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“FRIGHTENING AND HIGH”: THE SUPREME COURT’S CRUCIAL MISTAKE ABOUT SEX CRIME STATISTICS

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It isn't what we don't know that gives us trouble, it's what we know that ain't so.¹

In *McKune v. Lile*, 536 U.S. 24, 33 (2002), the Supreme Court reversed two lower courts in rejecting, 5-4, Robert Lile's claim that Kansas violated his 5th Amendment rights by punishing him for refusing to complete a form detailing all his prior sexual activities, including any that might constitute an uncharged criminal offense for which he could then be prosecuted. The form was part of a prison therapy program that employed a polygraph examination to verify the accuracy and completeness of the sexual history which program participants were required to reveal. Lile had earned placement in a lower-security prison unit, but the automatic punishment imposed on him for declining to complete this form included permanent transfer to a higher security unit where he would live among the most dangerous inmates, and lose significant prison privileges, including the right to earn the minimum wage for his prison work and send his earnings to his family.

Justice Kennedy, justifying this conclusion for the four-person plurality, wrote that the recidivism rate “of untreated offenders has been estimated to be as high as 80%.” The treatment program, he explained, “gives inmates a basis . . . to identify the traits that cause such a frightening and high risk of

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1. Often attributed to Will Rogers or to Mark Twain, but neither attribution appears to be documented. See Bob Kalsey, “*It Ain't What You Don't Know*”, WELL, NOW, BOB (July 1, 2008), <http://wellnowbob.blogspot.com>.

recidivism.” The following year in *Smith v. Doe*, 538 U.S. 84 (2003) the Court upheld Alaska’s application, to those convicted before its enactment, of a law identifying all sex offenders on a public registry. It reasoned that the *ex post facto* clause was not violated because registration is not punishment, but merely a civil measure reasonably designed to protect public safety. Now writing for a majority, Justice Kennedy’s *Smith* opinion recalled his earlier language in *McKune*:

Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature’s findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is “frightening and high.” *McKune v. Lile*, 536 U.S. 24, 34 (2002).

This “frightening and high” recidivism rate of “sex offenders” (more on the term “sex offender” later) is a commonly offered justification for the increasingly harsh set of post-release collateral consequences imposed on them, nearly all triggered by their inclusion in sex offender registries. An example is the voters’ pamphlet argument for the California initiative known as Jessica’s Law, which imposed extraordinary residency restrictions on sex offenders and also required them to wear location-monitoring ankle bracelets for life. These extreme measures were justified, the argument explained, by sex offenders’ “very high recidivism rates.”²

Residency restrictions like those in Jessica’s Law are severe enough to exclude registrants from most available housing in their community, preventing them from living with their families.³ Separate “presence restrictions” in many communities bar registrants from using public libraries or enjoying public parks with their families.⁴ Their registration formally excludes them from many jobs,⁵ and as a practical

2. This was noted in *People v. Mosley*, 60 Cal. 4th 1044, 1061 n.10, 344 P.3d 788, 185 Cal. Rptr. 3d 251 (2015). For the actual voters’ pamphlet summarizing the provisions, providing arguments for and against, and containing the law’s full text, see <http://www.voterguide.sos.ca.gov/past/2006/general/props/prop83/prop83.htm> (last visited Aug. 4, 2015).

3. For specifics, see the data described in *In re Taylor*, 60 Cal. 4th 1019, 343 P.3d 867, 184 Cal. Rptr. 3d 682 (2015). Russell Banks wrote a novel, *Lost Memory of Skin* (2011), based on the camp of sex offenders who lived under the Julia Little Causeway in Miami, where residency restrictions left them no other choices. See Charles McGrath, *A Novelist Bypasses the Middle to Seek Out the Margins*, N.Y. TIMES, Oct. 14, 2011, at C1.

4. See, e.g., Amy Meck, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OHIO ST. L.J. 1, 23–24 (2014).

5. See, e.g., Matt Mellema, *Not Wanted: Sex Offenders*, SLATE MAGAZINE (Aug. 14, 2014),

matter keeps them from many more. The registration requirement typically extends for decades, and in some states, such as California, for life, with no path off the registry for most registrants. Challenges to the registration requirement, and the consequences that flow from it, are usually turned back by courts and politicians who often quote Justice Kennedy's dramatic language describing the recidivism rate for sex offenders as "frightening and high." A Lexis search of legal materials found that phrase in 91 judicial opinions, as well as briefs in 101 cases.

Two examples from state supreme courts give the flavor of these decisions. The Iowa Supreme Court, while expressing sympathy for the "difficulties" that state's residency restrictions created for the "offender and his family, who lack financial resources,"⁶ still rejected his constitutional challenge to them because "the risk of recidivism posed by sex offenders is 'frightening and high', as 'numerous authorities have acknowledged.'" Despite this reference to "numerous authorities," only Justice Kennedy's language in *Smith* was cited. A Kansas law mandating *lifetime* post-release supervision of all sex offenders applied to a 25-year old man convicted of consensual intercourse with a fifteen year old girl who testified she had "encouraged" his behavior.⁸ A Corrections Department psychologist testified that he had accepted responsibility for his actions, displayed an "appropriate level of remorse," and was at low risk to re-offend.⁹ The Kansas Supreme Court nonetheless rejected his challenge to the statutes' mandated lifetime supervision, citing *Smith*, and explaining the legislature could reasonably have "grave concerns over the high rate of recidivism among convicted sex offenders" whose risk of recidivism "is frightening and high."¹⁰

Given the impact of the language in *Smith* and *McKune*, it seems important to know whether it's true—whether those convicted of sex offenses indeed re-offend at an 80% rate that is both "frightening and high," and much greater than the rate for other offenders.

McKune provides a single citation to support its statement "that the recidivism rate of untreated offenders has been estimated to be as high as 80%": the U.S. Dept. of Justice, Nat. Institute of Corrections, *A Practitioner's Guide to Treating the Incarcerated Male Sex Offender* xiii (1988). Justice Kennedy likely found that reference in the amicus

http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/several_states_ban_people_in_the_sex_offender_registry_from_a_bizarre_list.html.

6. State v. Seering, 701 N.W.2d 655, 664 (Iowa 2005).

7. *Id.* at 665.

8. State v. Mossman, 281 P.3d 153, 160 (Kan. 2012).

9. *Id.* at 157, 161.

10. *Id.* at 160.

brief supporting Kansas filed by the Solicitor General, then Ted Olson, as the SG's brief also cites it for the claim that sex offenders have this astonishingly high recidivism rate. This Practitioner's Guide¹¹ itself provides but one source for the claim, an article published in 1986 in *Psychology Today*, a mass market magazine aimed at a lay audience.¹² That article has this sentence: "Most untreated sex offenders released from prison go on to commit more offenses—indeed, as many as 80% do."¹³ But the sentence is a bare assertion: the article contains no supporting reference for it. Nor does its author appear to have the scientific credentials that would qualify him to testify at trial as an expert on recidivism.¹⁴ He is a counselor, not a scholar of sex crimes or re-offense rates, and the cited article is not about recidivism statistics. It's about a counseling program for sex offenders he then ran in an Oregon prison. His unsupported assertion about the recidivism rate for untreated sex offenders was offered to contrast with his equally unsupported assertion about the lower recidivism rate for those who complete his program.

11. While the Practitioner's Guide is a publication of the Justice Department, the Preface notes that its contents present the views "of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice," a distinction lost to readers of the Court's opinion.

12. Robert E. Freeman-Longo & R. Wall, *Changing a Lifetime of Sexual Crime*, PSYCHOLOGY TODAY, Mar. 1986, at 58. Freeman-Longo is the author described in the rest of this paragraph. Wall, the second author, is identified in the article as a therapist in a treatment program Freeman-Longo directed; no further information about him came up in a Google search.

13. *Id.* at 64.

14. The modern understanding of the relevant rule on expert testimony, Federal Rules of Evidence 702, is explained in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and the cases following upon it. The *Psychology Today* article does not indicate the author's training, but a Google search found that his only professional degree is a Master of Rehabilitation Counseling. His online CV indicates no academic or research appointments at any institution, but does list him as the second author in a 1982 article in the journal *Crime and Delinquency: Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME AND DELINQ. 450. The article reported what some incarcerated men said when asked if they had previously committed a sexual assault. The sample was men imprisoned in a maximum security Connecticut institution, or committed to a secured Florida treatment center for sexual offenders, who agreed to answer the questions. Most already had multiple convictions for rape or child molestation. The answers given by this small convenience sample of high-risk offenders tells one very little about the recidivism rate of sex offenders in general, even assuming the answers were truthful and accurate. Indeed, perhaps ironically, given the use the Court made of his statement, the author has elsewhere expressed the view that current registration laws "may do more harm than good" because, among other things, they apply to many people who are low-risk and often burden efforts at rehabilitation. Robert E. Freeman-Longo, *Revisiting Megan's Law and Sex Offender Registration: Prevention or Problem*, in *SEXUAL VIOLENCE: POLICIES, PRACTICES, AND CHALLENGES IN THE UNITED STATES AND CANADA* (James Hodgeson & Debra Kelley, eds., 2001). It appears the author has in recent years moved from traditional counselling to providing biofeedback services under the name Serendipity Healing Arts; see SERENDIPITY HEALING ARTS, <http://roblongo.com/index.php> (last visited Aug. 26, 2015).

So the evidence for *McKune*'s claim that offenders have high re-offense rates (and the effectiveness of counseling programs in reducing it) was just the unsupported assertion of someone without research expertise who made his living selling such counseling programs to prisons.¹⁵

The Solicitor General's brief in *Smith* is also the likely source of a second influential phrase about sex offenders. The brief frames the question before the Court with this opening statement:

Sex offenders exact a uniquely severe and unremitting toll on the Nation and its citizens for three basic reasons: "[t]hey are the least likely to be cured"; "[t]hey are the most likely to reoffend"; and "[t]hey prey on the most innocent members of our society." United States Dep't of Justice, Bureau of Justice Statistics (BJS), National Conf. on Sex Offender Registries (National Conf.) 93 (Apr. 1998).

The *Smith* opinion did not quote this language, but others have. One example is the preamble to California's Jessica's Law, which attributes the quoted language to an otherwise unidentified "1998 report by the U.S. Department of Justice."¹⁶ The California Supreme Court's citation attributed the same language to "a report by the United States Department of Justice."¹⁷ The language has also

15. The Solicitor General was complicit in urging the Court toward this conclusion with the argument that "[t]he absence of ready and reasonable alternatives for reducing recidivism among convicted sexual offenders bolsters the constitutionality of [Kansas's Sexual Abuse Treatment Program]." Amicus Brief of the United States at 24, *McKune v. Lile*, 536 N.W.2d 24 (2002) (No. 00-1187).

16. The statement was in the voter's pamphlet explanation of the law. See *People v. Aguon*, No. D053875, 2009 Cal. App. Unpub. LEXIS 9836 at *37, 39 (Cal. Ct. App. filed Dec. 14, 2009). The initiative made changes to various provisions of the California law; the key changes are summarized in *People v. Mosley*, 603 Cal. 4th 1044, 1063-64, 344 P.3d 788, 185 Cal. Rptr. 3d 251 (2015). There is some confusion about the law's actual effect. The residency restrictions have historically been applied to those on parole from a state sex offense, but not to other registrants, but the language is broader and in *Mosley* the California Supreme Court recently declined to decide its scope. In a companion case, the California Supreme Court found the residency restrictions unconstitutional as applied to parolees in San Diego County, *In re Taylor*, 60 Cal. 4th 1019, 343 P.3d 867, 184 Cal. Rptr. 3d 682 (2015). Jessica's Law also requires all registrants to wear GPS devices so that their whereabouts can be continuously monitored by state authorities. The scope of this requirement has not been contested, but at the moment California enforces it against current parolees only.

17. The California opinion, in rejecting an offender's claim that he was improperly placed on the registry and made potentially subject to the residency restrictions, explains the residency restrictions as "relatively modern attempts to address, by means short of secure confinement, the persistent problem of recidivism among sex offenders," and then in footnote 10 quotes the initiative language, noting that it "[relies] on a report by the United States Department of Justice." *People v. Mosley*, 60 Cal. 4th 1044, 344 P.3d 788, 185 Cal. Rptr. 3d 251 (2015).

appeared in several local ordinances in the Midwest.¹⁸ Yet the statement is rather odd. What does it mean to say that sex offenders are “the least likely to be cured?” Least likely to be cured of what? Of the inclination to commit sex offenses? In that case, who’s more likely to be cured? People who don’t have that inclination in the first place? It’s hard to imagine any scientist making such an incoherent statement, and a search for the referenced “Justice Department Report” reveals that none did. The “report” is merely a collection of speeches given at a 1998 conference of advocates for sex offender registries. The collection’s cover sheet disavows any Justice Department endorsement of its contents.¹⁹ The “least likely” phrase is taken from a speech in this collection given by a politician from Plano, Texas, who never claimed any scientific basis for it. Indeed, she did not even claim it was true. What she actually said was that it is a statement she likes to make.²⁰ The Solicitor General’s representation of this statement as a Justice Department conclusion about the nature of sex offenders was at best irresponsible.

So what *is* the re-offense rate for those convicted of a sex offense? One cannot calculate it without first defining “re-offense,” without specifying the time period to employ, and without considering whether one needs to distinguish among different groups of offenders said to have committed a “sex offense.” We consider these points in turn.

The right definition of re-offense depends on what we want to know: is it the proportion of released offenders who commit a crime of any kind, or a serious crime of any kind, or a sex crime (of any degree)? If the purpose of the sex offender registry the Court addressed in *Smith*

18. The language is quoted in several laws in Wisconsin and Michigan. See Tamara Rice Lave, *The Iconic Child Molester: What We Believe and Why We Believe It* 55–56 (Apr. 15, 2008) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1118554.

19. “Contents of this document do not necessarily reflect the views or policies of the Bureau of Justice Statistics or the U.S. Department of Justice.” Bureau of Justice Statistics, National Conference on Sex Offender Registries, *Proceedings of a BJS/SEARCH Conference*, April 1998, NCJ-168965, at p. ii.

20. Her precise words, as set forth in the conference proceedings: “Sex offenders are a very unique type of criminal. I like to say they have three very unique characteristics: They are the least likely to be cured; they are the most likely to reoffend; and they prey on the most innocent members of our society.” *Id.* at pp. 92–93. The politician was Texas state senator Florence Shapiro. Shapiro was a schoolteacher. When she retired from the Texas State Senate in 2013 she was quoted as saying “her proudest achievement came in 1995 when she introduced a set of bills called Ashley’s Laws, which are designed to protect children from sexual predators.” Matthew Watkins, *Retiring Plano Legislator Florence Shapiro Plans To Continue Community Work*, THE DALLAS MORNING NEWS (Jan. 5, 2013), <http://www.dallasnews.com/news/community-news/collin-county/headlines/2013/105-retiring-plano-legislator-plans-to-continue-community-work.ecc>. A researcher who asked Shapiro in 2007 for the basis of her “least likely/most likely” statement was promised an answer by her staff, but never received one. Lave, *supra* note 18 at 55.

is to aid the police in investigating sex offenses, or warn the public about persons thought likely to commit them, then we want to know the rate at which those convicted of a sex offense commit another one. That's quite different than the rate at which they commit any act that returns them to prison. The California Corrections Department recently examined cases of sex offender registrants who are returned to prison, and found that in 92% of the cases the reason was a parole violation, which is generally something that is not a crime for anyone who is not on parole—things like going to a bar or visiting a friend who's also an ex-felon. Less than 1% of those re-incarcerated had committed a new sex offense.²¹

The time period we ask about of course also matters: As one lengthens the follow-up period, one would expect to find more re-offenses. So the most cautious measure would ask whether an offender *ever* commits another sex offense. But answering that question would require following offenders until their death. Of course, a study limited to deceased offenders would necessarily exclude most released in recent decades. Long-term follow-up studies are available, however, and a recent meta-analysis by a leading scholar in the area, Karl Hanson, combines the data from 21 studies that followed offenders for an average of 8.2 years, and for as long as 31.²² Nearly 8,000 offenders were followed, overall. The use of a meta-analysis to combine the data from all these long-term studies provides more confident projections of long-term re-offense rates. Sixteen of the 21 studies were done on offenders in other western countries (most often, Canada) where sentences are typically shorter than in the U.S., and released offenders are not subject to American-style offender registries.²³ The 21 studies included in this meta-analysis examined different populations of offenders; one might expect the modal offender in some studies to present a higher risk of re-offense than the modal offender in others.

21. CALIF. DEPT. OF CORRECTIONS AND REHABILITATION, 2014 OUTCOME EVALUATION REPORT, 30 (July 2015), available at http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/2014_Outcome_Evaluation_Report_7-6-2015.pdf. The exact rate was 0.8%. Another 2% of the cases involved violation of the sex offender registry rules, such as failing to update registry information on schedule, while the remaining 5.3% of those returned to prison committed a new offense that was not a sex crime.

22. R. Karl Hanson, Andrew J. R. Harris, Leslie Helmus, and David Thornton, *High-Risk Sex Offenders May Not Be High Risk Forever*, 29 (15) J. OF INTERPERSONAL VIOLENCE 2792, 2792–813 (2014). The median year of release was 1996; the release year ranged from 1957 to 2007.

23. Ten of the 21 studies involved Canadian offenders. For a comparison of Canadian and American laws, discussing why Canada adopted a much less aggressive approach to sex offenders, see Michael Petrunik, *The Hare and Tortoise: Dangerousness and Sex Offender Policy in the United States and Canada*, 45 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 43 (2003).

But having such a variety of offenders is another advantage. The authors were able to assess offender risk levels using a well-established actuarial measure,²⁴ the Static 99-R,²⁵ to classify each of the individual offenders in all 21 studies as low, medium, or high risk.

Consider first the *high-risk* offenders in this study. Nearly 20% of them committed²⁶ a new sex offense within five years of release, and 32% (an additional 12%) did so within 15 years. But high-risk offenders who hadn't committed a new sex offense within fifteen years of their release rarely did later. Indeed, *none* of the high-risk offenders who were offense-free after 16 years committed a sex offense thereafter.²⁷ This point is important because most people are typically put on registries for decades, and often for life. Being offense-free for twenty years, or more, will not get them removed even though this history tells us the chance of their committing a new offense is very small. Some context can help here. One recent study found that about 3% of felons with *no* known history of sex offenses commit one within

24. In clinical judgments a professional combines or processes information about the person in his or her head, rendering an intuitive assessment said to be based on training and experience. Actuarial judgments, by contrast, are based entirely on empirically established relations between data and the condition or event of interest. The relationship can be set out in a table or formula. A life insurance agent uses the actuarial method when he assesses life expectancy, or the likelihood of causing an automobile accident, by entering data into a formula, or consulting tables and charts that relate the data to the event to be predicted. The nature of the actuarial method thus encourages predictions based on objective assessable facts that can be summarized numerically. The agent employing a clinical method might look at the same data, but might consider other factors as well, and would in any event assess risk intuitively rather than by reference to a formula or table. Robyn M. Dawes, David Faust, and Paul E. Meehl, *Clinical versus Actuarial Judgment*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 716, 716 (Thomas Gilovich, Dale Griffin & Daniel Kahneman, eds., 2002). The psychological literature has repeatedly shown that actuarial judgments yield better predictions of future behavior than do clinical judgments. *Id.* A recent Canadian study showed that general rule applied (as one would expect) in the context of predicting criminal recidivism in general, and sexual re-offense in particular. The study allowed assessors to use their professional judgment to adjust the risk level score obtained from a commonly used actuarial measure, and compared the predictive accuracy of their adjusted rating to the unadjusted actuarial score. The assessor adjustments made the re-offense predictions *less* accurate, largely because they mistakenly predicted a higher chance of re-offense than was in fact the case. J. Stephen Wormith, Sarah Hogg, & Lina Guzzo, *The Predictive Validity of a General Risk/Needs Assessment Inventory on Sexual Offender Recidivism and an Exploration of the Professional Override*, 39 *CRIM. JUST. AND BEHAV.* 1511, 1529–32 (2012).

25. See R. Karl Hanson, Alyson Lunetta, Amy Phenix, Janet Necley & Doug Epperson, *The Field Validity of Static-99/R Sex Offender Risk Assessment Tool in California*, 1 *J. OF THREAT ASSESSMENT AND MGMT.* 102 (2014).

26. What constitutes having “committed” a new offense depends on the criterion used in the individual study. Eleven of the 21 studies logged a new offense for any offender who was charged; the other ten required a new conviction. Hanson et al., *supra* note 22.

27. There were 126 high-risk offenders followed after 17 years who had not yet re-offended; 61 of them were followed for at least five additional years and none re-offended. Hanson et al., *supra* note 25, at n.12.

4.5 years of their release.²⁸ Of course, *they* are not on the sex offender registry during their release period, even though the chance of their committing a sex offense is higher than the chance of a new sex offense by a high-risk sex offender who has been offense-free for fifteen years.

Indeed, it's mistaken to think of anyone who's been offense-free for fifteen years as high-risk. At the time of their release we cannot tell which high-risk offenders will be among the two-thirds who won't re-offend, but that is revealed over time. Those who haven't re-offended after fifteen years are not high-risk for doing so, regardless of their offense or their initial risk assessment.²⁹ One cannot accurately assess an individual's risk of committing an offense in the future if one ignores what they have done—and *not* done—for the last fifteen, twenty, or

28. Wormith et al., *supra* note 24. This study followed 1,905 sex offenders, and 24,545 nonsexual offenders, who were released in Ontario, Canada, during 2004. The mean follow-up period for both groups was 4.5 years, with a standard deviation of 106 days. 3.73 percent of the sex offenders (97% male), committed another sex offense during the follow-up period; 3.17 percent of the nonsexual offenders (80.5% male) did so. See Wormith et al., *supra* note 23, at 1521 tbl. 1. The difference between these two percentages was not statistically significant. There was also no difference between the groups in rate of nonsexual violent offenses. *Id.*

29. Another statement in *Smith v. Doe* ("Empirical research on child molesters, for instance, has shown that '[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release, but may occur as late as 20 years following release,'" 538 U.S. at 104) is sometimes cited for the claim that sex offenders remain at high risk of re-offending for life. Here *Smith* cites Robert A. Prentky, Raymond A. Knight, and Austin F.S. Lee, *Child Sexual Molestation: Research Issues*, National Institute of Justice Research Report, NCJ 163390 (1997). But the more complete published version of this study, Robert A. Prentky, Austin E. S. Lee, Raymond A. Knight, and David Cerce, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 L. & HUM. BEHAV. 635 (1997), reveals why it is inapt. The study's offender sample consisted of rapists and child molesters released from the Massachusetts Treatment Center for Sexually Dangerous Persons, established in 1959 "for the purpose of evaluating and treating individuals convicted of repetitive and/or aggressive sexual offenses." *Id.* at 637. As Prentky and his coauthors themselves observe, "Sexual offenders sampled from general criminal populations, from offenders committed to a state hospital, and from a maximum security psychiatric hospital, are likely to differ in ways that would affect their recidivism rates and make cross-sample comparisons difficult." *Id.* at 636. The data in this older study are also difficult to interpret because we aren't given the number of offenders followed for any given length of time. We are told, however, that the total sample of offenders convicted of child molestation was just 115. Clearly, the subset they were able to follow for ten or fifteen years was much smaller, but we do not know how much smaller because they do not provide that number. We do know that the re-offense rate from a sample of just ten or twenty offenders would be too small to be meaningful. By contrast, the 2014 Hanson study described in the text provides complete information on the 7,740 offenders it followed. Prentky himself (with coauthors) recently reviewed studies on the effectiveness of offender treatment programs, in a book evaluating research on sex offender recidivism, and found treatment effects were small or absent. But they explain that one reason why treatment does not reduce re-offense rates very much is that the rates for control groups of *untreated* offenders is already quite low. Indeed, they found rates that were similar to those found in the Hanson study. ROBERT PRENTKY, HOWARD BARBAREE, AND ERIC JANUS, *SEXUAL PREDATORS: SOCIETY, RISK, AND THE LAW* 243-244 (2015).

twenty-five years in the past. Yet that is exactly what sex offender registries do for large groups of people listed on them.

And what about those who were *not* classified high-risk in the first place? About 97.5% of the low-risk offenders were offense-free after five years; about 95% were still offense-free after 15 years.³⁰ Thus, a simple actuarial test identifies a large group of sex offenders whom we know are, from the outset, less likely to commit a sex offense after release than are released felons with no sex offense history (who of course are not on the registry). What about the chance of a sex offender committing some other serious crime? Other studies find that released sex offenders are *less* likely to commit a new felony of any kind, after release, than are other released felons.³¹

People may assume that most registrants committed violent rapes or molested children, but they would be wrong. State laws require registration of a teenager who had consensual sex with another teenager, of people who possessed erotic images of anyone under 18 but had no history of any contact offense, and even, depending on the state, someone convicted of public urination.³² A Justice Department study concluded that more than a quarter of all sex offenders committed their offense when they were themselves a minor.³³ If the registry's main purpose is to let us monitor and warn people about those who committed violent, coercive, or exploitative contact sex offenses, we dilute its potential usefulness when we fill it up with people who never did any of those things.

Or, people who once did but are very unlikely to do so again because it's been many years since they committed any crime. The respondents in *Smith* who challenged the Alaska registry were classified as "aggravated" sex offenders, required under Alaska law to register *four times a year for life*, because they had been pled *nolo*

30. These figures are all taken from Table 2 of Hanson et al., *supra* note 22. The high risk group was 26% of the entire sample of 7,740 offenders; the low risk group was 11.5%.

31. *Id.* at p. 2. While 43% of released sex offenders were rearrested for some crime within three years of release, 68% of the released non-sex offenders were, and a higher proportion of them were charged with a felony (84%) than was true of the rearrested sex offenders (75%).

32. Chanakya Sethi, *The Ridiculous Laws That Put People on the Sex Offender List*, SLATE MAGAZINE (Aug. 12, 2014, 11:41 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/mapped_sex_offender_registry_laws_on_statutory_rape_public_urination_and.html.

33. David Finkelhor, Richard Ormrod & Mark Chaffin, *Juveniles Who Commit Sex Offenses Against Minors*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUV. JUST. BULLETIN 1, 1 (Dec. 2009), <https://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf>. Juveniles account for 36% of all sex offenders with juvenile victims. *Id.*

contendere in 1984 to sexual contact with minors.³⁴ They served their sentences and were released in 1990. One had completed a two-year post-release treatment program. The other had remarried after release and been granted custody of his daughter, the court having concluded he had been rehabilitated. (Psychiatric evaluations found he had “a very low risk of re-offending” and was “not a pedophile.”) Neither had re-offended in the twelve years since release, a fact that alone predicts a re-offense rate below 5%.³⁵ Alaska posts the address and place of employment of all registrants for public viewing in print or electronic form, so that it can be used by “any person” and “for any purpose.”³⁶ Alaska’s registry rules are milder than some. California’s and Florida’s registries, for example, make no distinction among sex offenses; lifetime registration is required for all. A 14-year old in Florida who had consensual intimate contact with his 13-year old girlfriend would have to register for life.³⁷

The Pennsylvania Supreme Court has recently held that treating everyone convicted of a sex offense as a likely re-offender, when many are not, violates the constitutional guarantees of Due Process. In *J.B.*³⁸ it considered changes to the Pennsylvania registry law that automatically placed juveniles on the offender registry for 25 years if they committed a rape or “aggravated indecent assault” when over 14.³⁹ The rationale for the registry law was the legislative finding that “Sexual offenders pose a high risk of committing additional sexual offenses and protection of the public from this type of offender is a paramount governmental interest.” The court objected that the affected juveniles were effectively subject to an “irrebuttable presumption” that they posed a high risk of re-offense even though the presumption is in fact “not universally true.”

The effect of registration was one key to the court’s holding that this misclassification has constitutional significance. The plaintiffs had argued that registration “impedes a child’s pathway to a normal productive life through continuously reinforcing the unlikely supposition that the youth has ‘a high risk of committing additional sexual offenses,’” creating “difficulty obtaining housing, employment,

34. The factual information in this paragraph about the offenders, and the provisions of Alaska law then in effect, is taken from the Ninth Circuit opinion that the Supreme Court reversed. *Doe v. Otte*, 259 F.3d 979, 990 (9th Cir. 2001).

35. Hanson, et al., *supra* note 22.

36. The Ninth Circuit opinion that the Supreme Court reversed in *Smith*, *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001) described Alaska Admin. Code tit. 13, § 09.050(a) (2000) as then containing these provisions.

37. Sethi, *supra* note 32.

38. In the Interest of J.B., 107 A.3d 1 (Pa. 2014).

39. *Id.* at 12.

and schooling” as well as “depression.”⁴⁰ Imposing these burdens on the plaintiffs unconstitutionally denied them Due Process, the court concluded, because individual offenders were allowed no meaningful opportunity to show the presumption of high risk was factually wrong in their case. Because good *individualized* measures of the likelihood of re-offending are available, the state has no need to employ, and thus endorse, global stereotypes that registered sex offenders are particularly dangerous, when these stereotypes have no basis in fact. Registration requirements “premised upon the presumption that all sexual offenders pose a high risk of recidivating . . . impinge upon juvenile offenders’ fundamental right to reputation as protected under the Pennsylvania Constitution.”⁴¹

The California Supreme Court used different labels but a similar logic when it held this year that it was unconstitutionally irrational to automatically subject *every* sex offender parolee in San Diego County to residency restrictions that impeded their rehabilitation and left many of them with no place to live.⁴² Once again, the problem with the statute was its application to every sex offender, without regard to their individual circumstances including an individualized assessment of each offender’s risk of re-offense. The court noted that parole officers have general supervisory authority over parolees that allows them to impose restrictions on their residence that are reasonably related to the particular parolee’s situation. So the court allowed customized restrictions logically connected to the individual offender’s situation, but not “one size fits all” restrictions imposed on all offenders.

The logic of these decisions offers hope for a wider judicial rationalization of the rules on sex offender registries and the life restrictions that typically accompany them. To realize that hope, one must apply the principle common to the Pennsylvania and California decisions to a correct understanding of the facts. The principle is that concerns about public safety cannot justify policies that impose serious burdens on entire categories of individuals when many of them actually present little risk, at least when more accurate assessment criteria employing established actuarial measures, and the simple passage of time, could easily be employed instead. The burdens imposed by registration and all the consequences that follows from it demand

40. *Id.* at 33–34.

41. *Id.* at 42–43. The Pennsylvania Supreme Court is not alone in its concern about the effect of registration on juveniles. Two years before, the Ohio Supreme Court held that imposing lifetime registration on juveniles constituted “cruel and unusual punishment”. *In re C.P.*, 967 N.E.2d 729, 749 (Ohio 2012). Treating required registration as punishment accurately captures its impact on the registrant, and triggers additional constitutional protections, but differs from the position taken by the U.S. Supreme Court in *Smith*.

42. *In re Taylor*, 60 Cal. 4th 1019, 343 P.3d 867, 184 Cal. Rptr. 3d 682 (2015).

justifications grounded on more nuanced risk assessments than those the registration laws currently employ. The simple fact is that the risk level, for nearly everyone on the registry, is nowhere near the “frightening and high” rate assumed by *Smith* and *McKune* and all the later decisions that rely on them.

But while the principles endorsed by these recent opinions offer hope, the Pennsylvania opinion also illustrates the difficulty of getting courts to understand the facts well enough to apply them properly. The court held that the burdens of registration on juveniles could not be justified because of their lower re-offense rate: “While adult sexual offenders have a high likelihood of reoffense, juvenile sexual offenders exhibit low levels of recidivism (between 2–7%), which are indistinguishable from the recidivism rates for non-sexual juvenile offenders, who are not subject to SORNA registration.”⁴³ But one can see that the court’s comparison was infected by the very same error it condemned when it compares juveniles to *all* adults, making no distinction among adult registrants. The Hanson study finds the re-offense rate for low and moderate-risk offenders, who probably account for *most* adults on the registry, is within the same 2-7% range the court attributes to juveniles.⁴⁴ And of course, the re-offense rate then declines, for all registrants, with each year after release that they remain offense-free. Any state that routinely imposes 25-year registration requirements on adult offenders has a registry full of people who have gone ten or more years with no new offense, for whom the average likelihood of re-offense is well below 7%. The problem is worse in states like California and Florida that put all offenders on the registry for life.

Writing on a different subject entirely, Eula Biss recently observed:

Risk perception may not be about quantifiable risk so much as it is about immeasurable fear. Our fears are informed by history and economics, by social power and stigma, by myth and nightmares. And as with other strongly held beliefs, our

43. In the Interest of J.B., 107 A.3d at 17. SORNA refers to the Sex Offender Registration and Notification Act, which is Title I of the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 109-248). SORNA sets out federal standards for sex offender registration and notification. Pennsylvania was one of seventeen states meeting these requirements; see the compilation at SEX OFFENDER REGISTRATION AND NOTIFICATION ACT, <http://www.smart.gov/sorna.htm> (last visited Oct. 3, 2015).

44. If one examines the sources the Pennsylvania court relies on for its conclusion that the re-offense rate for juveniles is 2 to 7 percent, one finds that it is a 5-year re-offense rate. Table 2 of the Hanson study shows a 5-year re-offense rate of 2.2% for low-risk sex offenders, and 6.7% for moderate-risk offenders. These two groups together account for 74.2% of Hanson’s sample of 7,740 offenders. Hanson, et al., *supra* note 22, at 2802.

fears are dear to us. When we encounter information that contradicts our beliefs, we tend to doubt the information, not ourselves.⁴⁵

The label “sex offender” triggers fear, and disgust as well. Both responses breed beliefs that do not yield easily to facts. That’s why even those politicians now urging criminal justice reforms conspicuously omit mentioning sex offenses when they argue for less punitive policies that would facilitate the offenders’ reintegration into civil society.⁴⁶ Unfortunately, the Supreme Court has fed the fear. It’s become the “go to” source that courts and politicians rely upon for “facts” about sex offender recidivism rates that aren’t true. Its endorsement has transformed random opinions by self-interested nonexperts into definitive studies offered to justify law and policy, while real studies by real scientists go unnoticed. The Court’s casual approach to the facts of sex offender re-offense rates is far more frightening than the rates themselves, and it’s high time for correction. Perhaps there’s now hope it may soon happen.

45. EULA BISS, *ON IMMUNITY: AN INOCULATION* (2014), as quoted in Jerome Groopman, *There’s No Way Out of It!*, *NEW YORK REVIEW OF BOOKS*, Mar. 5, 2015, at 4. Biss (and Groopman) were writing about parents’ irrational fears of inoculating their children.

46. See Carl Hulse, *Unlikely Cause Unites the Left and the Right: Justice Reform*, *N.Y. TIMES*, Feb. 19, 2015, at A1.