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## 'I'm appalled,' says source of phony number used to justify harsh sex offender Laws

Claims of "frightening and high" recidivism rates, endorsed by the Supreme Court, have no basis in fact

<https://reason.com/2017/09/14/im-appalled-says-source-of-pseudo-statis/>

**Jacob Sullum** Sep. 14, 2017

*The New York Times* "op-doc" posted this week zeroes in on a persistent myth that has helped inspire and sustain harsh policies aimed at sex offenders: the idea that their recidivism rate is "frightening and high," as Supreme Court Justice Anthony Kennedy put it in a pair of cases decided a decade and a half ago. David Feige, a former public defender who directed *Untouchable*, a 2016 documentary about sex offenders, shows how an uncorroborated assertion in a 1986 *Psychology Today* article continues to influence the politicians who pass laws and the judges who uphold them.

In *McKune v. Lile*, a 2002 decision that upheld a mandatory prison therapy program for sex offenders, Kennedy said "the rate of recidivism of untreated offenders has been estimated to be as high as 80%," a number he called "frightening and high." He repeated that claim the following year in *Smith v. Doe*, which upheld retroactive application of Alaska's registration requirements for sex offenders. As of 2015, according to a review published in *Constitutional Commentary*, Kennedy's phrase had been echoed in 91 judicial opinions and the briefs filed in 101 cases.

Yet there was never any evidence to support Kennedy's assertion, and research conducted during the same period when it was proliferating indicates that it is not even remotely true. As Feige notes in a commentary that accompanies his video, "Nearly every study—including those by states as diverse as Alaska, Nebraska, Maine, New York and California as well as an extremely broad one by the federal government that followed every offender released in the United States for three years—has put the three-year recidivism rate for convicted sex offenders in the low single digits, with the bulk of the results clustering around 3.5 percent." Studies covering longer periods find higher recidivism rates, but still nothing like 80 percent, even for high-risk offenders.

The authors of the *Constitutional Commentary* article, Ira Ellman and Tara Ellman, found that the original source of the 80-percent figure—which Kennedy apparently got from Solicitor General Ted Olson, who cited a 1988 Justice Department handbook—was a 1986 *Psychology Today* article by Robert Longo, a counselor who ran a treatment program at an Oregon prison, and Ronald Wall, a therapist who worked for him. "Most untreated sex offenders released from prison go on to commit more offenses," they wrote, explaining the value of the work from which they earned their livelihoods. "Indeed, as many as 80% do." As Ellman and Ellman pointed out, it was "a bare assertion" with "no supporting reference."

Longo himself repudiated the estimate in a March 2016 interview with Joshua Vaughn, a reporter at the Carlisle, Pennsylvania, Sentinel, saying it does not accurately reflect recent research and should not be used as a basis for public policy. In Feige's video, Longo says it is "absolutely incorrect" to suggest that anything like 80 percent of sex offenders commit new crimes after serving their sentences. That number, he says, was the high end of the range indicated by research at the time, although he once again fails to cite any actual studies.

"You don't cite popular psychology magazines" as a basis for upholding laws, Longo says. "It's not a scientific journal. I'm appalled that this could happen. This is not my intent."

Feige also tracked down Barbara Schwartz, the psychologist who wrote the 1988 DOJ manual that cited Longo's article and was in turn cited by Olson. "I couldn't find any" information on sex offenders' recidivism rates, Schwartz says, "so basically I just made up a model." She had a grand total of six references, including a dictionary and "the paper that Rob Longo did for Psychology Today." Schwartz adds that "the best we were doing was making a bunch of guesses." Relying on such speculation makes no sense, she says, now that there is "hard-core, scientifically based research." She says ignoring the work that has been done since the 1980s amounts to "deliberate indifference."

All the rulings claiming "frightening and high" recidivism rates, Miami civil rights attorney Valerie Jonas tells Feige, "cite to the Supreme Court, which rested its assumptions on nothing." Two cases the Court could soon decide to review give it a chance to do better.

Snyder v. Doe is an appeal of the 2016 decision in which the U.S. Court of Appeals for the 6th Circuit concluded that Michigan's Sex Offender Registration Act violates the constitutional ban on ex post facto laws by imposing retroactive punishment. The 6th Circuit noted the lack of evidence to support the claim that sex offenders' recidivism rates are "frightening and high," citing research indicating that sex offenders "are actually less likely to recidivate than other sorts of criminals."

Karsjens v. Piper involves a challenge to Minnesota's system of civil commitment for sex offenders who have completed their prison sentences. In 2015 a federal judge said the program, which supposedly is aimed at "curing" its involuntary "patients" but has never succeeded in doing so, amounts to unconstitutional preventive detention, violating the right to due process. Last year the U.S. Court of Appeals for the 8th Circuit overturned that decision. Minnesota's program is based the premise that the state can identify sex offenders who are especially likely to commit new crimes and decide when they no longer pose a threat—impossible tasks, according to Gov. Mark Dayton, who nevertheless defends the policy.

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