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When Junk Science About Sex Offenders Infects the Supreme Court

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Our harsh treatment of sex offenders is based on flawed social science.
By DAVID FEIGE on Publish Date September 12, 2017. Photo by David Feige.

This month (Oct. 2017) the Supreme Court will have a rare opportunity to correct a flawed doctrine that for the past two decades has relied on junk social science to justify punishing more than 800,000 Americans. Two cases that the court could review concern people on the sex offender registry and the kinds of government control that can constitutionally be imposed upon them. NOTE: Neither case was taken up.

In Snyder v. Doe, the court could consider whether Michigan's broad scheme of regulating sex offenders constitutes "punishment." The other case, Karsjens v. Piper, examines the constitutionality of Minnesota's policy of detaining sex offenders forever — not for what they've done, but for what they might do.

And while the idea of indefinite preventive detention might sound un-American or something out of the film "Minority Report," the larger problem is that "civil commitment," like hundreds of other regulations imposed on those required to register, has been justified by assertions about the recidivism of sex offenders. But those assertions turn out to be entirely belied by science.

For the past 24 years, Minnesota has detained sex offenders released from prison in a "therapeutic program" conveniently located on the grounds of a maximum-security prison in Moose Lake. The "patients" are kept in locked cells, transported outside the facility in handcuffs and leg irons, and subjected to a regimen that looks, sounds and smells just like that of the prison it is adjacent to.

But unlike prison, this "therapeutic" program, which aims to teach the patients to control their sexual impulses and was initially designed to last from two to four years, has no fixed end date. Rather, program administrators decide which patients are safe enough to release. In the 24 years it has existed, not a single "patient" has ever been fully released. There are now about 850 people in the Minnesota Sex Offender Program, some with no adult criminal record, and others who, despite having completed every single program ever offered at the facility, have remained civilly committed for over 20 years.

While civil commitment is perhaps the most extreme example of punishments imposed on people convicted of sex crimes, it is by no means the only one. Driven by a pervasive fear of sexual predators, and facing no discernible opposition, politicians have become evermore inventive in dreaming up ways to corral and marginalize those forced to register — a category which itself has expanded radically and come to include those convicted of "sexting," having consensual sex with non-minor teenagers or even urinating in public.

These sanctions include being forced to wear (and pay for) GPS monitoring and being banned from parks, and draconian residency restrictions that sometimes lead to homelessness. In addition, punishments can include, on pain of re-incarceration, undergoing interrogations using a penile plethysmograph, a device used to measure sexual arousal. They have also included requirements that those on the registry refrain from being alone with children (often including their own) and barred from holding certain jobs, like being a volunteer firefighter or driving an ice cream truck.

And when these restrictions have been challenged in court, judge after judge has justified them based on a Supreme Court doctrine that allows such restrictions, thanks to the "frightening and high" recidivism rate ascribed to sex offenders — a rate the court has pegged "as high as 80 percent." The problem is this: The 80 percent recidivism rate is an entirely invented number.

A few years ago, Ira Ellman, a professor of law at the University of California, Berkeley, and Tara Ellman set out to find the source of that 80 percent figure, and what he found shocked him. As it turns out, the court found that number in a brief signed by Solicitor General Ted Olson. The brief cited a Department of Justice manual, which in turn offered only one source for the 80 percent assertion: a Psychology Today article published in 1986.

That article was written not by a scientist but by a treatment provider who claimed to be able to essentially cure sex offenders though innovative “aversive therapies” including electric shocks and pumping ammonia into offenders’ noses via nasal cannulas. The article offered no backup data, no scientific control group and no real way to fact-check any of the assertions made to promote the author’s program.

Nonetheless, because that 80 percent figure suited the government lawyers’ aim of cracking down on sex offenders, Solicitor General Olson cited it, and Justice Anthony Kennedy, seemingly without fact-checking it, adopted the figure in a 2002 opinion that Justices William Rehnquist, Antonin Scalia and Clarence Thomas joined. (Justice Sandra Day O’Connor concurred.) Their decision blew open the doors to the glut of sex offender restrictions that followed.

But in the 30 years since that Psychology Today article was published, there have been hundreds of evidence-based, scientific studies on the question of the recidivism rate for sex offenders. The results of those studies are astonishingly consistent: Convicted sex offenders have among the lowest rates of same-crime recidivism of any category of offender.

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. Needless to say, there is a tremendous difference between claiming that 80 percent of offenders will re-offend and that more than 95 percent of them won’t. And it is in that basic difference that the Supreme Court’s doctrine has done its most lasting damage.

This profound misrepresentation of social science has led to extraordinary real-world harms. For example, while the public almost universally embraces the strict residency restrictions the Supreme Court and lower courts have ratified, study after study has shown that rather than reduce sexual violence, these residency restrictions actually increase recidivism.

The merciless enforcement of the conditions routinely placed on those on the registry has resulted in the constant re-incarceration of offenders — not because they have committed new crimes but for technical violations of the conditions themselves, like failure to maintain a driving log, being late for curfew or failing to pay polygraph fees.

Indeed, a study by the California Department of Corrections concluded that 91 percent of sex offenders returned to California prisons were returned for these technical violations, while only 1.8 percent were returned as a result of having committed a new sex crime. In short, the entire scheme of registration and restriction that the Supreme Court condoned 15 years ago in McKune v. Lile has done enormous violence to a huge number of Americans now branded forever as sex offenders.

Now more than ever, Americans should be able to look to our highest court and expect decisions that are based on reason and grounded in science rather than fear. The court must rule wisely and bravely, including being willing to acknowledge its mistake and finally correct the record. More than 800,000 Americans have needlessly suffered humiliation, ostracism, banishment re-incarceration and civil commitment thanks to a judicial opinion grounded in an unsourced, unscientific study. Simple decency and perhaps more important, intellectual honesty demands better.

David Feige, a television writer and a former public defender in the Bronx, is the director of “Untouchable,” a feature documentary about sex offender laws.