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Blocking Former Sex Offenders from Online Social Networks: Is this a Due Process Violation?

by Nichole Hines

My [previous iBlawg post](#) analyzed whether [recent legislation](#) allowing the removal of sexual predators from social-networking websites such as [MySpace.com](#) constituted a violation of sex offenders' right to free speech.

That post also brought up, but declined to analyze, whether such legislation and technology designed to help carry out the removal and blocking of sexual predators also constitutes a violation of the sex offenders' due process rights. This iBlawg post will address the due process issue left open in my previous post.

The Supreme Court has only ruled on two cases regarding sex offender registries and only one of those cases specifically discussed due process.¹ In *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003), a Connecticut statute provided for public disclosure of the state's sex offender registry.² This included posting the information on the Internet.³ By 1996, every state had a similar law, termed a "Megan's Law".⁴ Plaintiff alleged that he was not a dangerous sex offender and therefore, the statute deprived him of a liberty interest (his reputation and the alteration of his status under the law) because he was not afforded notice or a meaningful opportunity to be heard.⁵ The court of appeals agreed with Plaintiff and ruled that such disclosure deprived registered sex offenders of their liberty interests and therefore was a due process violation because there was no hearing to determine whether the sex offender was currently dangerous.⁶ The Supreme Court overruled the decision.⁷

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The Court never investigated whether there was a procedural due process violation.⁸ It did not matter whether there was in fact a liberty interest being deprived.⁹ The application of Connecticut's Megan's Law simply turned on an offender's conviction, and no other fact was relevant; not even whether the former offender was currently dangerous.¹⁰ Therefore, unless Plaintiff could show that the substantive rule of law was unconstitutional, conducting a hearing on a sex offender's current dangerousness was a "bootless exercise."¹¹

Even in the wake of *Doe*, there are two arguable reasons for why sex offenders are being denied due process rights when banned from social online communities without any determination of their current dangerousness. First, the scope of *Doe* is very narrow. The Court ruled that Plaintiff already had a hearing when it was determined that he was a sex offender and that the Connecticut statute required the registration of all convicted sex offenders.¹² The Court never investigated whether such a statute was in fact constitutional because Plaintiff never brought the question before the Court.¹³ The Court also did not determine if Plaintiff was being deprived of a liberty interest.¹⁴ Here, it is unlikely that sex offenders can successfully argue that their reputations are being harmed because online social communities are not posting the offenders' status onto their websites. However, there may be a deprivation of freedom of expression and freedom of association. Second, in *Doe*, the online registry was solely for the purpose of public awareness.¹⁵ Here, third parties are using the registry to block certain individuals from Internet sites, and such a distinction may change the analysis. For example, in *Coleman v. Dretke*, 409 F.3d 665, 669 (5th Cir. 2005), the court held that the plaintiff was denied a liberty interest without due process when ordered to list himself in the sex offender registry and participate in mandatory behavioral therapy without a determination of his sex offender status. The Fifth Circuit stated that this due process inquiry was different than in *Doe*, because there only the sex offender registration was being challenged, as opposed to the sex offender registration followed up with behavioral modification.¹⁶

As with all sex offender cases, the arguments are always more difficult when courts continuously point out that "[s]ex offenders are a serious threat in this Nation."¹⁷ Nevertheless, there are reasons for why there may be a due process violation when social online communities use sex offender registries to prohibit sex offenders from using their website. Are such exclusions truly just when the offender committed his crime ten years ago and is no longer dangerous?

¹ The other case is *Smith v. Doe*, 538 U.S. 84, 96-99 (2003) (holding that a sex offender registry did not violate the Ex Post Facto clause on the basis that the statute was not punitive. The fact that Alaska posted the information on the Internet did not alter the conclusion because Internet access just makes the information search more convenient for Alaskan citizens).

² *Doe*, 538 U.S. at 4.

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Id. at 5.

⁴ *Smith*, 538 U.S. at 89 (“Megan Kanka was a 7-year-old New Jersey girl who was sexually assaulted and murdered in 1994 by a neighbor, who unknown to the victim’s family, had prior convictions for sex offenses against children.”).

⁵ *Doe*, 538 U.S. at 6.

⁶ *Id.* at 4.

⁷ *Id.*

⁸ *Id.* at 7-8.

⁹ *Id.* at 7.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 8.

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 5.

¹⁶ *Coleman* 409 F.3d at 669.

¹⁷ *Doe* 538 U.S. at 4.

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