidential source," informing Officer Hooker that Mr. Doe "had been 'cruising' parks and watching young children" earlier that January. In his deposition, Doe admitted to the incident, stating he had parked his car across the street from Murdock Park to watch a group of teenagers. At the time, Doe said he was "in the mood for cruising," i.e., looking for children. He further admitted that he was "having those urges that night" and testified as follows:

> When I saw the three, the four kids there, my thoughts were thoughts I had before when I see children, possibly expose myself to them, I thought about the possibility of, you know, having some kind of sexual contact with the kids, but I know with four kids there, that's pretty difficult to do. It's a wide open area. Those thoughts were there, but they, you know, weren't realistic at the time. They were just thoughts.

Upon receiving the anonymous tip, Doe's probation officer had contacted the City's chief of police. Already aware of Doe's criminal history, the police chief initiated discussions with various officials, including the superintendent of parks and recreation, regarding the appropriate response. The police chief advised the parks and recreation superintendent to "issue a ban ordering Mr. Doe not to enter the City's public parks." In so doing, the police chief explained that he gave this advice "because of the duty I have to protect the citizens, and specifically the children of this community, from the imminent danger posed by John Doe." Accordingly, on February 2, 2000, the parks and recreation

superintendent sent Doe a letter informing him that he was prohibited from entering the City's parks. The ban did not have a termination date, nor was it limited to certain geographical areas within the City's parks.

In challenging the ban, Doe claimed "he would like to go to the parks to play softball, watch the Colt World Series [baseball league for 16-17 yr old boys], attend a company outing if one takes place at one of the City's parks and take walks with friends." Doe admitted, however, that "he has not been in a city park since his 1990 arrest" until "the January 2000 evening in question."

Doe's therapist testified that Doe was attending "a self-help group for sexual addicts, and, at some point after January of 2000, he voluntarily began taking medications to control his sexual urges." In the past ten years, Doe's therapist further testified that Doe had "learned how to resist these inappropriate urges." On the other hand, the therapist conceded that there was "absolutely no guarantee that Mr. Doe will not reoffend, " and sexual addicts, such as Mr. Doe, "do fall down that slippery slope sometimes." Similarly, Doe himself acknowledged that "I will always have inappropriate thoughts regarding having sexual contact with children."

DISTRICT COURT DECISION

Based on this evidence, the federal district court held that the City's ban did not infringe on Doe's First Amendment rights. In so doing, the district court found that any impact on Doe's freedom of thought was merely "incidental" in advancing the City's "legitimate governmental interest" in protecting its youth. Further, in the opinion of the federal district court, the ban did not impinge upon any fundamental right "to intrastate travel or freedom of movement."

Moreover, given the City's "strong and legitimate interest in protecting its youth," the federal district court found a rational basis for the ban which was "narrowly tailored to the specific facts and circumstances involving Doe and therefore advances the legitimate goals of the city." As a result, the federal district court held "the ban did not violate Mr. Doe's right to substantive due process" under the Fourteenth Amendment. *See Doe v. City of Lafayette,* 160 F. Supp. 2d 996 (N.D. Ind. 2001).

Doe appealed this decision. By a vote of 2-1, a three judge panel ruled in Doe's favor. The City's petition to have this decision reviewed by the full circuit court of appeals was granted.

As noted by the appeals court, "Doe, by his own admission, is a sexual addict with a proclivity toward children." Further, the court found that Doe would always have "sexual urges toward children; the only question is whether he can control them." On the evening at issue in January 2000, the court found that Doe's "control was, charitably stated, marginal." In the opinion of the court, "Doe brought himself to the brink" of giving in to his urges to have "some kind of sexual contact with the kids" in Murdock Park.

According to the court, it was the number of children and the "wide open area," rather than Doe's self-control which prevented Doe from acting on his thoughts and urges. Once aware of this incident and Doe's criminal history, the court found the City had "understandably concluded that they had a duty to take action to protect the children," i.e., ban Doe from the City's parks. The question before the appeals court was, therefore, whether "the officials' chosen course was a constitutionally permissible one under the First and Fourteenth Amendment."

NON-EXPRESSIVE CONDUCT

Under the circumstances of this case, the appeals court found no First Amendment issue regarding "the right to self-expression." In the opinion of the court, "Doe did not go into the park to engage in expression at all."

> Doe makes very clear why he went to the park. He did not go to the park to advocate the legalization of sexual relations between adults and minors. He did not go into the park to display a sculpture, read a poem or perform a play celebrating sexual relations between adults and minors. He did not go into the park for some higher purpose of self-realization through expression… Rather, he went "cruising" in the parks "looking for children" to satisfy his sexual urges.

As noted by the court, the First Amendment protects conduct as long as the conduct at issue contains "a significant expressive element." Conversely, the First Amendment does not protect non-expressive conduct. Applying these principles to the facts of the case, the issue was whether Doe's "conduct in going to the park in search of children to satisfy deviant desires somehow was infused with an expressive element." In the opinion of the court, Doe's "urges and actions manifest absolutely no element of protected expression, and the City's ban bears absolutely no connection to any expressive activity." On the contrary, found "nothing approaching 'expression'; instead, we have predation."

PUNISH PRIVATE THOUGHTS?

On appeal, Doe had also contended that "the City is punishing him for his private thoughts." As noted by the appeals court, "[a] government entity no doubt runs afoul of the First Amendment when it punishes an individual for pure thought." Further, the court acknowledged that "the government cannot regulate mere thought, unaccompanied by conduct." In other words, "only governmental regulations aimed at *mere* thought, and not thought plus conduct" violate the First Amendment's "freedom of mind mandate."

Applying these principles to the facts of the case, the appeals court rejected Doe's allegation that the City "punished" him for "pure thought" by banning him from the City's parks. As characterized by the court, the ban was a nonpunitive form of "civil exclusion" designed for the protection of the public, rather than a criminal punishment. Moreover, the court noted that "the Supreme Court has held that the Constitution affords

latitude to governments to commit dangerous persons, such as sexual predators, in order to protect the public." Further, the court found the "imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objective and has been historically so regarded."

While acknowledging the authority of the government to "fulfill its responsibility to protect vulnerable children in dangerous situations," the appeals court cautioned that such protective measures "certainly does not license society, acting through government, to exile, harass or marginalize Mr. Doe." However, in this particular instance, the court found that the City had not banned Doe from the public parks "because he admitted to having sexual fantasies about children in his home or even in a coffee shop." Rather, in the opinion of the court, the ban was prompted by the "inescapable reality" that Doe "did not simply entertain thoughts; he brought himself to the brink of committing child molestation." Specifically, the court found that Doe "had sexual urges directed toward children, and he took dangerous steps toward gratifying his urges by going to a place where he was likely to find children in a vulnerable situation."

> To characterize the ban as directed at "pure thought" would require us to close our eyes to Mr. Doe's actions. It also would require that we give short shrift to Mr. Doe's condition as an admitted pedophile who continues to have difficulty controlling his urges. Mr. Doe is an admitted sexual addict with a proclivity toward children; as such, he belongs to a group of persons who are more susceptible to having sexual desires with respect to children *and* to acting on those urges.
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> We cannot ignore, nor can we say the law somehow commands the City to ignore, Mr. Doe's pedophilia and the history of his battle with that affliction.

Under such circumstances, the court concluded that "[t]he City was not bound to wait until Mr. Doe again committed the crime of child molestation or attempted child molestation in order to act." On the contrary, the court held that the City "had the power to address Mr. Doe's actions outside the criminal law context and did exactly that."

> In short, we must recognize the actual situation confronting the City as well as the parents and children who look to that City for protection. The children and their parents are not concerned about Mr. Doe's thoughts. They are concerned about his coming to the park to achieve sexual gratification. They do not need to wait until a child is molested to take steps to protect their children.
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> The First Amendment does not prohibit the City from taking the action it did to protect its children. It does not require the City to act in an ostrichlike fashion and expose the children of the City to the risk that, on a future date, a child will wander further from the group, present a better opportunity and experience the tragic consequences.

FUNDAMENTAL LIBERTY?

As cited by the appeals court, "[t]he Due Process Clause of the Fourteenth Amendment provides that the state shall not 'deprive any person of life, liberty, or property, without due process of law'." U.S. Const. amend. XIV. In this particular instance, Doe had alleged that he was deprived of "substantive due process." According to the court, the relevant inquiry in addressing a claim of substantive due process is "whether the individual has been subjected to the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." Further, the court would determine the "liberty interest that Mr. Doe seeks to have protected" and whether that interest is "fundamental." In this context, a fundamental liberty interest would have to be "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed."

In this particular instance, the court noted that Doe was not claiming a liberty interest "involving a generalized right to movement" with "interstate and international travel components". Nor was Doe claiming that "the ban inhibits his right to travel *through* parts of the City to engage in religious, political, commercial and social activities. Rather, the court found that Doe was claiming "the ban infringes his right to enter *into* particular types of public facilities and to stay there for certain purposes."

Unlike fundamental liberty interests in an individual's bodily integrity, right to marry, marital privacy, and directing the education and upbringing of one's children, the appeals court found Doe's asserted "right to enter the parks to loiter or for other innocent purposes" was not "essential to the orderly pursuit of happiness by free men."

> When we compare Mr. Doe's asserted liberty interest with those which have been held fundamental, we are bound to the conclusion that Mr. Doe's asserted right to enter the parks to loiter is not on the same footing; it is not "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed."… Although we could say with certainty this right is not unimportant, we cannot say that existing authority establishes that it is "fundamental."

On the other hand, the court acknowledged that "[t]he freedom to loiter *for innocent purposes* is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." (Emphasis by the court) However, under the circumstances of this particular case, the appeals court found "scant evidence to support the assertion that Mr. Doe truly is seeking a right to enter parks "*to wander and loiter*" for innocent purposes. On the contrary, during the night in question, the court found Doe went to the park in search of children to satisfy his sexual fantasies. As a result, the court found no fundamental right or liberty interest existed for Doe "to enter parks to prey on children."

> [Doe] is not limited in moving from place to place within his locality to socialize with friends and family, to participate in gainful employment or… intrastate travel…[or any] everyday right, a right we depend on to carry out our daily life activities… By banning Mr. Doe from the parks, the City only has deprived him of the "right" to go the City's parks which he wishes to use for allegedly innocent, recreational purposes. That this right is not "fundamental" to Mr. Doe's personhood is readily apparent not only from a comparison to other "fundamental" rights, but also from the fact that Mr. Doe has not even entered the City's parks since at least 1990.

GOVERNMENTAL INTEREST

Having "concluded that the City's ban does not encroach on a fundamental liberty interest," the court then had to determine whether the City's ban was "rationally related to a legitimate government interest, or alternatively phrased, whether the ban is arbitrary or irrational." In so doing, the court noted that Doe himself conceded that the City's interest in safeguarding the physical and mental well-being of its children was not merely legitimate, but compelling. Moreover, the court found "the ban of Mr. Doe from the City's parks is rationally related to that end."

> Doe admits that he is a sexual addict who always will have inappropriate urges toward children; his physician readily concedes that sexual addicts like Mr. Doe sometimes fall down the slippery slope into abuse; and, in January of 2000, he started down the slippery slope when he went to the parks in response to those urges and did not act on them only because they were not "realistic" at the time. Add these facts to the reality that children, some of the most vulnerable members of society, are susceptible to abuse in parks, and it is hard to see how the City's ban is anything but rational.

Given "the compelling nature of the City's interest in protecting its youth," the court found the City's actions would still be valid under the more demanding "strict scrutiny standard" for constitutionally protected activity. As described by the court, the strict scrutiny standard "mandates that the governmental regulation at issue have a compelling government interest and be narrowly tailored to serve that interest." In addressing the narrow tailoring requirement, the court would determine whether there were "other, reasonable ways to achieve the goals with a lesser burden on constitutionally protected activity." In this particular instance, the court found that the City had chosen "the narrowest *reasonable* means for the City to advance its compelling interest of protecting its children from the demonstrable threat of sexual abuse by Mr. Doe."

> The City has banned only one child sex offender, Mr. Doe, from the parks, and they have banned Mr. Doe only because of his near-relapse in January of 2000 when he went into the park to engage in psychiatric brinkmanship.

In reaching this conclusion, the appeals court rejected Doe's contention that "the ban could be narrower both geographically--limited to certain areas of the park system--and temporally--it could extend for a finite period of time."

> The City cannot reasonably anticipate what parts of the park system children will be located in at all times, and, on this record, we have no basis on which to question its judgment that children are vulnerable throughout the park system. As to the temporal nature of the ban, Mr. Doe concedes that his sexual urges toward children *always* will be with him, and his behavior in January of 2000, coupled with his criminal history, presents a compelling case that he is prone to relapse. Nothing in the record suggests this is likely to subside over time.

On appeal, Doe had also argued that "his exclusion is irrational because there are many convicted sex offenders living in the same geographic area who are not banned from the parks." In rejecting this argument, the appeals court noted that "the City does not have knowledge that relapses or near-relapses involving other sex offenders have occurred on city property." Moreover, the court found "nothing in the record to suggest the City would act differently when faced with a similar case."

As a result, the appeals court rejected Doe's challenges to the ban based on the First and Fourteenth Amendments and affirmed the judgment of the federal district court in favor of the City.

(See also *Hobbs v. County of Westchester*, No. 00 Civ. 8170 (S.D.N.Y. 8/13/2003) reviewed in "Pedophile Clown Brings His Act To Playland"
James C. Kozlowski. *Parks & Recreation*. Nov 2003. Vol. 38, Iss. 11)