

Supreme Court consistently relies upon bogus studies about sex offender recidivism

written by NARSOL | August 17, 2015

By Ira Ellman . . . Proponents of criminal justice reform never talk about sex offenders. They're political untouchables subject to lifelong restrictions that continue long past their confinement, restrictions justified as necessary to protect the public from their propensity to re-offend. Two Supreme Court decisions established that justification. But they rely on a scientific study that doesn't exist.

"Frightening and High"

[McKune v. Lile, 536 U.S. 24, 33 \(2002\)](#) rejected, 5-4, Robert Lile's claim that Kansas violated his 5th Amendment rights by punishing him for refusing to complete a form detailing prior sexual activities that might constitute an uncharged criminal offense for which he could then be prosecuted. The form was required for participants in a prison therapy program; refusing to join the program meant permanent transfer to a higher security unit where he would live among the most dangerous inmates and lose significant privileges, including the right to earn the minimum wage for his prison work and send his earnings to his family. Justice Kennedy explained the treatment program helped identify the traits that caused "such a frightening and high risk of recidivism" among sex offenders—a rate he said "has been estimated to be as high as 80%." 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 justified because the

“risk of recidivism posed by sex offenders” is “frightening and high”, 536 U. S. at 34.

The idea that sex offenders repeat their crimes at high rates has fed legislation imposing increasingly harsh post-release burdens on them, nearly all triggered by being on a sex offender registry. Registrants may face residency restrictions sometimes severe enough to exclude them from entire cities and prevent them from living with their families, “presence restrictions” barring them from using public libraries or parks with their families, formal exclusion from many jobs, and informal exclusion 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. Courts have usually turned back challenges to registration and the consequences that flow from it; a Lexis search finds that in 91 cases the court’s opinion quotes Justice Kennedy’s dramatic statement that the sex offender recidivism rate is “frightening and high”. But is it? Do those convicted of sex offenses really re-offend 80% of the time, or anything close to that? (Visit [here](#) to continue reading)

Or visit [here](#) to read the full article that will appear in [Constitutional Commentary](#) later this year.